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THE LAW JOURNAL

FOR

THE YEAR 1829:

COMPRISING

REPORTS OF CASES

IN THE

Courts of Chancery, King's Bench, and Common Pleas,

FROM

MICHAELMAS TERM 1828, TO TRINITY TERM 1829,

BOTH INCLUSIVE;

AND

Cases connected with the Duties and Office of Magistrates,

DECIDED DURING THOSE TERMS.

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MDCCCXXIX.



JUDGES, &c.

1829.

IN THE COURTS OF EQUITY.

LORD LYNDEHURST, Lord High Chancellor.
Sir JOHN LEACH, Knt. Master of the Rolls.
Sir LANCELOT SHADWELL, Knt. Vice Chancellor.

IN THE COURT OF KING'S BENCH.

The Right Hon. Lord TENTERDEN, Lord Chief Justice.
The Hon. Sir JOHN BAYLEY, Knt.
The Hon. Sir GEORGE SOWLEY HOLROYD, Knt. who, in Michaelmas Term 1828, resigned his seat, and was succeeded by
The Hon. Sir JAMES PARKE, Knt.
The Hon. Sir JOSEPH LITTLEDALE, Knt.

IN THE COURT OF COMMON PLEAS.

The Right Hon. Sir WILLIAM DRAPER BEST, Knt., Lord Chief Justice, who, in Easter Vacation, was created Baron Wynford, and was succeeded by
The Right Hon. Sir NICHOLAS CONYNGHAM TINDAL, Knt.
The Hon. Sir JAMES ALLAN PARK, Knt.
The Hon. Sir JAMES BURROUGH, Knt.
The Hon. Sir STEPHEN GASELEE, Knt.

IN THE COURT OF EXCHEQUER.

The Right Hon. Sir WILLIAM ALEXANDER, Knt., Lord Chief Baron.
The Hon. Sir WILLIAM GARROW, Knt.
The Hon. Sir JOHN HULLOCK, Knt.
The Hon. Sir JOHN VAUGHAN, Knt.

IN THE ECCLESIASTICAL COURTS.

The Right Hon. Sir JOHN NICHOLL, Knt., Official Principal of the Arches Court of Canterbury, Judge of the Prerogative Court and the Court of Peculiars of Canterbury.
The Right Hon. Sir CHRISTOPHER ROBINSON, Knt., Judge of the High Court of Admiralty.
Sir STEPHEN LUSHINGTON, Chancellor of the Diocese of London.
Dr. HERBERT JENNER, His Majesty's Advocate General.

Sir CHARLES WETHERELL, Knt., succeeded, on his resignation, by	} Attorney General.
Sir JAMES SCARLETT, Knt.	
Sir NICHOLAS CONYNGHAM TINDAL, Knt., succeeded, on his promotion, by	} Solicitor General.
Sir EDWARD BURTENSHAW SUGDEN, Knt.	

PROMOTIONS.

Easter Term, 1829.

Mr. Justice HOLROYD resigned his seat, as one of the Judges of the Court of King's Bench, and was succeeded by JAMES PARKE of the Inner Temple, Esq. ; who was called to the degree of Serjeant, and gave rings with the motto, "*Justitiz tenax.*"—He took his seat in that Court on Tuesday the 18th of November, and was afterwards knighted.

THOMAS DENMAN, Esq. took his seat within the Bar, having received a patent of precedence.

Hilary Term, 1829.

EDWARD GOULBURN, Esq. was called to the degree of the Coif, and gave rings with the motto, "*Nulla retrorsum.*"

Easter Vacation, 1829.

Sir WILLIAM DRAFER BEST resigned the office of Chief Justice of the Court of Common Pleas, and was created Baron Wynford ;—he was succeeded by Sir NICHOLAS CONYNGHAM TINDAL, Knt., who was called to the degree of Serjeant, and gave rings with the motto, "*Quid leges sine moribus!*" He took his seat as Chief Justice of that Court on the first day of the ensuing Trinity Term.

Sir CHARLES WETHERELL, his Majesty's Attorney General, resigned his office, and was succeeded by Sir JAMES SCARLETT, Knt.

EDWARD BURTENSHAW SUGDEN, Esq. was appointed his Majesty's Solicitor General in the room of Sir NICHOLAS CONYNGHAM TINDAL, and was knighted.

Trinity Term, 1829.

WILLIAM HENRY TINNEY, THOMAS PEMBERTON, JAMES LEWIS KNIGHT, Esqrs. ; and the Honourable CHARLES EWEN LAW, were respectively appointed his Majesty's Counsel learned in the Law, and took their seats within the Bar accordingly.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery,

COMMENCING IN THE

SITTINGS BEFORE MICHAELMAS TERM, 9 GEO. IV.

1828. }
Oct 20. } DRUMMELL V. MACPHERSON.

If money be impressed by the Crown into the hands of an army agent, for the purpose of being paid to officers, to whom it is due, and it is never demanded by them, and is therefore, not paid by the agent; it remains the money of the Crown in the hands of the agent, for which the agent is accountable to the Crown.

The facts of this case are fully stated in the report of the original hearing, before the Vice Chancellor. See 5 Law Journ. Chanc. p. 57.

The order then made was, "that so much of the said Master's report, dated the 18th of April 1826, as certified that his Majesty was entitled to call for an account of the balances in the said report mentioned, and to take them out of the hands in which they then remained, be confirmed; and it was ordered, that the 2,590*l.* 1*s.* 7*d.* bank three per cent. annuities, standing in the name of the Accountant-General of this Court, in trust in these causes,—the claim of the Crown on the testator's estate—should be sold;" and, after providing for the payment of costs out of it, it was ordered, "that, out of the residue of the money to arise by the said sale, and any interest which might ac-

VOL. VII. CHANC.

crue on the said bank annuities previous to the said sale, the sum of 2,238*l.* 5*s.* 7*d.* should be paid to George Maule, on behalf of the petitioner, his Majesty's Attorney-General, acting on behalf of his Majesty; but, in case the said residue of the money to arise by the said sale, and the said interest should not be sufficient to pay the said sum of 2,238*l.* 5*s.* 7*d.* as aforesaid, that the whole of the said residue of the money to arise by the said sale and the said interest should be paid to the said George Maule, on behalf of the said petitioner (the Attorney-General), acting on behalf of his Majesty as aforesaid, in satisfaction of the claim on the said testator's estate, as far as the same would extend."

From this order two of the plaintiffs appealed; praying, by their petition, that the order of his Honour, the Vice Chancellor, dated the 7th of June 1826, might be rescinded, and that, in lieu thereof, it might be declared, that there was not any further sum due and owing from the estate of the testator, William Brummell, to the Crown, in respect of the regiments in his agency, or in the agency of Messrs. Bishopp and Brummell.

In the discussion, the same points were raised as in the court below.

B

Mr. Pepys, Mr. Treslove, and Mr. Pemberton, were for the appellants:

Mr. W. Brougham, for the Crown.

The judgment of *The Lord Chancellor* was as follows:—

It appears that Messrs. Bishopp and Brummell carried on the business of army agents in partnership till the death of Bishopp; and that it was afterwards carried on by Brummell alone, under the same firm, till the year 1794, when he died. A considerable sum of money, amounting in the whole to 2238*l.*, which was received by the house in the interval, between the years 1783 and 1794, on account of the subsistence and arrears of the officers, and other allowances, has remained in the hands of Messrs. Bishopp and Brummell, or of Mr. Brummell, without any demand having been made of any part of it, either by the officers, on account of whose pay and other claims it was received, or by any of their representatives. Under these circumstances, it is contended, by the plaintiffs, that the Crown is not entitled to claim the repayment of this money out of the estate of Mr. Brummell; but that the money is due to the individual officers on whose account it was received, or to their personal representatives, and that they alone can demand it.

It appears that the agents are appointed by the colonels of the respective regiments, by power of attorney;—the substance of the instrument is set out in the Master's report:—when so appointed, the agent is adopted by the Crown; the public money is paid into his hands for defraying the expenses of the regiment, and he accounts for the sums so received to the government. It is impossible to read the evidence and the provisions of the act 23 Geo. 3. c. 50, and to resist the conclusion, that, whatever he may be in relation to the colonel, he acts in this business as the agent also of the Crown. In this character, Messrs. Bishopp and Brummell, or Mr. Brummell, received the money in question; it was advanced to defray certain expenses; it has not been so applied, and, after so long an interval, there is no prospect that it will ever be required for the objects for which it was originally issued; the purpose of the advance having thus

failed, there seems to be no reason nor justice in the claim set up, on the part of the plaintiffs, to retain this money.

Some argument was built upon the manner in which the accounts of Messrs. Bishopp and Brummell were kept; but it does not appear to me, that the accounts made any change in their situation with respect to these sums; the money advanced by the Crown was carried in the accounts to the credit of the respective officers, and they were debited with the payments which they received, it does not appear that there was any private arrangement between the parties; when the money was received by the agent, it was received for the purpose of being paid to the officers in discharge of their claims, and the entry in the books amounts only to an admission of that which, without such entry, would not have been open to dispute. While the money remained in the hands of the agent, he would be liable to the claims of the officers, or their representatives; but such liability will, I think, under the circumstances of the case, terminate when the money is repaid to the Crown. It appears to me, therefore, that there is no ground for sustaining this appeal; and the petition must therefore be

Dismissed.

1828. }
October. } GARDNER v. BOWE.

In a lease, the name of A is inserted as the lessee upon a trust for B, but there is no declaration of trust in writing: A commits an act of bankruptcy, and then executes a declaration of trust: afterwards, a commission of bankruptcy issues against A:—Held, that this declaration of trust, though executed after the bankruptcy, will prevail in favour of B, against the assignees.

The facts of this case are stated in the report of the hearing and judgment before the Vice Chancellor. (1)

The plaintiffs appealed; and the case was again argued at great length.

The judgment of the *Lord Chancellor* was as follows:—

This was an appeal from three orders pronounced by the late Vice Chancellor. The principal point insisted upon, on the part of the defendants, related to the deed executed by Wilkinson, containing the declaration of trust, and which, being executed after he had committed an act of bankruptcy, was contended to be inoperative and void. The case upon this point was fully argued before the Vice Chancellor, and I see no reason to differ from the opinion expressed upon it by that learned Judge. Assuming the bankrupt to have been a trustee for Mr. Rowe, there was nothing, I think, to prevent him from making a valid declaration of trust, notwithstanding his bankruptcy.

It is true, that the property of a trader cannot be assigned by him after his bankruptcy: the property is no longer his; it is vested in his assignees. But property held in trust, is not the property of the bankrupt; it does not pass to his assignees. The only question therefore, as it appears to me, in this case is, whether the declaration contained in the deed, was founded upon a previous trust, or was altogether fraudulent. That question, however, has been decided in substance by the jury upon the trial of the issue; for they have found that the name of Wilkinson was used in the original deed, as a trustee for Rowe.

It was further contended, that the order directing the issue ought not to have been made; and from that order the defendants have also appealed. The issue was directed in March 1822, for a trial at the summer assizes. The trial was delayed until the following spring; and, upon the verdict being found for the plaintiff Rowe, an application was made for a new trial; and it was not till after that application had failed, and a subsequent delay of two years, that the defendants appealed against the order directing the issue. They take the chance of a verdict in their favour, try the effect of a motion for a new trial, and, failing in both, they then, for the first time, object to the original order. I think, however, under the circumstances of this case, there is no ground of objection to the order directing the issue; and with respect to the motion for the new trial,

I have read through the evidence, and the summing up of the learned Judge who presided at the trial, and who appears to have given the defendants the full benefit of every observation in their favour, which the evidence afforded,—and after considering the whole case, I cannot say that I think the jury have erred in finding their verdict for the plaintiff.

I am of opinion, therefore, that these appeals must be dismissed; and, as to the two first orders, with costs.

Nov. 1827. }
Nov. 1828. } WILLIS V. BLACK.

Construction.

In a marriage settlement, reciting that the father of the wife had agreed to make a further provision for his daughter equal to his younger child or children, he covenanted to give or secure to the trusts of the settlement, as large a share of his property as he should give to any of his other younger children, to take effect on the death of the survivor of himself and his then wife; and that, if he died intestate, or omitted to make the provision before covenanted for, there should be paid to the trustees of the settlement as great a share of his property, as any younger child should in that event become entitled to:—Held, that the decree of the Vice Chancellor, declaring that those interested under the settlement were entitled to a further provision, equal only to that which any younger child took upon the death of the covenantor, and without reference to advancements made by the covenantor during his life, was erroneous; and

That the parties interested under the settlement were entitled, on the settlor's death, to a share of his property equal to what any of his younger children either received during his life, after the date of the settlement, by way of advancement, or took upon his death.

In the second volume of the *Law Journal*, Chanc. 131, will be found a statement of the facts of the case, and what passed on the original hearing and the rehearing of the cause before the Vice Chancellor.

The decree of the Vice Chancellor pronounced upon the rehearing, declared, that

the decree should be varied by omitting such part thereof as declared that the testator was bound by the covenant in the settlement bearing date the 1st day of June 1803, to make provision for his daughter Margaret, her husband, and the issue of the marriage, including the sum of 1400*l.* advanced at the time of the marriage, equal to the share of any younger child either in his real or personal estate, by provision or gift in his lifetime, or by his will, to take effect upon his death; and whereby it was ordered that it should be referred to the Master to inquire what provision or gifts were made by the testator in his lifetime, or by his will, in favour of his younger children out of his real and personal estate; and it was declared, that the said testator was only bound by such covenant to give or provide for his said daughter, her husband, and the issue of their marriage, as full and great a part and share of his estate, effects and property, as his other younger children would become entitled to, in the event of his death, whether to take effect in possession at his own death or at the death of his wife, in the said settlement named, if she should happen to survive him.

From this decree the plaintiff appealed.

Mr. Heald and *Mr. Preston* were for the plaintiffs:

Mr. Horne appeared in support of the decree.

The argument for the respondent was founded on the reasons stated in the judgment of the Vice Chancellor.

The argument for the appellants was adopted by the Lord Chancellor, and coincides with the views stated in his judgment.

The judgment of the Lord Chancellor was as follows:—

The Lord Chancellor.—This case turns on a question relating to the construction of a covenant in a marriage settlement. It is not necessary to state the facts in detail. Upon the marriage of a person of the name of Formby with Miss Black, the daughter of Patrick Black, 1400*l.* was settled upon the husband and wife, and upon the issue of the marriage; and in that settlement was

contained a covenant upon which the present question arises. The covenant is in these words—"And, for the considerations aforesaid, the said Patrick Black doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise, and agree, to and with the said William Black and Richard Willis (who were the trustees), their executors and administrators, in manner following, that is to say, that he the said Patrick Black, by his last will and testament, or otherwise, shall and will give, devise, bequeath, or otherwise settle and secure, to or in favour of the said Richard Formby and the said Margaret his intended wife, and to and for the issue of the said intended marriage, upon the trusts, nevertheless, aforesaid, as full and great a part and share of his estates, effects and property, as he shall by his said will or otherwise, give or provide, to or for the use of any of his other younger child or children, to take effect on the death of the survivor of himself and his present wife; and also that in case the said Patrick Black shall happen to die intestate, or omit to make such provision or bequest to the use or in favour of the said Richard Formby and the said Margaret his intended wife, and to and for the issue of the said intended marriage, the heirs, executors or administrators of the said Patrick Black, shall and will pay or cause to be paid to the said William Black and Richard Willis, or the survivor of them, his executors or administrators, as full and great a part and share of the estates, effects and property of the said Patrick Black, as or to which his younger child or children shall in that event become entitled."

Now this covenant divides itself into two parts, and, in the course of the argument, it was so divided and so considered; and it was so divided and so considered by the Vice Chancellor, when he gave his judgment, I believe, on both occasions. The question first is, as to the meaning of the former part of the covenant. In substance it is this, that the father, for the considerations aforesaid, stipulates that he shall give to the parties to the marriage and to their issue, by his last will or otherwise, as large a proportion of his property as he shall by his last will or otherwise give to his younger children, to take effect on the death of the

survivor of himself and his present wife; and the first question is, as to the true construction of the words "to take effect after the death of himself and his present wife."

In reading this part of the covenant, I have come to the conclusion, that those words relate entirely to the first part of this covenant, and that, in point of fact, the true construction of this; 'that I, the settlor, will give to the parties to the marriage and to their issue, so much of my property, (and that gift to take effect at the death of the survivor of myself and wife,) as I shall give any younger child by will or otherwise;—that appears to be the true construction of the first part of the covenant. It was contended in the argument that those words "to take effect at the death of the survivor of himself and his present wife," applied to both parts of the covenant. In that case it would be read thus, "I will give to the parties to the marriage and to their issue, by will or otherwise, as great a part of my property—that gift to take effect on the death of the survivor of myself and my present wife,—as I shall by will, or otherwise, give to any of my younger children by will, or otherwise, to take effect upon the death of the survivor of myself and my present wife."

I think the latter interpretation, which was adopted by the Court below, is not a construction that is reconcilable with the obvious purposes of this deed and with the language itself of that covenant. I think, therefore, that those words relate in point of construction to the time when the gift is to take effect to the parties to the marriage and to their issue; and, it appears to me, that that part of the covenant is free from all reasonable doubt.

Upon the supposition that this part of the covenant was ambiguous, the latter part of the covenant was called in for the purpose of putting a construction on it; and I direct my attention to the latter part of the covenant to see, whether, assuming the former part to be ambiguous, the construction which was put on the latter part of the covenant with a view of removing the ambiguity, is the correct construction. "And also," these are the words, "that in case he, the said Patrick Black, shall happen to die intestate, or omit to make such provision or bequest to the use or in favour of the said Richard Formby and the said Margaret his

intended wife, and to and for the issue of the said intended marriage, the heirs, executors or administrators of the said Patrick Black shall and will pay, or cause to be paid, to the said William Black and Richard Willis, or the survivor of them, his executors or administrators, as full and great a part and share of the estate, effects and property of the said Patrick Black, as or to which his younger child or children shall in that event become entitled."

Now, what is the meaning of the words "shall in that event become entitled"? The stipulation is this, that, in case Patrick Black shall die intestate or shall omit to make that disposition of his property which he has stipulated he should make, then the parties are to have a claim upon his representatives, for "as full and great a part and share of the estates, effects and property of the said Patrick Black, as or to which his younger child or children shall in that event become entitled."

Now, "in that event" has been supposed to mean upon his death; I apprehend that is not the true meaning. I apprehend the true meaning to be this—in the event of his dying intestate, or omitting to make that disposition of his property; "in that event" is not to be confined simply to the circumstance of his death, it is not meant to be equivalent to the words "on his death," but in the event of his dying intestate, or in the event of his not making a will in conformity to what he had stipulated—That event of his so dying, and that omission under such circumstances, were to give a claim upon his estate to the extent specified; and, in that view, it is perfectly reconcilable with the former part. The only difficulty is as to the words "to which he shall be entitled." Now, I apprehend, for the purpose of ascertaining what a younger child would be entitled to in case of intestacy, the law would have taken into consideration what the parties had previously received; and, I think, in the framing of the covenant, it was the intention to consider what the parties had previously received in addition to what they would under the will become entitled to.

Under these circumstances I concur, not with the second, but the first decree, of the Master of the Rolls: but the first decree ought in one point to be varied; for the

arrangement or the consideration of property is to be prospective from the period of the settlement, and is not to include any disposition of property anterior to that period. That this must be so, is quite clear from the language of the settlement itself, all of which is every where future.

The only remaining consideration is as to the 1400*l.*--whether that sum is to be brought into the account. It was argued by Mr. Preston, that the 1400*l.* was not to be brought into the account; but Mr. Heald, who was on the same side, rejected that interpretation, and with great generosity gave up the 1400*l.* I must say that I agree with Mr. Heald, and that Mr. Preston has not sufficiently satisfied me that the 1400*l.* ought not to be taken into the account. It comes within the spirit of the covenant, and is not to be put out of the account.

I ought to mention, with respect to the words "to take effect on the death of the survivor of himself and his present wife," that there appears to have been so much difficulty in bending them to the interpretation put upon the covenant in the second decree, that those words in that decree have been entirely altered. The words substituted are, "upon his death or the death of his wife," and not "upon the death of the survivor of himself and his present wife." It was found, that the words in the covenant must be altered, in order to support the decree that has been pronounced.

1828. }
December. } NAYLOR v. WYNCH.

It is not the rule of equity that every person to whom the artificial name of trustee applies, is incapable of dealing with his cestui que trust, respecting the fund; but the rule is, that the trustee shall not deal with the cestui que trust, where the relation between them gives the former any possible advantage over the latter.

A deed of compromise with respect to doubtful rights will not be set aside, because the bargain was such as would have seemed disadvantageous to one of the parties, if she had been certain as to the full extent of her legal right.

Costs will be given against a party, who

endeavours unsuccessfully to impeach a compromise, after a contingency has happened, which renders the compromise less for his benefit.

The grounds on which the Vice Chancellor dismissed this bill with costs, were reported in 2 *Law Journ.* Chanc. p. 132.

The plaintiff appealed from the decree of the Vice Chancellor.

The points raised on the argument of the appeal, were the same as those which were discussed on the original hearing.

The judgment of the Lord Chancellor was as follows:—

Lord Lyndhurst.—The case of Naylor and Wynch was an appeal from the decree of his Honour the Vice Chancellor, the present Master of the Rolls. It arises out of the will of a person of the name of John Wynch, who made his will in the East Indies, as far back as the year 1796. By that will he gave and bequeathed to the plaintiff, the wife of Ridgway Mealey, an annuity of 600*l.* sterling to commence six months after his death, for her life, and the issue from her body lawfully begotten, in failure of which to revert to his heirs. The testator also requested that Nathaniel Kindersley and Thomas Cockburn would act as trustees for her, securing the said annuity for her sole use, and paying it to her quarterly or half yearly, as they might think proper. He gave the residue, subject to some other legacies, to his two brothers, George Wynch and James Wynch, whom he appointed his sole heirs and executors.

The testator died soon after the date of this will. In 1798, an agreement was entered into between the legatee, at that time Mrs. Mealey, and the executors; and, by that agreement, it was stipulated, that 20,000 star pagodas should be delivered to two gentlemen, of the name of De Fries; and that out of these 20,000 star pagodas, 600*l.* a year should be paid to the trustees of the annuity under this will. The trustees consented to accept the trusts only for the life of Mrs. Mealey. It was further stipulated, that, upon her death, the money should be repaid to the executors, that they might have the means, after her death, of

paying the interest of 600*l.* a year equally between the children, with the benefit of survivorship. The agreement was entered into in 1798, and nothing further took place till the year 1808, when, Mr. Mealey, having, in the meantime, died, a settlement in the year 1808, was made in contemplation of a marriage about to take place between the present plaintiff and Mr. Naylor; and, by the terms of that settlement, the annuity was to be settled upon her for her life, for her sole use; and, after her death, it was to be subject to the trusts declared in the will of the testator, John Wynch. I should have stated, that, in the agreement of 1798, it was stipulated, that if the executors should at any period find it advantageous, and for the benefit of the estate, which they represented, that the money should be invested in this country, instead of remaining in the hands of the De Frieses; it should be competent for the parties to enter into a new agreement for that purpose.

After the settlement of 1808 was executed, the marriage took place between the parties; and then it seems, it occurred to the trustees, and I believe, it occurred to them previously to the execution of the settlement in 1808, and to all the parties interested, that it would be desirable that the funds should be deposited in this country; and, accordingly, a bill was filed in the year 1809, for that purpose, to which bill the present plaintiff and her husband were parties. No answer was put in to that bill, and, on reading the evidence of a person of the name of Smith, I think it is suggested by him, that there was some reason why it was proper no answer should be put in. However, the parties at last came to a compromise; and, by the terms of that compromise, it was agreed, that the 20,000 star pagodas deposited in the hands of the De Frieses should be repaid to the executors, who were to lay it out in the purchase of 12,000*l.* navy five per cents. in England, for the purpose of securing a fund for the payment of the annuity. It was further stipulated, that Mr. Naylor and his wife should assign all the interest which they then had, in the capital of the navy five per cents. in their own right, or which they might have at any future period, either in their own right, or in respect of the representations of their children, in terms very general and com-

prehensive: and it was further stipulated, that, in consideration of this agreement, in the event of Mr. Naylor surviving his wife, if the executors should take any benefit under the assignment, they should, to the extent of that benefit, secure to him during his life, an annuity of 300*l.* a year. Such, as I understand it, is the substance of the agreement, that was made between these parties.

This agreement, which was in the general terms I have stated, was afterwards finally settled and signed by all the parties in a manner to which I shall presently advert. The prayer of the bill, is—at least part of it—that the agreement should be delivered up to be cancelled as a void agreement against this plaintiff, and that she should be declared entitled to the absolute interest in this annuity.

Now the first question that arises on this bill is, as to the manner in which this agreement was entered into. It is not pretended that it is an agreement entered into without deliberation, nor is there any fraud suggested. There is not the slightest evidence to prove that it was an agreement entered into without consideration; on the contrary, it is an agreement entered into with great care and deliberation. This lady, the present plaintiff, was represented by Mr. W. as her solicitor, by the late Mr. B. as her counsel, persons who were not likely to neglect her interest or be careless with regard to it. The terms of the agreement appear to have been under much consideration, because after the outline of it had been constructed, some difficulty arose as to the manner in which it was to be carried into effect. Some doubt as to the precise form in which it was to be shaped, and accordingly they consent, there being some difference between Mr. Naylor, who was the husband of this lady, and Mr. Smith who was the solicitor for the executors on the other side, as to the manner in which the instrument should be framed,—that that question should be referred to the late Mr. Shadwell; and it appears upon the draft of that agreement now before me, in the hand writing of Mr. Shadwell, and by the various distinct notes that appear in the margin, that it underwent a long and serious consideration. And there was a circumstance which occurred, which afford-

ed still greater time for consideration. One of the executors died, in consequence of which the proceedings were stopped, and it was not till the year 1813, that this agreement was executed finally, with the terms and conditions to which I have before adverted.

But it is suggested, that, at the time when this agreement was entered into, it never had occurred as matter of doubt to the present plaintiffs, that she could claim the absolute interest in this property; that the agreement was made with reference to another state of facts, and to other considerations exclusively of that to which I have adverted.

Now it does appear to me singular, when I consider who the professional gentlemen were who acted in this case, when I consider their high character and great professional acquirements, and when I consider what the terms of the agreement are, that no such question should ever have occurred to their minds, as to this being an absolute interest in the plaintiff. Looking at the great care that was exercised, and the great caution displayed, I cannot bring myself to suppose under such circumstances, that at least the consideration of the question had not, previously to this agreement being entered into, occurred to the parties to it, who were acting in the transaction. Now I look to the evidence of Mr. Smith, and I find it states, that, before the agreement was entered into, doubts were entertained as to the question of the interest that this lady and her children were entitled to, and he states it was deliberately considered and understood by all the parties, that, whatever interest she should have, or might have independent of her life interest in this annuity, that should be assigned to the executors. I find, on the other hand, Mr. W. was examined as a witness, on the part of the plaintiff: but he does not say any thing upon what I have been stating. Under these circumstances, I cannot bring myself to the conclusion, that this consideration had not entered the minds of the parties, previously to the time when the adjustment was entered into. Reference is made to the terms of the agreement, and particularly with reference to the recital, as shewing, that doubts had existed with respect to her rights in certain contingencies. But I think not

much reliance can be placed on that, particularly when I find afterwards words introduced in the hand-writing of Mr. Shadwell, for conveying and granting the whole absolute interest in the capital, in whatever manner it might become vested in Mrs. Naylor.

It seems to me impossible that the terms can be more general and more comprehensive than those which occur in this deed: and it is a strong confirmation of what is stated by Mr. Smith, that it was the intention of the plaintiff, that, whatever present right existed in her, or whatever future right she might obtain, either in her own right or with respect to the representations of her children, all should depart from her and become vested in the executors.

But it is stated further, that from the terms of the compromise, and from the amount of the consideration, it is clear she could not have considered that she was disposing of her absolute interest; but I think, that is founded upon a fallacy. It is clear, that the consideration which was given is not equivalent to an absolute interest, supposing that interest clearly established, and known to be free from all doubt at the time; but if the question was a question of doubt, at that time, (and it has been made a question of doubt at the bar, the one side contending, that she was entitled to this absolutely; and the other, that she had only a life interest;) if it was a question of doubt, the amount of the consideration, and the equivalency of the consideration, must depend upon this doubt existing in the minds of the parties; and we have no means of measuring what the worth of those doubts was. In point of fact, much doubt was entertained on both sides, as appears by the transactions. In the first place, 20,000 star pagodas were by the first agreement to be invested; and it became necessary, that a sum almost equivalent to what had been invested under the first agreement, namely, such a sum as, in addition to the 20,000 pagodas, would produce the sum of 12,000*l.* navy five per cents., should be provided: in addition to that, there was a stipulation, that, in a certain event, an annuity of 300*l.* a year should be allowed to the husband of this lady from the funds that should come into the hands of the executors.

The next point suggested in the course of the argument was, that Mrs. Naylor

was kept in ignorance of all the particulars of this transaction. Now, there is not the slightest evidence whatever to lead me to the conclusion, that Mrs. Naylor was not apprised of every thing going on. In the first place, Mrs. Naylor attended the meeting; she was represented by a counsel and a solicitor in the cause; she signed the agreement, attended by her husband, who had a personal interest; and it is too much for me to come to the conclusion, I am here asked to come to,—that this agreement must be set aside, upon a conjecture, that she knew nothing of the transaction.

But then it is said, she was a married woman; and, therefore, on that ground, this transaction should be set aside. But when I look at the instrument, I find the bequest is for her sole and separate use. The argument urged at the bar, by Mr. Horne, was, that though the gift, to her, was for her sole and separate use, yet that qualification was only during her life; and if she took an absolute interest, she took it by law. Now, the answer I give is this, that whatever she takes, she takes by the will of the testator, and under the terms, he has made use of, in his will. The law puts its construction upon those terms in the will. What *she takes* is, in point of grammatical construction, subject to the construction, that she takes it for her sole and separate use.

It is then stated, that this transaction is invalid, because it is a transaction between trustee and *cestui que trust*. It is unnecessary for me to say anything with respect to that; because I am satisfied with the reasons, and with the explanations given on that point, by his Honour the present Master of the Rolls, then Vice Chancellor, in his printed judgment: indeed, I have done little more than repeat the line of observation made use of by him; and I repeat it for the purpose of stating that I agree entirely with him in thinking, that there is no ground to set aside this agreement. I think it binding upon this lady; and it is remarkable, that, during the life of her husband, which continued for some time after this agreement was entered into, no attempt was made to question the validity of the agreement; but, upon his death, when the charge upon

VOL. VII. CHANC.

the executors, in the event of his surviving her, has ceased,—then, and then, for the first time, is the validity of the agreement questioned. I am, therefore, of opinion, that the agreement is binding, and cannot be set aside.

It is quite unnecessary then for me to take any notice of what is prayed as to the declaration of right; and I agree with the Master of the Rolls, that it is unnecessary to give any directions with respect to the construction of the devise; because, whatever interest she had, if absolute, she has absolutely parted with, if the agreement is binding, which I consider it to be.

Under these circumstances, therefore, I think the decree of the Master of the Rolls must be affirmed, and affirmed substantially, for the reasons upon which that judgment is founded.

Mr. Simpkinson, who was for the respondents, asked for the costs of the appeal.

The Lord Chancellor.—I hardly think you should have the costs, there are so many complicated considerations in the case.

Appeal dismissed without costs.

1828. }
October. } CORBETT v. CORBETT.

Infant—Jointure in bar of Dower.

A, previous to his marriage with an infant who had no fortune, by an indenture, to which her father was a party, granted a rent charge of 100*l.* a year to trustees, for her during her life, after his decease, to be in bar of dower, and issuing out of certain lands; at the time of the execution of the indenture, he had no power of charging any jointure on those lands, but it was, during his life, confirmed by the remainder-man, who, *A* not having any sons, became entitled in possession to the lands upon *A*'s death:—*Held*, that the widow was barred of all claim to dower.

The instruments on which, and the circumstances under which, the question in

C

this suit arose, are stated (1) in the report of what passed on the original hearing of the cause. The arguments and authorities relied on, are likewise there given, together with the judgment of the Vice Chancellor.

From that judgment, the plaintiff appealed.

Mr. Sugden was for the plaintiff:

Mr. Fonblanque and *Mr. Temple* appeared for the defendants.

The judgment of the *Lord Chancellor* was as follows:—

I concur in the view taken of this question by the present Master of the Rolls, when sitting as Vice Chancellor. In the case of a jointure at law, if the widow be lawfully expelled or evicted, she is, by the statute, entitled to be endowed of so much of the residue of her husband's lands, of which she was before dowable, as the lands from which she is so expelled shall amount to.

It follows, therefore, that, if a title originally defective be made good, so as to prevent such eviction, this will be sufficient to render the jointure binding; and there is no inconvenience in this rule, for the right to dower thus becomes a security for the enjoyment of the jointure. If this be so, in the case of a jointure at law, the same rule must prevail where the jointure is equitable, provided, in the case of an infant, it has the assent of the parent or guardian. In the present instance, the original defect has been cured, and there is nothing to prevent the widow from having the full benefit of the settlement.

The case of *Carruthers v. Carruthers* was cited in the argument; but the decision in that case does not appear to me to bear upon the present question. There, by the terms of the settlement, the widow might, if it had been held good, have remained without any provision during her life; for the prior tenant for life might have outlived her. This, at law, would have been a fatal objection; and the Court held, that the same rule would apply in equity, in the case of an infant female, notwithstanding the assent of her guardian.

(1) 2 Law Journ. Chanc. 108.

It is charged in the bill, in the present case, that the original settlement was fraudulent, and the fraudulent nature of the transaction was insisted upon at the bar; but there was no evidence, and nothing, as it appears to me, in the circumstances of the case, to maintain such a charge: and with respect to what was urged as to the supposed inadequacy of the provision, it not only forms no part of the complaint, but was wholly unsupported by proofs. It is unnecessary, therefore, to enter further into this part of the subject.

The appeal must be dismissed; but, I think, without costs.

Appeal dismissed without costs.

1828. } *Ex parte* STONE, AND *Ex*
Oct. & Dec. } *parte* BOLLAND, IN THE
MATTER OF MARSH, STRACEY, GRAHAM, AND FAUNT-
LEROY.

A, being in partnership with B and C, and holding stock, as a trustee, along with two other trustees, forges the signature of his co-trustees to a power of attorney, authorizing B and C to sell the stock: they sell the stock, and transfer it to the purchaser, and the proceeds are paid in to the bankers of the partnership; commissions of bankrupt issue against B and C, and against A; prosecutions are instituted against A for other forgeries of a similar kind, and he is convicted, and executed, but no prosecution is instituted by his co-trustees:—Held, that the co-trustees are entitled to prove the value of the stock against the partnership estate.

In this case, the original petition was presented by Stone and Gahagan, the surviving trustees of certain stock, which had been sold out by the bankrupts under the circumstances stated below, claiming to prove the value of the stock under the commission.

Upon the hearing of this petition, the *Lord Chancellor* directed that the parties should proceed to a trial at law, in the Court of King's Bench, upon the following issue: "Whether the bankrupts were, at the date and suing forth of the commission of bankrupt against them, indebted to

William Stone, Henry Gahagan, and Henry Fauntleroy, in the sum of 16,000*l.*, or in any and what other sum of money;" with a direction, that, upon the trial of the issue, no objection should be taken, on the ground that the said Henry Fauntleroy was interested as a trustee jointly with William Stone and Henry Gahagan, and was also a partner with Marsh, Stracey, and Graham.

On the 23d of March 1826, the issue was tried, before the Lord Chief Justice of the Court of King's Bench, when the jury found, that the bankrupts were, at the date and suing forth of the commission of bankrupt against them, indebted to William Stone, and Henry Gahagan, and Henry Fauntleroy, in the sum of 16,000*l.* This verdict was, by the direction of the Lord Chief Justice, taken, subject to the opinion of the Court, whether the fact of the letter of attorney being forged, affected the rights of Stone and Gahagan to recover. The Court of King's Bench having desired to have the question argued in a special case, the facts were stated on behalf of the parties as follows:—

"On the 26th of May 1819, there was standing in the books of the Governor and Company of the Bank of England, in the name of the plaintiffs, jointly with Henry Fauntleroy, deceased, the sum of 17,061*l.* 12*s.* 4*d.* in the capital stock of Navy Five per cent. annuities, which were held by the plaintiffs and the said Henry Fauntleroy, as trustees, under the will of Sir Thomas Berners Plaistow, deceased. The defendants, and the said Henry Fauntleroy, and Sir James Sibbald, bart., until the death of the said Sir James Sibbald, and the said defendants, and Henry Fauntleroy, since the death of the said Sir James Sibbald, carried on the business of bankers, in Berners-street, under the firm of Marsh & Co. On the 25th May 1819, instructions were given by the house of Marsh & Co. to their broker, John Henry Spurling, to sell as much of the said stock as would produce 16,000*l.* sterling; previously to which time, there had been lodged at the Bank of England a letter of attorney, purporting to be executed by the plaintiffs and Henry Fauntleroy, to sell, assign, and transfer all or any part of 16,000*l.*, part of the said annuities, which letter of attorney was executed by the said Henry Fauntleroy; but the execu-

tion thereof, by the plaintiffs, was forged by the said Henry Fauntleroy. Pursuant to such instructions, the said John Henry Spurling entered into contracts with various stock-jobbers, for the sale to them of 15,811*l.* 13*s.* of the said Navy Five per cent. annuities, at prices, which, upon the whole, yielded 16019*l.* 15*s.* 4*d.*, the 19*l.* 15*s.* 4*d.* being the amount of the brokerage. On the 26th May 1819, the said John Henry Spurling caused transfers to be prepared, in the books of the Governor and Company of the Bank of England, of part of the said annuities, to the amount of 7000*l.*, to the purchasers thereof, or their nominees; and on that day, the defendant, Josias Henry Stracey, attended at the Bank, and signed the demand to act, indorsed on the said power of attorney, and then executed two several instruments of transfer, so prepared in the books kept at the Bank of England, of two sums, part of the said annuities, viz. 6895*l.* 10*s.* 6*d.*, to the Rev. William Yates, and Thomas Norris, esq., and 104*l.* 9*s.* 6*d.* to one Henry Neil; and the said annuities were thereupon carried, by the said Governor and Company, to the credit of the said transferees, in the books kept at the Bank of England for transfer thereof; and the plaintiffs, and the said Henry Fauntleroy, ceased to have credit for the same, in the said books kept at the Bank. On the 28th May 1819, the said John Henry Spurling caused transfers to be prepared, in the books of the Governor and Company of the Bank of England, of the sum of 8811*l.* 13*s.*, residue of the said annuities so sold as aforesaid, in various sums, to the purchasers thereof, or their nominees; and on that day, the defendant Graham attended at the Bank, and executed four several instruments of transfer, in the books kept at the Bank of England, of the following sums, part of the said annuities: that is to say, 5000*l.*, part of the said annuities, to one Joseph Seaton Aspden; 811*l.* 13*s.*, other part thereof, to one John Brett; 2000*l.*, other part thereof, to one David Gibson; and 1000*l.* other part thereof, to one Thomas Courtenay; and the said annuities were thereupon carried, by the said Governor and Company, to the credit of the said transferees, in the books kept at the Bank of England for transfer thereof; and the plaintiffs, and the said Henry Fauntleroy, ceased

to have credit for the same in the said books kept at the Bank. The defendant's house had an account with Messrs. Martin, Stone and Co. bankers in the city, in the usual way of a banker's account, and a pass-book went from one house to the other, from time to time, according to the usual practice between bankers and their customers; and to this account Spurling the broker usually paid the money received by him for stock sold by the order of the defendant's house. The consideration money of the said annuities was received by the said John Henry Spurling, and was paid by him to Messrs. Martin, Stone & Co. to the credit of the house of Marsh & Co. according to the usual practice, in the following sums: viz. 7105*l.* on the 26th of May 1819, and the further sum of 8964*l.* 17*s.* 8*d.*, on the 28th of May 1819, being the said principal sum of 16,000*l.*, together with the sum of 9*l.* 17*s.* 8*d.*, one moiety of the broker's commission, which was allowed by him to the said house of Marsh & Co., according to the usual practice on sales effected by him on their account; since which payment the account of Marsh & Co. with Martin & Co. had been frequently balanced before the bankruptcy. Henry Fauntleroy was permitted by the partners to conduct the greater part of the business of the house without their interference, and he drew upon the account of Martin, Stone & Co. in the partnership firm as he thought fit, without the knowledge and in fraud of his partners, more than the amount of the said sums so paid in. A book was kept at the defendant's banking-house, called the house-book, in which entries were from time to time made by Fauntleroy, and by some of the defendants. Many entries were made in it by the defendant Graham, by the direction of Fauntleroy, or of some clerk in the defendant's house. This book purported to contain the transactions of the defendant's house with Martin, Stone & Co., and the sums ought to have corresponded with those in the pass-book. The pass-book was never examined by either of the defendants before the bankruptcy. Upon comparing the two books after the bankruptcy, it was found, that neither of the sums before mentioned to have been paid by Spurling to Martin, Stone & Co. was mentioned in the house-book or any other book, except the pass-

book; but the said sum of 9*l.* 17*s.* 8*d.*, the moiety of the commission, was entered in the house-book in the hand-writing of Fauntleroy. Upon such comparison of the two books, it also appeared, that sums to a very large amount were entered on each side of the pass-book, at various dates subsequent to March 1819, which were not in the house-book; and also that sums to a very large amount were entered in the house-book as paid to Martin, Stone & Co. which had never been paid to them. These latter entries were in the hand-writing of Fauntleroy. Upon the apprehension of Fauntleroy, shortly before the bankruptcy, a paper was found in his private desk, whereof he kept the key, in the hand-writing of the defendant Graham, in pencil, of which the following is a copy:—

“ 26th May 1819, 15,000*l.* odd, Navy Fives: 7105*l.* paid into Martin's on the 26th, and, on the 28th, 8900*l.* odd, to make up the account to raise 16,000*l.* money of H. F. Gahagan and Stone.”

“There was no account with the defendant's house in the names of the plaintiffs and Fauntleroy, but there was an account in the name of the executors of Sir T. B. Plaistow. The executors were, in fact, the plaintiff Gahagan, Miss Plaistow and Fauntleroy; the defendant Stracey knew that the plaintiff Stone was in India in the year 1819. The money raised by the transfers was not carried to the executors' account. A broker's note of the sale was transmitted by the said John Henry Spurling to the house of Marsh & Co. in the usual course.”

The Court of King's Bench gave judgment in favour of William Stone and Henry Gahagan.

The assignees of the bankrupts now presented a petition, praying that there might be a new trial of the issue, or that the case reserved might be reheard.

The case was argued at great length on the part of the assignees, particularly by *Mr. Serjeant Wilde* and *Mr. Montague*; and on the other side, by *Mr. Serjeant Bosanquet* and *Mr. Horne*.

The judgment of the Lord Chancellor was as follows:—

The Lord Chancellor.—This case, on a former occasion, was before the Court. It

appears, according to the facts presented to the Court, that Stone and Gahagan, and Henry Fauntleroy, were trustees of certain stock, amounting to the sum of about 17,000*l*. Henry Fauntleroy prepared and signed a power of attorney for the transfer of this stock. He signed that power of attorney in his own name, and he forged the names of his co-trustees. By that power of attorney, he gave authority to the other members of the house, each of them individually, or all of them together, to transfer the stock in question. In consequence of the execution of this power of attorney, authority was given, or an order was sent by the house, to Mr. Spurling, who was the ordinary stock-broker of the house, directing him to sell the stock in question. It does not appear from the evidence, in what manner or by whom that order was sent; but Mr. Spurling states, that he received the order from the house. Mr. Spurling, in consequence of this authority, entered into contracts for the sale of the stock. Mr. Stracey, who was one of the parties named in the power of attorney, went to the Bank and claimed to act under it. Mr. Graham, who was another partner in the house, also went to the Bank and claimed to act under the power. In consequence of the contracts that had been entered into, the stock was transferred: Stracey signing one of the transfers, Graham signing the other transfer. The money, which was the consideration of the purchase, was paid to Spurling, the broker; and Spurling, the broker, paid it into the house of Martin, Stone and Company, who were the bankers of the house of Marsh & Co. The payment into the house of Martin, Stone & Co. was therefore a payment to Marsh & Co. Spurling, the broker, was in the habit, according to an agreement, either express or implied, with the house, when he was employed by the house to sell stock, of dividing with them the commission. Upon this occasion, he did divide the commission with them; he paid into the house of Martin, Stone & Co. one half of the commission, amounting to 9*l*. and upwards; and it was carried, together with other payments, by Martin, Stone & Co. to the credit of Marsh & Co. generally. The account between Marsh & Co., and Martin, Stone & Co., with this item in it, or with these par-

ticulars in it, was subsequently settled, upon more than one occasion, by the house of Marsh & Co. They therefore must be taken to have been cognizant of the particulars of that account. In addition to these circumstances, upon the apprehension of Mr. Fauntleroy, a paper was found in his possession, in the hand-writing of Mr. Graham, in which Mr. Graham stated, that to make up the amount 16,000*l*. that money was paid. The precise terms I do not at this moment recollect; but the substance of that document is, that, for the purpose of making up the sum of 16,000*l*.; money to that extent, being money of the trustees, was paid into the house of Martin, Stone & Company.

These are the facts of the case. The house contracted for the sale of this stock; the house effected the transfer of the stock; the house received the consideration for the stock; the house divided the commission: a member of the house admitted, that the money in the hands of Martin, Stone & Co. was the money of the trustees. Who can doubt then, that, upon that state of facts, unqualified by other circumstances, an action for money had and received might be maintained against the house?

But, it is said, that this was arranged and contrived by Fauntleroy; that the money was paid into the house of Martin, Stone & Co. by his fraud, and through his contrivance, and that he afterwards drew it out; that nothing remains in the hands of Marsh & Co. The facts proved in evidence do not establish such a case. But, independently of that, the money was paid in upon the general account of Marsh & Co. It became part of their general funds; and the drawings were upon the general account by Fauntleroy; and I do not therefore see how drawings upon the general account by Fauntleroy can be considered as extinguishing or affecting the claim of the trustees to this money.

But then, on the authority of the case of *Davis v. the Bank of England*, which was decided in the Court of Common Pleas⁽¹⁾, and which afterwards went by writ of error to the King's Bench⁽²⁾, but upon which the main point was not decided,—it is said,

(1) 3 Law Journ. C.P. p. 4.

(2) 4 Id. K.B. p. 145.

that, in point of fact, at this moment the trustees hold their stock ; that they are at this moment in possession of the stock ; that it has never been divested out of them, and that they are entitled to claim the dividends.

Now, without impeaching the authority of that decision, let us see what are the facts of this case, or let me rather advert to the facts of the case, as I have already stated them. A contract was made for the sale ; and the transfer in the books was actually effected by the house of Marsh & Co., professing to be the agents of the owners of the stock. There is no longer standing in the names of the trustees any of that stock. It has been transferred into the names of other persons ; and, according to the evidence, it further appears, as to one part, (and probably that is the case with respect to the greater part of it), that, after it had been so transferred into the names of other parties, it became mixed up with the stock of those other parties, and part of the entire mass, and has been transferred from hand to hand through several individuals. It seems extremely difficult, therefore, to know, what course of proceeding is to be adopted for the purpose of putting these gentlemen, the trustees, in the situation in which they originally stood. At this moment they cannot sell the stock, because they can make no transfer. There is nothing standing, in their names in the books of the Bank of England ; they therefore, cannot at this moment sell the stock, and they can exercise no dominion over it. If the Bank of England is liable, in what mode can these gentlemen be restored to their former possession ? The Bank of England may make a new entry of new stock to their credit, but it is difficult to say that the same identical stock can again come to their credit in the books of the Bank. Whether the Bank can or cannot be called upon to do this, it is not necessary for me, on the present question, to decide.

Then, what is the case ? These parties, assuming to act for the trustees, enter into a contract for the sale and transfer of the stock, and actually in the books do transfer the stock out of the name of one, into the name of another, individual : and I want to know, under such circumstances—they doing this act, and professing to do it as agents of

the trustees, receiving the consideration money, and holding the consideration money at this moment,—whether they can, under such circumstances, say, “ the act we have done is altogether void, because we had no authority ; the instrument under which we assumed to act was a void authority ; it was a fraud, it was a forgery.” Such a defence could never in a case of this kind be set up in a court of law ; and I am of opinion, that it cannot be set up or insisted upon in a court, which, with respect to a case of this kind, must be considered as a mixed court of law and equity.

But then it is said, that some agreement has been entered into between the trustees and the Bank of England. I have looked at the terms of that agreement ; it is an agreement contingent upon the proof. If these gentlemen have a right (I will not say whether they have or have not) of maintaining an action against the Bank of England, and if they have a right to maintain an action against Marsh & Co., they may elect, as was stated in the Court of King's Bench, against which of the parties they choose to proceed ; and it is no answer to their election to say, that they have made an agreement as to something that is to be done contingent upon their proceeding, nor can that at all affect their right to recover against the party whom they are proceeding against.

Another argument was urged at the bar, which was a mere repetition of the argument urged in the Court of King's Bench, and to which it is only necessary for me, therefore, shortly to allude. The argument was, that the parties are, in this case, attempting to ratify a felonious act. The Court of King's Bench, with reference to that argument, said, that it was founded upon a fallacy. The felony was complete, antecedent to the transfer. The felony was completed by forging the power of attorney. The transfer of the stock was not a felony ; the sale of the stock was not a felony ; the receipt of the money was not a felony : and all that is ratified and confirmed, or rather all that is adopted in this case, is that transfer—that receipt of the money—that sale : and I agree with the Court of King's Bench, in considering that it is a fallacy in this case

to say, that, by adopting this act, the parties are in effect ratifying a felony.

This brings me, then, to the main argument that was insisted upon at the bar, and principally relied upon by *Mr. Serjeant Wilde*, in the course of his very elaborate argument:—I mean, that principle of law, by which, where a felony has been committed, the party who is injured by that felony cannot proceed, for the purpose of recovering compensation for the injury which he has sustained, in a civil action, until he has prosecuted for the felony. It must have occurred, I think, to that learned gentleman, in the course of his argument, or in the course of preparing that argument, that much of it, when it came to be sifted and considered, was inapplicable to the present question. A great deal of that argument was built upon the law with respect to the restitution of property in the cases of larceny and robbery. According to the old law, as was stated at the bar, (and it is unnecessary to controvert, or to attempt to qualify that proposition,) where two persons, A, for instance, and B, had respectively had their property stolen by a felon, and one of the parties, whose property was stolen, had instituted an appeal against the felon, and had obtained judgment and conviction upon such an appeal, the other party would not be entitled to restitution, unless he also prosecuted his appeal. This argument, in various shapes, was pressed upon the consideration of the Court; and it was contended, that it still applied, notwithstanding the change in the law which had been introduced by the statute of Henry VIII. previous to which the prosecution by way of indictment would not entitle a party to his writ of restitution. All this was founded upon the law relative to larceny, and the distinctions and questions connected with the writ of restitution.

But there is another principle connected with the same subject and arising out of it, not confined to the case of larceny, but extending itself to cases of felony generally—to cases of felony, not merely at common law, but to cases that have been made felony by subsequent statutes; and it is the principle adverted to by the Court of King's Bench—that, where a party had been guilty of a felony generally, it was contrary

to the rules of public policy, and contrary to the interests of society, to allow him who was thus injured to bring his action, until he had prosecuted the criminal; because, if he were allowed to bring his action in the first instance, it might lead in a great variety of cases to the abandonment altogether of any idea of prosecution. That principle is applicable to felony in general, as a principle of public policy. It may have arisen out of the law with respect to restitution in cases of larceny: it is connected with it; but, as a general principle, applicable to cases of felony generally, it is a principle founded upon public policy. It is so stated in the case of *Crosby v. Leng* (3), to which I refer, because that renders it unnecessary to refer to other cases, of which there are so many upon the subject, most of the authorities having been there presented to the consideration of the Court in the course of the argument, by Mr. Justice Holroyd and Mr. Justice Richardson, then at the bar. If this rule then, be a principle of public policy, and be founded upon principles of public policy, we are to take care not to extend it beyond what public policy requires. That was the principle upon which the Court of King's Bench proceeded—to which principle I entirely subscribe.

Let us now consider that rule with reference to the facts of the present case, and see how it applies. There were several prosecutions instituted against Fauntleroy; I believe two of them were carried on with effect against him for forgeries of a similar nature. He was found guilty, convicted, and suffered the extreme penalty of the law. It became unnecessary, therefore, for these parties to institute any prosecution, upon any ground or principle of public policy. It does not appear, according to the facts of the case as they are presented to the consideration of the Court, (or rather the contrary appears), that they had the means of effectually instituting and carrying on a prosecution for this forgery against Fauntleroy, but it does not appear that there was any indisposition or backwardness on their part, to do what might be necessary for the purpose of bringing this offender to justice. It appears to me, therefore, that the prin-

ciples of public policy do not require that the rule should be applied to this case.

Therefore, upon all these considerations; looking at the various arguments that were presented in opposition to what appears in the first instance to be a clear case of claim and title, and finding that those arguments are not, in my judgment, sufficient to lead me to consider, that the party is not entitled to prove,—I must adhere to the opinion I gave on the first occasion when this case was originally presented to me—and when it was presented to me, not with so extended a view of the subject—not with arguments pressed so elaborately, and embracing so many topics,—but presented very effectively. I then formed a distinct opinion, and to that opinion I now adhere.

The petition must be dismissed; and under the circumstances, it must be dismissed with the costs of this petition of rehearing and appeal.

1828. }
December. } FITZROY V. HOWARD.

Estates held for lives will pass under a general devise of lands.

A testator devises leaseholds for lives to his daughter F, and the heirs of her body, and, in default of such issue, to A and her heirs: the daughter being at the time of his death a married woman, and of unsound mind, her husband took out administration to the testator, with his will annexed, and, as such administrator, renewed the leases and assigned them to a trustee for his own benefit: F survived her husband:—Held, that, upon the death of F, A became entitled to the renewed leases.

Charles Fitzroy Scudamore, at the times of making his will, and of his decease, was, by virtue of certain deeds of settlement, and of an indenture, bearing date the 28th of May 1750, made between the Bishop of Hereford of the one part, and the said Charles Fitzroy Scudamore of the other part, seised of, or entitled absolutely to, all those houses, great barn, dove-house, granary-house, and other edifices, situated and being in and upon the close called the Grainge, within the parish of Leominster; and also, all

that close or parcel of ground called the Grainge, with its appurtenances, together with all those the tithes arising and increasing and happening, yearly and every year, within the liberties of Westham, commonly called the Grainge tithes, within the said parish of Leominster, during the lives of himself and other two persons in such indenture of lease mentioned. He was likewise by virtue of another similar indenture, of the same date, seised of, or entitled absolutely to, the rectory and parsonage impropriate of Bridstow, with the demesne lands, glebe lands, tithes, and appurtenances thereunto belonging, during the lives of himself and other two persons therein named.

He died in 1782, having, by his last will, bearing date the 1st day of April 1762, signed by him, and attested as is required by law for passing freehold estates by devise, given and devised unto his dear daughter Frances Fitzroy Scudamore, and the heirs of her body lawfully issuing, all and every his lands, tenements, and hereditaments whatsoever, situate, lying, and being in the several counties of Middlesex, Hereford and Gloucester, any or either of them, and all other his real estate in the kingdom of England or elsewhere, either in possession, reversion, or expectancy; and for default of such issue of his said daughter, he gave and devised the said several estates unto the Honourable Charles Fitzroy, brother of his Grace the Duke of Grafton, and the heirs and assigns of the said Charles Fitzroy for ever.

The bill was filed by a plaintiff who derived title under Charles Fitzroy. It stated, that Frances Fitzroy Scudamore had intermarried with Charles, late Duke of Norfolk; that she, by virtue of the devise contained in the will of her father, became seised of the aforesaid estates for lives, for an estate in the nature of, or as a *quasi* estate-tail; and having survived her husband, the said duke, she departed this life in October 1820, without issue, and without having done any act to bar the *quasi* estate-tail, created in the aforesaid estates for lives under or by virtue of the said will of her said late father.

It stated various renewals of the leases by the Duke of Norfolk, the Duchess being at all those times a lunatic, and, since her death, by the defendant Henry Howard, who claimed under the duke.

The prayer was, that the plaintiff might be declared entitled to the aforesaid leaseholds for lives, called the Grainge tithes and Bridstow Rectory, for his own use and benefit absolutely; that the defendant might be directed to assign the same, and the leases by which the same were holden, to the plaintiff and his heirs; and that an account might be taken of the rents, issues, and profits of the said hereditaments and premises received by the defendant since the decease of the said Duchess of Norfolk, and that the same might be directed to be paid to the plaintiff, he offering on his part to repay to the defendant any sums of money which he had paid in respect of renewals since the decease of the said Duchess of Norfolk.

The defendant was the executor and devisee in trust of the duke. He admitted the material allegations of the bill, and by his answer stated, that administration of the personal estate of the testator, with his said will annexed, was granted to the Duke; that, by virtue of the said will, Frances, the wife of the duke, became entitled to the leasehold estates, as personal estate, and not under the devise contained in the said will, and not for an estate in the nature of, or as a quasi estate-tail.

He likewise set forth an indenture, bearing date the 1st of Sept. 1810. This deed recited, that, by the letters of administration to the testator, which had been granted to the duke, the leasehold estates, whereof Charles Fitzroy Scudamore was possessed, interested in, or entitled unto, became legally vested in the Duke of Norfolk, and amongst them, the several estates demised or granted to the lessee, his executors, administrators or assigns, during the lives of the persons therein named, and the life of the survivor; that the said duke possessed himself of all the other personal estate and effects of the said testator, Charles Fitzroy Scudamore, which he could come at, and thereout paid and satisfied the funeral expenses and all debts of the said Charles Fitzroy Scudamore; that the duke had surrendered some of the leases, and obtained new leases to be granted to him, his executors, administrators and assigns, of the premises therein comprised, for the lives of the several persons in such renewed leases named, and the life of the longest liver of them; that he had with his own

proper monies discharged the fines upon such renewals, and the fees incident thereto; and that he, as the husband of Frances Fitzroy, Duchess of Norfolk, was by the rights of marriage entitled to all her personal estate, but in regard that some question might arise, in case the said duchess should survive the duke, as to the right to the said leasehold estates,—he, the Duke of Norfolk, being desirous that the same leasehold estates should be considered and be his own absolute property, and be at his own absolute disposal, had therefore determined to make and execute an assignment of the same to Henry Howard, the defendant: and it was therefore witnessed, that, in consideration of the premises, and of 10*l.* to the duke paid by this defendant, he, the Duke of Norfolk, bargained, sold, and assigned unto this defendant, his executors, administrators, and assigns, all the messuages, tenements, and hereditaments, which Charles Fitzroy Scudamore, at the time of his death, was seised of, or interested in, under any leases granted to the lessee, his executors, administrators, and assigns; and it was thereby declared, that the defendant, his executors, and administrators, should stand possessed of the said several messuages, tenements, and premises, in trust for the duke, his executors, administrators, and assigns.

It further appeared, that, in the renewed leases, the duke was described as administrator of the testator. And the defendant insisted, that the interest of the said Charles Fitzroy Scudamore in the said leasehold hereditaments and premises, was in the nature of personal estate, and that the same passed to the Duke of Norfolk, as administrator of C. Fitzroy Scudamore; that the Duke of Norfolk was entitled, if he had thought proper so to do, to have converted the said leasehold interests into money, as personal estate, in the lifetime of the duchess; and that, by the several acts mentioned, he made the said leasehold interests his own property, and that the same were absolutely vested in the defendant, as his legal personal representative, and as trustee thereof under his will.

Mr. Sugden and Mr. Norton appeared for the plaintiff:

Mr. Preston, for the defendant.

ciples of public policy do not require that the rule should be applied to this case.

Therefore, upon all these considerations ; looking at the various arguments that were presented in opposition to what appears in the first instance to be a clear case of claim and title, and finding that those arguments are not, in my judgment, sufficient to lead me to consider, that the party is not entitled to prove,—I must adhere to the opinion I gave on the first occasion when this case was originally presented to me—and when it was presented to me, not with so extended a view of the subject—not with arguments pressed so elaborately, and embracing so many topics,—but presented very effectively. I then formed a distinct opinion, and to that opinion I now adhere.

The petition must be dismissed ; and under the circumstances, it must be dismissed with the costs of this petition of rehearing and appeal.

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Charles Fitzroy Scudamore, at the times of making his will, and of his decease, was, by virtue of certain deeds of settlement, and of an indenture, bearing date the 28th of May 1750, made between the Bishop of Hereford of the one part, and the said Charles Fitzroy Scudamore of the other part, seised of, or entitled absolutely to, all those houses, great barn, dove-house, granary-house, and other edifices, situated and being in and upon the close called the Grainge, within the parish of Leominster ; and also, all

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He died in 1782, having, by his last will, bearing date the 1st day of April 1762, signed by him, and attested as is required by law for passing freehold estates by devise, given and devised unto his dear daughter Frances Fitzroy Scudamore, and the heirs of her body lawfully issuing, all and every his lands, tenements, and hereditaments whatsoever, situate, lying, and being in the several counties of Middlesex, Hereford and Gloucester, any or either of them, and all other his real estate in the kingdom of England or elsewhere, either in possession, reversion, or expectancy ; and for default of such issue of his said daughter, he gave and devised the said several estates unto the Honourable Charles Fitzroy, brother of his Grace the Duke of Grafton, and the heirs and assigns of the said Charles Fitzroy for ever.

The bill was filed by a plaintiff who derived title under Charles Fitzroy. It stated, that Frances Fitzroy Scudamore had intermarried with Charles, late Duke of Norfolk ; that she, by virtue of the devise contained in the will of her father, became seised of the aforesaid estates for lives, for an estate in the nature of, or as a *quasi* estate-tail ; and having survived her husband, the said duke, she departed this life in October 1820, without issue, and without having done any act to bar the *quasi* estate-tail, created in the aforesaid estates for lives under or by virtue of the said will of her said late father.

It stated various renewals of the leases by the Duke of Norfolk, the Duchess being at all those times a lunatic, and, since her death, by the defendant Henry Howard, who claimed under the duke.

The prayer was, that the plaintiff might be declared entitled to the aforesaid leaseholds for lives, called the Grainge tithes and Bridstow Rectory, for his own use and benefit absolutely; that the defendant might be directed to assign the same, and the leases by which the same were holden, to the plaintiff and his heirs; and that an account might be taken of the rents, issues, and profits of the said hereditaments and premises received by the defendant since the decease of the said Duchess of Norfolk, and that the same might be directed to be paid to the plaintiff, he offering on his part to repay to the defendant any sums of money which he had paid in respect of renewals since the decease of the said Duchess of Norfolk.

The defendant was the executor and devisee in trust of the duke. He admitted the material allegations of the bill, and by his answer stated, that administration of the personal estate of the testator, with his said will annexed, was granted to the Duke; that, by virtue of the said will, Frances, the wife of the duke, became entitled to the leasehold estates, as personal estate, and not under the devise contained in the said will, and not for an estate in the nature of, or as a quasi estate-tail.

He likewise set forth an indenture, bearing date the 1st of Sept. 1810. This deed recited, that, by the letters of administration to the testator, which had been granted to the duke, the leasehold estates, whereof Charles Fitzroy Scudamore was possessed, interested in, or entitled unto, became legally vested in the Duke of Norfolk, and amongst them, the several estates demised or granted to the lessee, his executors, administrators or assigns, during the lives of the persons therein named, and the life of the survivor; that the said duke possessed himself of all the other personal estate and effects of the said testator, Charles Fitzroy Scudamore, which he could come at, and thereout paid and satisfied the funeral expenses and all debts of the said Charles Fitzroy Scudamore; that the duke had surrendered some of the leases, and obtained new leases to be granted to him, his executors, administrators and assigns, of the premises therein comprised, for the lives of the several persons in such renewed leases named, and the life of the longest liver of them; that he had with his own

proper monies discharged the fines upon such renewals, and the fees incident thereto; and that he, as the husband of Frances Fitzroy, Duchess of Norfolk, was by the rights of marriage entitled to all her personal estate, but in regard that some question might arise, in case the said duchess should survive the duke, as to the right to the said leasehold estates,—he, the Duke of Norfolk, being desirous that the same leasehold estates should be considered and be his own absolute property, and be at his own absolute disposal, had therefore determined to make and execute an assignment of the same to Henry Howard, the defendant: and it was therefore witnessed, that, in consideration of the premises, and of 10*l.* to the duke paid by this defendant, he, the Duke of Norfolk, bargained, sold, and assigned unto this defendant, his executors, administrators, and assigns, all the messuages, tenements, and hereditaments, which Charles Fitzroy Scudamore, at the time of his death, was seised of, or interested in, under any leases granted to the lessee, his executors, administrators, and assigns; and it was thereby declared, that the defendant, his executors, and administrators, should stand possessed of the said several messuages, tenements, and premises, in trust for the duke, his executors, administrators, and assigns.

It further appeared, that, in the renewed leases, the duke was described as administrator of the testator. And the defendant insisted, that the interest of the said Charles Fitzroy Scudamore in the said leasehold hereditaments and premises, was in the nature of personal estate, and that the same passed to the Duke of Norfolk, as administrator of C. Fitzroy Scudamore; that the Duke of Norfolk was entitled, if he had thought proper so to do, to have converted the said leasehold interests into money, as personal estate, in the lifetime of the duchess; and that, by the several acts mentioned, he made the said leasehold interests his own property, and that the same were absolutely vested in the defendant, as his legal personal representative, and as trustee thereof under his will.

Mr. Sugden and *Mr. Norton* appeared for the plaintiff:

Mr. Preston, for the defendant.

For the plaintiff, it was contended, that the testator had a freehold interest in these leaseholds; and therefore, that they passed by the words "lands, and his other real estates;" and that the duke had no right to take renewals for his own benefit, but that the renewed leases must belong to the same persons, as would have been entitled to the leases which were the subject of the devise.

For the defendant, it was said, that a lease to a man, his executors, administrators, and assigns, was not a proper or pure freehold; and that there was no authority for saying that such an interest would pass by a general devise of "lands." Even if the words were sufficient to pass it, it was not the intention of the testator that the leaseholds for lives should pass; for it was not likely that he should have meant to subject them to a mode of limitation, which was properly applicable only to lands of which he had the fee-simple. Besides, the original leases would have expired in the lifetime of the duchess, for she outlived all the *cestuis que vie* named in them. What claim, therefore, could the plaintiff have on the leases now existing? He could not have forced the Duke to renew; and the Duke had renewed only for his own benefit.

The cases referred to were—*Ripley v. Waterworth* (1), and the cases there cited; *Milner v. Lord Harewood* (2), *Watkins v. Lea* (3), *Rose v. Bartlett* (4).

The Lord Chancellor.—The facts of this case appear to me to be extremely simple, as far as they are necessary for the purpose of the judgment of the Court. Charles Fitzroy Scudamore, before and at the time of making his will, was entitled to the impropriate rectory of Bridstow, and also to the estate called the Grange, and the Grange tithes, within the parish of Leominster. The estates were held for three lives, under the Bishop of Hereford. They were held by Mr. Charles Scudamore, to himself, his executors, administrators and assigns. C. F. Scudamore, in the year 1762, made his will, and thereby—"He gave and devised

unto his dear daughter, Frances Fitzroy Scudamore, and the heirs of her body lawfully issuing, all and every his lands, tenements, and hereditaments whatsoever, situate, lying and being in the several counties of Middlesex, Hereford, and Gloucester, any or either of them, and all other his real estate in the kingdom of England or elsewhere, either in possession, reversion, or expectancy; and for default of such issue of his said daughter, he gave and devised the said several estates unto the Hon. C. Fitzroy, brother of his Grace the Duke of Grafton, and the heirs and assigns of the said Charles Fitzroy for ever."

Frances Fitzroy Scudamore, named in that will, married the Earl of Surrey, afterwards the Duke of Norfolk; and the testator died in the year 1782. At that time Frances Fitzroy, named in the will, Lady Surrey, was in a state of mental derangement, and administration of the personal estate of Charles Fitzroy Scudamore, with the will annexed, was taken out by the Earl of Surrey. The Earl of Surrey renewed those leases for lives, having surrendered the old leases; and in the surrenders he described himself as administrator, and paid the fines upon the renewals out of his own property. In the year 1810, he executed a deed, in which he conveyed those estates to a trustee, for his the Duke of Norfolk's use and benefit. The Duke of Norfolk died in the year 1815; the duchess survived him, and died in the year 1820. The present plaintiff claims, and makes out his title under the Hon. Charles Fitzroy, brother to the Duke of Grafton.

These are the facts of the case; and the first question is, whether these estates passed by devise.

That they are freehold estates, being estates for lives, is perfectly clear: they pass only by a will, attested according to the provisions of the Statute of Frauds; and all the authorities, shewing clearly that they are freeholds, from *The Duke of Dorset v. Kinton*, down to the present time, are collected in the elaborate judgment of Lord Eldon in *Ripley v. Waterworth*. Indeed, I think, in the discussion at the bar, it was admitted by Mr. Preston that they were freeholds in the lessee, though the word *quasi* occasionally crept in. If they are freeholds in the lessee, they are freeholds also

(1) 7 Vesey, 425.

(2) 18 Id. 259.

(3) 6 Id. 634.

(4) Oro. Car. 292.

in the executor, if he take as special occupant; but, though he takes them as freeholds, yet, according to the opinion of Lord Eldon, in the case to which I referred, he takes them as trustee for the persons entitled to the personal estate.

If they are freeholds, they will pass by the description of "land," the word used in this will. That does not rest on mere general assertion, because the very point was made by counsel in the case of *Watkins v. Lea*; and the Court was of that opinion, confirming it not merely by a short statement, but, according to the habit of Lord Eldon, by a train of observations connected with it. This estate, therefore, being freehold, passed by the description of "lands," or would pass by the description of "lands."

Against this a number of cases were cited, but they do not appear to me to be very closely applicable to the present question. I allude to the case of *Rose v. Bartlett*, which decided, that, where a person is seised in fee, and has also leaseholds, and devises all his lands, his leaseholds will not pass. But then, that is confined to leaseholds for years, and there is no case and no principle that can extend it to leaseholds for lives. I put therefore all that class of cases, *Rose v. Bartlett*, *Day v. Trigg*, &c. (5), entirely out of my consideration upon the present occasion.

Then, reliance was placed upon the term "other real estate." It was said these words imported that, under the term lands, the testator meant real estates; and, that, though these leaseholds are freeholds, it does not follow that they are real estate. In the first place, I do not admit that necessarily follows from the construction of the clause; but if it did,—if this is a freehold estate in lands, I should wish, at least, for some authority to satisfy me that it is not to be considered, in the hands of the lessee, at least, as real estate.

But then it was contended, and very properly contended, that, although these estates might pass by the words used in the will, yet, if there was an intention on the part of the testator that they should not pass, that intention must be carried into effect.

It is perfectly clear, that although these words are sufficient to pass an estate of

this description, if there be anything on the face of the will to satisfy the Court that it was not intended that they should pass, in that case the Court will not consider them as passing. The *onus* of proving that intention is upon the party who contends for the exception. Now, the single fact that is relied upon, as it appears to me, for the purpose of establishing that intention in this case, is the nature of the limitations: it is said that the limitations are not applicable to an estate of this description. It is perfectly clear, however, in practice, that estates of this description are given and passed with such limitations; and that such limitations may be applicable to estates of this description, nobody can doubt. In fact, the point came before the Court in the case of *Low v. Burron* (6); and the Court was of opinion, that such limitations were, in point of law, applicable to an estate of this description. In the case of *Sir J. Sheffield v. Lord Mulgrave* (7), where the question was as to the intention, one circumstance relied upon,—I should not say relied upon, but mentioned by the Court—was the nature of the limitations, being limitations in the nature of an estate-tail; but the Court did not decide the case upon that statement, because Lord Kenyon selected another circumstance, which, according to his phrase, was decisive of the intention, that the leasehold should not pass. And it was on the ground of that particular circumstance, (whether properly or improperly selected, it is unnecessary at present to decide,) and in consequence of that particular circumstance manifesting a decisive intention, that it was considered that the leasehold in that case did not pass. It does not appear to me, that there is any case, or any authority whatever, to shew, that the mere circumstance of a limitation of this description, is a sufficient indication of intention that property of this description should not pass under a general devise similar to that which is the subject of the present inquiry. I am therefore of opinion that, so far as relates to this point, the estate did pass by the devise to Frances Fitzroy Scudamore.

The next question for consideration is, with respect to the operation of the renewals. It was admitted at the bar, and is ad-

(6) 3 P. Wms. 262.

(7) 2 Vesey, jun. 526; 2 Term Rep. 372.

mitted in the case, I think, that nothing was done by the Duchess of Norfolk to bar this estate-tail, or this *quasi* estate-tail; the question, therefore, is, as to the operation of the renewals.

The lease was renewed by the husband. It is said, he was not bound to renew; I admit he was not bound to renew, according to the doctrine in *Milner v. Lord Harewood*. The husband was not bound to renew, Lord Eldon there said, and no stranger could renew so as to charge rents and profits during the coverture. But, if there is in fact a renewal, and by the husband, the next question is, on whose account and for whose benefit is that renewal to operate? In that case of *Milner v. Lord Harewood*, Lord Eldon said, it was very questionable whether the wife should have the benefit of the renewal, according to the principle of equity, that the parties interested in the settlement ought to have the benefit of the renewal. But that turned entirely upon the particular circumstances of that case; and the very exception taken by Lord Eldon, establishes the rule, that if these circumstances had not existed,—if it had been an ordinary case like the case now before the Court,—it would have been considered that these parties, who were entitled to the original lease, would be entitled to the benefit of the renewal in a case of this description, precisely the same as in the ordinary case of a renewal of such an estate. I am of opinion, therefore, upon the whole case, that the party who takes under Charles Fitzroy,—that is, the present plaintiff,—is entitled to the benefit of those leases.

Of course an account must be taken with respect to fines on the one side, and with respect to the receipt of rents on the other, since the death of the Duchess of Norfolk.

Nov. 1827. }
Dec. 1828. } HOUSTON v. PLATT.

Construction of wills.

The Court held, upon the particular language of a will, that an estate tail would not be implied in A. and B., though an estate was given to them for life, and the property was, upon failure of their issue male, limited

over to their grand-daughters, and there was no express limitation which would include all their issue male.

Henry Lambert, of the Bartons, in the parish of Colwall and county of Hereford, esquire, by his last will and testament, bearing date the 26th of September 1811, duly executed and attested for the devise of real estates, gave and devised as follows:—(1)

“*First*—I will and direct that all my just debts funeral and testamentary expences be fully paid and satisfied I give and devise bequeath unto Abraham Robarts of Lombarts Street Esquire in the city of London Banker and unto Henry Hughes of Newport Street in the city of Worcester and unto John Platt Bridge Street in the city of Worcester and to their heirs for ever all my messuages or tenements farms lands hereditaments estates and premises whatsoever or wheresoever freehold copyhold or leasehold having surrendered my copyhold estate to the use of my said will in possession reversion remainder or expectancy or whereof I have a disposing power with their several and respective members rights and appurtenances to have and to hold such of my said hereditaments and premises as are freehold unto the said Abraham Robarts Henry Hughes John Platt their heirs and assigns to have and hold my copyhold and all such other of my estates as are less than freehold unto Abraham Robarts Henry Hughes John Platt for and during all my right title and estate terms therein or thereto respectively according to the nature and quality of the said estate respectively I likewise give and bequeath to Abraham Robarts Henry Hughes John Platt all my ready money securities for money household and other goods plate china linen cattle chattels and all other my personal estate of what nature or kind soever as and for and to the end that my trustees alone may have full power and clear and absolute authority to release convey assign and assure all and every the estates and premises which at the time of making and of executing this my will and at my death may be

(1) In reference to the questions raised in this cause, and the judgment pronounced, it has been deemed necessary to set forth the will *literatim*, without attempting to render it more intelligible by means of punctuation.

vested in me as mortgagee in fee or as a trustee without calling upon my heir-at-law to concur or join in any releas or transfer of any such premises or have any affirmation concerning what belong to my real or personal estate whatsoever and I do give and devise all my estates title and interest in and to such premises as last mentioned together with all benefit and advantages thereof to Abraham Robarts Henry Hughes John Platt in trust and confidence that the shall hold all my lands tenements real and personal estates for the uses hereinafter mentioned I give Abraham Robarts Henry Hughes John Platt on condition that they undertake and execute the office of trustees also the several trust therein this my will contained two hundred pounds a piece to each but only to such of them who shall prove my said will and that all the charges and expences of my said trustees herein mentioned in this trust shall be paid out of my personal estate and that if any or either my trustees die or refuse to act in the trust that then my other trustee or my trustees shall have a power of choosing a trustee in the place of such trustee or trustee so dying or refusing to act and so as often as the same do happen to the intent of keeping a sufficient number of acting trustees and that the trust may not descend to the heirs of the survivors and my will is that the said trustee or trustees so chosen shall have the same power and estate as givin to the trustees herein named I give to my niece Mrs. Sheen Houghton formerly of Grafton Street in the city of Dublin and the eldest daughter of my sister Mrs. Ruth Leay three hundred pounds a piece each upon their respitive marriage of each of her grand children with the consent of their mother or when they attain the age of twenty-one years and if any die their share to be equally divided between her mail and famail sons and daughters and I give to Miss Eliza Griffith the daughter of Mrs. Charlotta Griffith late of Grafton Street in the city of Dublin in the Kingdom of Ireland five hundred on her respective marriage with her mother consent or when she attains the age of twenty-one years and I give to Miss Eleanor Kelly of the Custom-house five hundred pound and I give to Miss Susan Kelly two hundred pounds and I give to Mr. Henry Hughes of Worcester

Newport Street three hundred pounds and in trust and confidence that my trustees shall hold all my lands tenements real and personal property of what kind or nature soever and all my estates and interest in the same to be holden by my trustees in trust and then apply the income and annual amount of such property to the use of my two nieces Elizabeth Sheen Houghton and Charlotta Griffith for their lives and proper use and benefit and after their decease to such child or if more than one to the use of such children in manner following to wit if male issue of my niece Mrs. Sheen Houghton daughter Mrs. Strong then I give and devise to my trustees Abraham Robarts Henry Hughes John Platt that they shall hold all my lands in trust and confidence that the shall hold my will is whatsoever of my real estate or personal estate and interest therein come to my two nieces by virtue of this my will before their own sole and separate use and not subject to the disposal of any husband nor to set let or assignee any part of the premises thereof and that upon the payment of money that arise from my real or personal property of what nature soever that Elizabeth Sheen Houghton or Charlotta Griffith their receipt only shall be a discharge for the money received then from and after the decease of my two nieces Elizabeth Sheen Houghton and Charlotta Griffith and failure of their mail issue and satisfying my before mentioned gifts and bequeth my trustees shall hold in trust for for the use of Elizabeth Sheen Houghton and Charlotta Griffith my two nieces their grand daughters when the attain the age of twenty-one years or be married with the approbation and consent of their mother and my trustees and not having such approbation and consent their share to be divided among the remainder and as my my two nieces by their will or deed in writting shall direct or appointment then to the use of such child or children and the profits arising from my real and personal estates of what nature or kind soever shall accumulate and be laid out and invest the same in stock or public funds on real or government security at interest and the produce thereupon due or to become due and securities in which the same shall be then invested amongs all and every the child and children of my said two nieces Mrs. Sheen

Houghton and Mrs. Charlotta Griffith and my meaning is that if Miss Eliza Griffith married and have issue that Eliza Griffith and her children share in this my bequeathment equally with Mrs. Sheen Houghton but not till after the decease of my two nieces and if this happen my trustees allowing what they shall judge proper for their maintenance and education of such child or children till they arrive at the age before mentioned and my will is that every such child who shall take my estate by virtue of this my will shall take my surname without the addition of any other surname and shall inhabit the Barton-house and make it their residence and place of abode also I give and bequeath to my two nieces Elizabeth Sheen Houghton and Charlotta Griffith all my plate linen China household furniture of what nature kind soever as well in or about my dwelling-house at the Barton or elsewhere upon trust during their natural lives the use and enjoyment of all such and after their decease to the use of such son or sons and daughters as my will directs as shall from time to time come into the possession of my estates and inhabit the Barton-house and also as often and from time to time renew the Barton lease which is every seventh year and also as often as the live do fall in the lease of Colwall-park that it be renewed and three live kept up to preserve it and that all the building be kept in repair and what is expended in needful repairs to be paid out of the rent and profits of the estate and my will is that whatsoever of my personal estate that comes to my two nieces Elizabeth Sheen Houghton and Charlotta Griffith of my plate linen household goods and furniture of any kind in my dwelling at the Barton shall remain and after their decease to be for the use of such child sons or daughter that comes to the possession of my estate by virtue of this my will but in case of failure of issue male I devise to the female grand-daughters of Elizabeth Sheen Houghton and Charlotta Griffith grand-daughters then my will that my trustees shall hold in trust all my lands tenements real and personal estates after satisfying the beforementioned gifts and bequeaths in trust for the use of such grand-daughters of Elizabeth Sheen Houghton and Charlotta Griffith as are then living as tenants in common and not as joint tenants

and if this happens and any dispute to cause a difference of the bequeaths of this my will I direct that my said trustees do adjust my bequeath and determine absolute the same and those that reject my bequest be void and then so avoidable and divided equally between such daughters as then living and I do appoint my two nieces Elizabeth Sheen Houghton and Charlotta Griffith executrix."

The testator was, at the time of making his will, and thence up to, and at the time of his death, seised of divers freehold lands and hereditaments, for an estate of inheritance in fee simple in possession, and of divers copyhold lands and hereditaments, held of the manors of Barton Colwall, Coddington, and Bosbury Colwall, in the county of Hereford, according to the custom of the said manors respectively, and of lands and hereditaments for the lives of certain persons named in the leases or grants thereof, and was also, at the time of his death, possessed of lands and hereditaments, which had been demised to him for terms of years; and all the testator's copyhold lands had been duly surrendered to the use of his will.

The testator died on the 25th of March 1814, without having altered or revoked his will, leaving Dame Susannah Pritchard Tempest, the wife of Sir Henry Tempest, baronet, his only child and heiress at law, and customary heiress, and sole next of kin. The plaintiff, Elizabeth Houston, who was the person designated in the will as Mrs. Sheen Houghton, and the plaintiff, Charlotte Griffith, who was the person designated in the will as Charlotta Griffith, were the only surviving children of the testator's sister, Ruth Lea; and they duly proved the testator's will.

At the date of the will, and at the time of the death of the testator, Elizabeth Houston had only one child—Elizabeth Strong, the wife of Joseph Strong: Charlotte Griffith, also had only one child—Eliza Griffith. Mrs. Strong, had, at the testator's death, three children, viz. Elizabeth Charlotte Strong, Elinor Beresford Strong, and Ann Strong; and she afterwards had two children, viz. Susannah Strong, and Charlotte Sarah Strong; all of whom are now living. Eliza Griffith, after

the testator's death, intermarried with Nicholas Peyton, and had divers children. No child of Mrs. Strong or of Mrs. Peyton has attained the age of twenty-one years or married.

Dame Susannah Pritchard Tempest survived her husband, and died on the 3rd of July 1821, without issue, and intestate as to her freehold estates, leaving the plaintiffs Elizabeth Houston, and Charlotte Griffith, her co-heiress at law, and sole next of kin. Elizabeth Houston was her customary heiress.

On the 12th of August 1825, letters of administration of her goods, chattels, rights, and credits, with her will annexed, were granted to Thos. Lesingham, who thereby became her legal personal representative.

Mrs. Houston and Mrs. Griffith, the plaintiffs, filed their bill against the trustees, the personal representative of Lady Tempest, the children of Mrs. Strong, and Mr. and Mrs. Peyton, and their children; praying, amongst other things, that the will of the testator might be established, and the rights of the several parties claiming thereunder declared, and that the plaintiffs might be declared under the said will entitled to all and singular the messuages or tenements, farms, lands, hereditaments, and premises, of which the said testator died seised and possessed, or entitled in fee, as tenants in common in tail male, and to all the copyhold and leasehold estates, and also to the whole of the personal estate and effects of the testator, subject only to the payment of his debts, funeral and testamentary expenses, and legacies, according to the several natures thereof, for their own use absolutely, in equal moieties.

The cause came on to be heard, before the Master of the Rolls, on the 5th of July 1826, when his lordship directed a case to be made for the opinion of the Judges of the Court of King's Bench, and that the questions should be,

First—What estate and interest Abraham Robarts, Henry Hughes, and John Platt take, under the will of the said testator, in the freehold and copyhold lands and hereditaments, in which the said testator had, at the time of his decease, an estate of inheritance to him and his heirs, and in the lands and tenements which were then held by him, on leases for the lives of certain

persons in the said leases in that behalf named?

Secondly—What estate and interest do the plaintiffs, Elizabeth Houston and Charlotte Griffith, respectively take under the will of the testator, in the said freehold and copyhold lands and hereditaments, and in the said leaseholds for lives?

Thirdly—What estate and interest do Reynolds Peyton, Thomas Griffith Peyton, Henry Peyton, Francis Peyton, and William Peyton, the sons of Eliza Peyton, respectively take, under the will of the testator, in the said freehold and copyhold lands and hereditaments, and in the said leaseholds for lives respectively?

Fourthly—What estate and interest do Elizabeth Charlotte Strong, Elinor Beresford Strong, Ann Strong, Susanna Strong, and Charlotte Sarah Strong, the grandchildren of the said Elizabeth Houston and Eliza Peyton, the daughter, and Charlotte Lea Peyton, and Elizabeth Peyton, the grand-daughters of Charlotte Griffith, respectively take, under the will of the testator, in the said freehold and copyhold lands and hereditaments, and in the said leaseholds for lives respectively?

And, if the Court should be of opinion, that, by the will of the said testator, the whole legal estate in fee simple, in the aforesaid lands and hereditaments of inheritance, and the whole absolute interest in the said leaseholds for lives, were vested in the said Abraham Robarts, Henry Hughes, and John Platt, then, in case they had been merely devisees to the uses, and the legal estate had not remained in them,—

Fifthly—What estate and interest would the persons enumerated in the second, third, and fourth questions have respectively taken under the will of the testator, in the said freehold and copyhold lands and hereditaments, and in the said leaseholds for lives respectively?

The Court of King's Bench certified as follows (1), viz.—

We are of opinion, that Abraham Robarts, Henry Hughes, and John Platt, took, under the will of the testator, an estate in fee simple in the freehold and copyhold lands and hereditaments, in which the testator had, at the time of his death, an estate

(1) See this case and the arguments upon it, 5 Law Journ. K.B. 315.

of inheritance to him and his heirs; and we are of opinion, that the said Abraham Roberts, Henry Hughes, and John Platt, took the whole interest which the testator, at the time of his death, had in the lands and tenements which were then held by him on lease for the lives of the persons in the said leases in that behalf named: and as we are of this opinion, the interest of the other parties mentioned in the questions are equitable interests only, and we have not given any opinion as to them.

J. BAYLEY,
G. S. HOLROYD,
J. LITLEDALE.

Mr. Sugden and Mr. Russell for the plaintiffs.

Though there is much incoherence, confusion, and perplexity in this will, yet this much is plain, that there is a gift to the plaintiffs for life, and that there is a clear expression of an intention to give the property over to some person or other after an indefinite failure of their issue male; while, at the same time, there are not any such express gifts as will include all the issue male. Under these circumstances, the rule of legal construction will raise an estate in tail male in the plaintiffs. The obscurity of the other parts of the will is rather an argument in their favour, than against them. The bequest to the plaintiffs for their lives is sufficiently plain. Then come the words, "after their decease to such child, or if more than one, to the use of such children in manner following to wit if male issue of my niece Mrs. Sheen Houghton daughter Mrs. Strong then I give and devise to my trustees," &c. These words only shew that the testator had some intention floating in his mind of making some bequest, after the death of the plaintiffs, to some child or children, and that he was contemplating the possibility of there being issue male of Mrs. Strong. The interest given to the plaintiffs is next made an interest to their separate use. Afterwards come the words "then from and after the decease of my two nieces Elizabeth Sheen Houghton and Charlotta Griffith and failure of their male issue and satisfying my before-mentioned gifts and bequest my trustees shall hold in trust for for the use of Elizabeth Sheen Houghton and Charlotta Griffith my two nieces their

grand-daughters when they attain the age of twenty-one years or be married with the approbation," &c. Here is an express gift, after failure of issue male of the nieces, to the grand-daughters of the nieces. These words, without more, create an estate tail in the nieces.

Then follow some directions about accumulation, and the distribution of the shares of grand-daughters marrying without consent. The next clause provides that Eliza Griffith (the daughter of one of the nieces) shall share equally with the niece Mrs. Houston; that does not constitute a gift to any person, though it shews an intention to give the two nieces and their families equal benefits. The proviso, that every child who takes the estate, shall assume the testator's surname, and inhabit the Barton-house, is more consonant to the line of succession which would take place under an estate tail, than to any mode of devolution, which would arise under any other construction of which the will is susceptible. Then there is a gift of the plate and furniture to his nieces for their lives, and after their decease, to such son or sons, and daughters, as his will directs should come into possession of his estates. Neither does this clause create a gift to any person: it only shews that he supposed either sons or daughters might take the property under his will. Next come the words "but in case of failure of issue male I devise to the female grand-daughters of Elizabeth Sheen Houghton and Charlotta Griffith grand-daughters then my will that my trustees shall hold in trust all my lands tenements real and personal estates after satisfying the before-mentioned gifts and bequests in trust for the use of such grand-daughters of Elizabeth Sheen Houghton and Charlotta Griffith as are then living as tenants in common and not as joint tenants." This is a repetition of the former bequest and devise: it is a limitation, after failure of issue male, that is, of issue male of the two nieces, to their grand-daughters.

The cases shew, that, under such words, an estate in tail male must be given to the nieces by implication: *Robinson v. Robinson* (2), *Jesson v. Wright* (3), and the au-

(2) 1 Burrows, 33; 2 Ves. 225.

(3) 2 Bligh, 1.

authorities there cited, establish that proposition.

Sir Charles Wetherell and *Mr. Preston*, for the children of *Mr. and Mrs. Strong*.

The plaintiffs take only an estate for life; for upon their decease, the property was meant to go to the issue of the daughters of the nieces. The two nieces had each of them a daughter; the daughter of the one was married, the daughter of the other was not married: there was no probability of the nieces having any more children, nor does the testator anticipate the event of their having other children, or mean to provide for such children. He made his will with reference to the actual state of the family; and it is for the children of *Mrs. Strong* and *Eliza Griffith*, afterwards *Mrs. Peyton*, that the gifts, after the decease of the mothers of those ladies, are intended. The failure of issue male, which is spoken of, is failure of issue male of *Mrs. Strong* and *Eliza Griffith*; and when child and children, son and sons, daughter and daughters, are mentioned in this will, as referring to a class of persons who are to take under it, the testator means grandchildren, grandsons and granddaughters of his nieces.

Mr. Agar and *Mr. Pepys* appeared for the sons of *Mr. and Mrs. Peyton*.

They contended, that the issue male of *Mrs. Strong* and *Mrs. Peyton* took in fee as tenants in common, expectant upon the decease of the plaintiffs.

Mr. Heald and *Mr. Knight*, for the daughters of *Mr. and Mrs. Peyton*, argued, that there was a valid gift, after the death of the two nieces, to all their granddaughters.

Mr. Treslove, *Mr. Serjeant Russell*, and *Mr. Lynch*, appeared for *Lesingham*, the administrator of *Lady Tempest*, and insisted, that the plaintiffs took nothing more than an estate for life, and that, after the life estate, the whole of the dispositions were void for uncertainty.

Dec. 4, 1828. *The Lord Chancellor*.—In this case the attention of the Court has been directed to a will, perhaps the most confused in its terms and provisions ever

VOL. VII. CHANC.

submitted for judicial decision. It consists of unfinished sentences, and words put together without regard to grammar or the ordinary rules of language; and the bequests and dispositions appear so contradictory and so extremely unintelligible, as to render it almost impossible to give it any reasonable or consistent construction.

The main question that was argued, and which stands for decision, is, whether the plaintiffs, the nieces of the testator, take under the will an estate for life only, in the property in question. The devise gives them an interest for life in express terms. It was contended on the part of the plaintiffs, that, in order to fulfil the general intent of the testator, the estate for life must be enlarged into an estate tail. The plaintiffs have acted on this view of their case; and in the year 1817, two years after the death of the testator, they suffered a recovery of those parts of the property to which the testator was entitled in fee at the time of his decease. It is necessary, in order to form a correct opinion on this point, to consider in succession the different portions of the will.

The testator devised all his property, freehold, copyhold, leasehold, and personal property of every description, to trustees, in trust and confidence that they should hold all his lands, tenements, real and personal property, of what nature or kind soever, and all his estate and interest therein to be holden by the said trustees in trust, and then apply the income and annual amount of such property to the use of his two nieces, *Elizabeth Sheen Houghton*, and *Charlotta Griffith*, the plaintiffs, for their lives and proper use and benefit. Here a life estate is expressly given to the nieces; the testator then proceeds thus—"and after the decease of my two nieces, the trustees are to hold the estates and property devised to the use of such child, or if more than one, to the use of such children in manner following, to wit, if male issue of my niece, *Mrs. Sheen Houghton*, daughter *Mrs. Strong*, then I give and devise to my trustees that they shall hold all my land in trust and confidence that they shall hold my will is"—and then he goes on to direct, that "whatsoever of my real and personal estate and interest therein come to my two nieces by virtue of this my will be for their sole and

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separate use." In this clause of the will, he appears to have had it in contemplation, that, on the death of his two nieces, the male issue of Mrs. Strong should take some interest in the property; but the disposition and intention are left imperfect, and what the testator's precise intentions were in this respect, does not appear. After the direction as to the interest taken by the nieces being for their separate use, the testator proceeds in these words, "then, from and after the decease of my two nieces, Elizabeth Sheen Houghton, and Charlotta Griffith, and failure of their male issue, and satisfying my before-mentioned gifts and bequests, my trustees shall hold in trust for the use of Elizabeth Sheen Houghton and Charlotta Griffith my two nieces, their grand-daughters when they attain the age of twenty-one years, or be married with the approbation and consent of their mother and my trustees." Then he directs what is to be done, if they marry without such consent.

The material question appears to me to be, as to what the testator intended by the words *failure of their male issue*. Did he use those words in their ordinary sense, or are there circumstances in the will, and the disposition of his property, to shew that he used them in a peculiar and qualified sense? Did he mean to exclude the sons of the nieces, or had he in contemplation only grandsons, the sons of the daughters of the nieces? In a former clause to which I have adverted, it is clear, though the sentence remains imperfect, that he contemplated and had in view the male issue of Mrs. Strong, as the issue to take on the death of the two nieces. He expressly notices the male issue of Mrs. Strong, but by some accident, or from that extraordinary ignorance and confusion which displays itself in every part of the will, the sentence remains unfinished. In a subsequent part of the will, the testator directs, that, if Miss Eliza Griffith shall marry and have issue, she and her children shall share in the testator's bequest equally with Mrs. Sheen Houghton, but not till after the decease of his two nieces. It appears therefore, that the issue of the two nieces, or rather the children of the two nieces, were intended by the testator to be put on a footing of equality.

The testator afterwards directs, that every such child who shall take the estate by virtue of his will, shall take his surname without the addition of any other surname, and should inhabit the Barton-house, and make it their residence and place of abode. He then proceeds thus—"also I give and bequeath to my two nieces Elizabeth Sheen Houghton and Charlotta Griffith all my plate linen china household furniture of what nature kind soever as well in or about my dwelling-house at the Barton or elsewhere upon trust during their natural lives the use and enjoyment of all such and after their decease to the use of such son or sons and daughters as my will directs as shall from time to time come into the possession of my estates and inhabit the Barton-house."—Here then, after the decease of his two nieces, the use and enjoyment of the testator's plate, linen, china, and household furniture, are given to such son, or sons and daughters, as shall by the directions of his will from time to time come into the possession of his estates, and inhabit the Barton-house. The sons and daughters are here coupled together, "such son, or sons and daughters": but the daughters who were to take, were the daughters, not of the nieces, but of Mrs. Strong and Eliza Griffith; they were the grand-daughters of the nieces. It seems therefore an obvious inference from this, that he meant sons of the same persons, and that they are the male issue that he contemplated in the former part of the will; for if the term issue male was used in its natural sense, the sons of the daughters could not take.

The same observation and inference arises out of the next clause, in which he directs that "the plate, linen, household-goods and furniture of any kind, in my dwelling-house at the Barton, shall remain, and after their decease to be for the use of such child, or sons or daughters, that come to the possession of my estate by virtue of this my will."

But he proceeds, "in case of failure of issue male, I devise to the female grand-daughter of Elizabeth Sheen Houghton and Charlotta Griffith, grand-daughters, then my will is, that my trustees shall hold in trust," &c. Here the expression issue male occurs again, and the use of it, in this particular place, appears to me to confirm the interpretation I have put on it; for after coupling sons and

daughters as before, that is, the daughters of Mrs. Strong and Eliza Griffith—the grand-daughters of the nieces—he directs that, in case of the failure of issue male, the female grand-daughters shall be entitled as tenants in common, and he further confines this to those who shall be then living. It would appear therefore, that the issue male here contemplated by the testator, were the issue male of the daughters of the nieces, and in fact the sons of such daughters.

That it was the intention of the testator to use the term male issue in the sense I have given to this term, is in some degree confirmed by the state of the family at the date of the will: Mrs. Strong, the only daughter of Mrs. Sheen Houghton, being then twenty-five years of age, and Miss Eliza Griffith, the daughter of Charlotta Griffith, being twenty-two years of age. It is not necessary, with respect to this point, to decide what estate would have been taken by any son or sons of Eliza Griffith, if it sufficiently appears, as it does, that the sons of the nieces were not meant to be comprehended by the testator under the term issue male as used in this will. If that is the correct interpretation of this will, the nieces will be entitled only to a life interest in the property. It is obvious, from the whole will, that the testator did not intend to give them more than a life interest.

I am of opinion, therefore, that the plaintiffs take only a life interest in the property in question; which is all, I think, I am required to decide—whatever, ultimately, as between the other parties, the defendants in this suit, may be the construction that the Court may feel itself called on to give to this instrument. Whether any reasonable interpretation can be given to it, it seems unnecessary to anticipate.

1828. { *Ex parte* SCHLESINGER,
December. { AND *ex parte* EDWARDS,
in *re* SCHLESINGER.

A purchases from B a parcel of goods, and accepts a bill of exchange for the amount; A purchases another parcel of goods from B, and accepts another bill of exchange for the amount; both bills are dishonoured: A is declared a bankrupt; and B proves the

amount of the first bill under the commission:—Held, that, notwithstanding his proof, he may proceed at law against the bankrupt for the amount of the other bill.

A commission of bankrupt issued against Schlesinger on the 6th of November 1826. The original petition was presented by the bankrupt. It stated, that Edwards, on the 6th of April 1826, sold the bankrupt a parcel of goods of the value of 135*l.* 16*s.* 6*d.*, and, on the 14th of the same month, drew a bill of exchange on the firm for that sum, payable three months after date, which bill was duly accepted by the bankrupt; that Edwards, on the 11th of the same month of April, sold to the bankrupt another parcel of goods, of the value of 88*l.* 3*s.*, and on the 24th of the same month, drew another bill of exchange on the firm for the sum of 88*l.* 3*s.*, payable three months after date, which was also accepted by the bankrupt; that the two bills of exchange became due on the 15th and 27th of July, and, the bankrupt being unable to pay them, they were both returned to Edwards dishonoured; that, on the 25th of November, Edwards proved a debt of 135*l.* 16*s.* 6*d.* under the commission, for goods sold and delivered to the bankrupt; and he, in his deposition, stated, that, for the said sum of 135*l.* 16*s.* 6*d.*, he had not received any security or satisfaction whatsoever, except the bill dated the 14th April 1826; that the bankrupt on that occasion asked Edwards, why he did not prove also the bill for 88*l.* 3*s.*? when Edwards replied, that it was of no consequence, that he had left the bill for 88*l.* 3*s.* at home, but that he would prove it at some other time; that Edwards, notwithstanding his having proved the bill for 135*l.* 16*s.* 6*d.* under the commission, did, on the 2d of January 1827, cause a process to be issued out of his Majesty's Court of King's Bench, on which the bankrupt was arrested and held to bail for the sum of 88*l.* 3*s.*, the amount of the other bill; that the bankrupt, in February 1827, took out a summons before Mr. Justice Littledale, calling on Edwards to shew cause why all further proceedings in the action should not be stayed; but that, after hearing both parties, the summons was discharged.

The original petition prayed, that Edwards might be restrained from any further proceedings in the action, and from taking any proceedings against the bankrupt, to compel payment of the sum of 88*l.* 3*s.*, or any part thereof; and that he might be directed to pay to the bankrupt the costs and expenses to which he had been put, in defending the action, and also of that application, or that, otherwise, the debt of Edwards might be expunged from the proceedings.

Edwards denied that he had made the statement imputed to him, with respect to the second bill being in his possession when he proved the first; and he alleged, that it was then in the possession of one Budd, who had previously become the holder of it for valuable consideration; and that it did not again come into the possession of him, Edwards, till late in December 1825.

The order of the Vice Chancellor was, "That Edwards should be restrained from taking any further proceedings in the action, and from commencing or prosecuting any other action against the bankrupt, in respect of the debt of 88*l.* 3*s.*; and that he should pay to the bankrupt his costs of the action, and also those occasioned by that application."

From this order Edwards appealed.

The question arose on the construction of the 59th section of 6 Geo. 4. c. 16, the words of which, so far as related to the present point, were the same with the words of the corresponding section in the former act (1); namely,

"That no creditor who has brought any action, or instituted any suit against any bankrupt, in respect of a demand prior to the bankruptcy, or which might have been proved as a debt under the commission against such bankrupt, shall prove a debt under such commission, or have any claim entered upon the proceedings under such commission, without relinquishing such action or suit; and in case such bankrupt shall be in prison or custody at the suit of or detained by such creditor, he shall not prove or claim as aforesaid, without giving a sufficient au-

thority in writing for the discharge of such bankrupt; and the proving or claiming a debt under a commission by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to the debt so proved or claimed."

Mr. Montague, in support of the appeal, contended, that, both upon principle, and upon authority, a creditor, to whom two distinct debts were due from a bankrupt, both of which were proveable under the commission, did not, by proving one of them, and not proving the other, preclude himself from afterwards bringing an action against the bankrupt for that other. The first clause enacted, that proof of any debt, after an action brought, was a relinquishment of the previous action; but the clause upon which the present question turned, expressly declared, "that the proving or claiming a debt under a commission, by any creditor, shall be deemed an election by such creditor to take the benefit of such commission, with respect to *the debt so proved or claimed.*" The election being thus confined to the debt proved, it follows, that the creditor has not elected with respect to any other debt; and, therefore, with respect to such other debt, he must be at full liberty to exercise all his legal rights. This is the construction which courts of law have repeatedly put upon the statute: *Watson v. Medex* (2), *Harley v. Greenwood* (3), *Bridget v. Mills* (4), *Ex parte Sly* (5).

The same authorities prove, that the demands on these two bills of exchange must be considered as distinct debts within the meaning of the statute. Besides, at the time when Edwards proved the first bill, he could not have proved the other; for it had not then come back into his hands.

Mr. Rose appeared in support of the Vice Chancellor's order.

Here, there were not two distinct debts. Both sums were due on simple contract, and might have been the subject of one action, and the ground of one arrest. Edwards, when he proved the one bill, might

(2) 1 Barn. & Ald. 121.

(3) 5 Barn. & Ald. 95.

(4) 4 Bing. 18.

(5) 2 Glynn & Jam. 1.

(1) See 49 Geo. 3. c. 121. s. 14.

have proved or claimed the amount of the other; for he had received notice of its dishonour. In *Ex parte Glover* (6), the Vice Chancellor stated, that, by distinct debts, are meant, debts of a distinct nature; as, where one was a debt by simple contract, and the other was a debt by specialty.

The cases at law which have been referred to, prove only that the objection arising upon this clause of the statute cannot be taken advantage of in the way of plea. But it does not follow, that the Great Seal will not interfere to prevent the incongruity of one and the same person taking the benefit of a commission, and, at the same time, proceeding against the bankrupt, whom that commission has stripped of all property. It is admitted, that, if a creditor brings an action for one debt, and then proves for another, the proof is a relinquishment of the action. Is there any reason, in the nature of the thing, why a different rule should apply, where the proof precedes the action? The relative priority of the action, and the proof, cannot, in principle, make any difference; and the legislature must have intended to apply the same rule, whether the proof precedes or follows the action. *Ex parte Dickson* (7), and *Ex parte Hardenberg* (8), shew, that the Great Seal will not permit a party to proceed both under the commission, and independently of the commission.

The Lord Chancellor.—The bankrupt was indebted, on a contract for a parcel of goods sold and delivered, in certain sums of money; and, on the sale of the parcel of goods, or shortly afterwards, a bill of exchange was given in payment of the sums so due. A distinct contract was entered into for another parcel of goods; and, shortly after the second sale, a second bill of exchange was given for the precise amount due on that contract.

The first debt was proved under the commission. At the time of the proof of that debt, the second bill of exchange was outstanding; it had been dishonoured; notice of that dishonour had been given; but the bill had not been returned, and no

demand of payment made. Afterwards the bill was returned, and an action was brought in the King's Bench; an application was then made to one of the Judges of that court to stay that action, but he refused to stay the proceedings. After this, an application was made to the Vice Chancellor to restrain that action; and he has restrained it.

From that order there is an appeal; and the question turns on the construction of the 59th section of the New Bankrupt Act. In the section, provision is made for two descriptions of cases; one, where an action has been brought in a court of common law for a debt due from the bankrupt, and is depending, and, afterwards the creditor proves another debt under the commission; under the first clause, there is no dispute that the proof of a debt is a relinquishment of the first action.

But this question turns on the subsequent part of the clause, in which it is declared, that where a party has proved a debt, that proof or claim shall be considered as an election with respect to the debt so proved or claimed. As it appears to me, nothing can be more distinct and precise than the language of that clause.

The question has repeatedly come before the courts of common law, and also this Court; and it is material, first, to see what the courts of common law have decided, and then to see whether a different construction has been put on the clause in this court.

The question came before the King's Bench in 1817. The circumstances of the case were very nearly similar to those of the present. There was a contract for the sale of a parcel of goods, and a security by bill was given; there was then a distinct sale of another parcel of goods, and a security given for the precise amount due under the second contract. In that case, the second bill was not due at the time of the proof of the first debt. Afterwards an action was brought on it; under these circumstances, perhaps it was not absolutely necessary to consider the construction of the clause. But the Chief Justice stated, that the election was confined to the debt which had been proved.

Mr. Justice Abbott went more particularly into the subject; for he entered into

(6) 1 Glyn & Jam. 270.

(7) 1 Rose, 98.

(8) 1 Rose, 304.

the construction of both parts of the clause, —drawing the distinction between them, and stated, that, in his opinion, the proof of the first debt was an election as to that debt only.

The other two learned Judges, Holroyd and Bayley, seem to have built their judgment on the circumstance, that the second bill was outstanding. The result, therefore, of the case of *Watson v. Medex* is, that two of the Judges were of opinion, that the effect of the proof was an election with respect to the particular debt only; and they went on to state, that, in their opinion, where there were two contracts for the sale of two distinct parcels of goods, for which two distinct securities were given, these were distinct debts within the meaning of this clause.

The question came again before the King's Bench in *Harley v. Greenwood*, in 1821. There were four or five contracts for distinct parcels of goods, and four or five securities given. In that case, all the securities were due at the time of the proof, and the application was not to stay the proceedings, but the circumstance of proof in the bankruptcy was pleaded in bar. The Court, in giving judgment, said, there were two questions which arose for consideration: the first, whether the circumstance pleaded would be a plea in bar, even with respect to the debt so proved; and secondly whether it could extend beyond the debt so proved;—so that it is not correct to say, that the question there turned merely on whether the proof could be pleaded in bar. Two of the Judges stated, that the matter could not be pleaded in bar. But all the Judges were of opinion, that, supposing it could be pleaded in bar, with respect to the particular debt, yet, on the construction of the clause, it could not have been pleaded to anything but that debt, and that a proof was to be considered as an election with respect only to the particular debt proved. That case decided, first, the legal and proper construction of the clause; and further, that distinct contracts, at distinct times, for distinct parcels of goods, for which distinct securities were given, were to be considered as distinct debts. Had the book been here, I should have adverted most particularly to what was stated by Mr. Justice Bayley and Mr.

Justice Holroyd, in giving judgment in that case.

The question came again before the Court of Common Pleas in *Bridget v. Mills*. The facts of the case were substantially the same. The Court expressed a clear opinion with respect to the construction of the clause; and also that two distinct contracts for two distinct parcels of goods, were to be considered as two distinct debts.

Further than that, this very case has been before one of the Judges of the Court of King's Bench, who has decided it on the same grounds; and if the parties had supposed that the full Court would entertain a different opinion, it was competent to them to have appealed to that Court to review the determination of a single Judge.

I must consider, therefore, that there are four concurrent decisions of the courts of common law on this question; in which they have stated also what their opinion is with respect to what will be deemed distinct debts within the meaning of the act.

Is there any difference in this court? *Ex parte Dickson* has been relied on. In that case there were two bills of exchange; an action was brought on the one, and afterwards there was a proof for the other. The result was, that the proof of the second amounted to a relinquishment. But that was on the former part of the clause, and therefore that decision does not invalidate the decisions in the Courts of King's Bench and Common Pleas, and so far from its having that effect, *Ex parte Dickson* was mentioned by Mr. Justice Abbott in *Watson v. Medex*.

Then comes *Ex parte Glover*. An action was brought on a bill of exchange, in the name of Walsh; his name was used for Loyd. After that action was brought, (the party being arrested on the 6th of April), on the 21st of the same month, there was a claim to prove under the commission. The claim to prove was considered as a relinquishment of the action. That, too, was a case on the first part of the clause.

Ex parte Hardenberg is not at all opposed to the decisions I have referred to: so far as it applies, it is a case on the former clause.

In *Ex parte Sly*, there was a debt of about 160*l.* for goods sold and delivered at different times on a running account; in which

respect that case is different from *Watson v. Medex*, and the other cases, where there were distinct contracts, at distinct times, for distinct parcels of goods, paid for by distinct securities. Two bills of exchange had been given. The creditor proved 109*l.*, producing one bill of exchange at the time. The other bill of exchange afterwards became due; and an action was brought on it. In that case the present Master of the Rolls was of opinion that he could not interfere to restrain the action, because, though he considered it all as originally one debt, yet, by a bill of exchange having been given for part of the debt, he considered that as an assignment of the debt, and he considered it, when the bill came back, as a new debt, which could not have been proved when the former was proved.

I ought, in *Ex parte Glover*, to have adverted to the language of the present Master of the Rolls. He went on to state "that the statute did not apply to actions for distinct demands brought subsequent to proofs or claim: that a distinct demand was a demand of a distinct nature, as of an *indebitatus assumpsit* and bond (9)." So that in this case, in giving his judgment, the Judge in equity confirms the decisions in the King's Bench and Common Pleas, and puts the same construction on that clause. He then goes on, indeed, to say, that "a distinct demand was a demand of a distinct nature." So far the opinion, expressed by the Master of the Rolls, is at variance with the King's Bench. But, in the first place, that observation was unnecessary with reference to the case before him; and, at all events, it is a *dictum* which cannot be put in opposition to three distinct decisions—courts of common law having decided, that it is sufficient that the demands are under distinct contracts, made at distinct times, and for which distinct securities are given.

The courts of equity, and the courts of law, therefore, do not differ with respect to the construction of the clause, that the election is limited only to the particular debt proved; and the only doubt that ever can arise, is, what constitutes a distinct debt? The courts of law have said, that those are distinct debts, which are contracted as I have mentioned. The result of my judgment is

to conform to the opinion pronounced by the Court of King's Bench, constituted differently, at two different times, and confirmed by the judgment of the Common Pleas.

That is decisive of the present question. Here were two distinct contracts, for two distinct parcels of goods, for which two distinct securities were given. According to all the decisions, the proof of the one is an election only as to that one of the debts. I think, therefore, the party, by proving under the commission one of these bills, even if he had been at the time the holder of the other bill, could have brought his action on the second bill.

It is, therefore, unnecessary to give any opinion as to whether this bill, having been outstanding at the time, and no demand made by the holder, it could have been proved or claimed under the commission. On that point, I give no opinion; because, I think it is impossible to look at the current of authorities, and not to say, that, upon the first ground, in order to maintain a uniformity of decision, I must be justified in holding, that we ought not to interfere for the purpose of staying the action.

I must, therefore, reverse the order of the Vice Chancellor.

1828. } THE ATTORNEY GE-
Aug., Nov. & Dec. } NERAL V. HARLEY.

A testatrix directs all her plate and jewels to be sold for the payment of her debts, except Lady Mary Duncan's ring set with diamonds, which she desires may be restored to her; and she bequeaths to her three cousins the remainder of her rings, and all her trinkets, necklaces of every description, pearls, garnets, cornelians, and watches:—

Held, that a diamond necklace and cross, and diamond rings, did not pass to the cousins, but were to be included as jewels, among the jewels that were to be sold.

By a codicil, the testatrix gave to her niece all her trinkets and pearls, and several jewel ornaments particularly described:—

Held, that a pearl necklace passed to the three cousins, under the bequest of necklaces, and not to the niece, under the bequest of pearls.

The will of Mrs. Anne Newton consisted of three several testamentary papers. The first of these appeared to have been made by the testatrix, at various periods, in the years 1806 and 1811; and in that part of such paper, which bore the date of March 12, 1806, the testatrix bequeathed as follows:—"To Mrs. Houblon, my gold bason and ewer, and all my gold plate at Bridge & Rundell's, Ludgate-hill, contained in one of my boxes in his care:" and, immediately after this disposition, and evidently at the same time, and under the same date, the testatrix directed all her plate and jewels to be sold, to pay her debts, except a particular ring set round with diamonds, which she desired might be returned to Lady Mary Duncan. In the same testamentary paper, under date May 1811, five years after the above bequest, the testatrix directed her "house, furniture, plate, jewels, and linen, to be sold." In the first of the testamentary papers, under the date of March 12th 1806, the testatrix, after bequeathing the above-mentioned ring to Lady Mary Duncan, directed as follows:—"And the remainder of my rings, and all my trinkets, necklaces of every description, pearls, garnets, cornelians, and watches, to be sent to my three cousins at Bath, with all my unmade muslins, silks, and laces. In that part of the same paper, which bore date May 1811, she bequeathed as follows: "All my laces, trinkets of every denomination, my jewels excepted, and my unmade muslins, I give to my niece, Mary Anne Catherine Bagshaw." And again, in the last part of such testamentary paper, dated June 1811, she bequeathed as follows: "To my niece, Mary Anne Catherine Bagshaw, *all* my laces, trinkets, pearls, unmade muslins, one bandeau of diamonds, and a pair of small stump ear-rings, which my dear mother gave me; and also, one pair of larger stump ear-rings, which belong to our family, my three pearl ear-rings, one rose diamond ring, one topaz ring, given me by my uncle General Caldwell, one brilliant diamond ring, enclosed with my dear mother's hair, one ring, containing several links of gold, and a small rose diamond in the centre, my father's picture, and my dear mother's hair, set with large pearls, and the initials C. B. worked in small pearls."

By a decree made, upon the hearing of the cause for further directions, bearing date the 19th of March 1821, it was, amongst other things, ordered, that it should be referred to the Master to inquire, what plate, jewels, rings, trinkets, necklaces, pearls, garnets, cornelians, and watches, and also what unmade muslins, silks, and laces, the said testatrix died possessed of; and he was to distribute the same, according to the directions contained in the testatrix's testamentary papers, amongst the persons entitled thereto, who were to have notice to attend him thereon; and the Master was to be at liberty to state any matter specially to the Court at the request of either party.

The Master, by his separate report, dated the 19th February 1828, certified, that he had, in the schedule to his report, set forth a list of the several jewels, rings, trinkets, necklaces, pearls, garnets, cornelians, and watches, belonging to the testatrix at the time of her decease, distinguishing the same in three columns; and he was of opinion, that such of the said several articles and things as were comprised in the first of the columns, were, by the testatrix's will, directed to be sold, and to form part of her personal estate and effects; and that such part thereof as were comprised in the second column, belonged to, and were bequeathed to the testatrix's niece, Mary Anne Catherine Bagshaw; and that such part thereof as were mentioned and comprised in the third column, belonged to, and were, by the testatrix's will, bequeathed to the Dowager Countess of Belmore, Elizabeth Caldwell, and Emily Caldwell, in the said testatrix's will described as her three cousins.

In the first column were contained the following articles: No. 1, diamond necklace and cross; No. 3, diamond and coloured stone head-ornament; No. 7, antique ring, set with diamonds; No. 9, emerald ring, set with diamonds; No. 26, a pair of brilliant diamond ear-rings; No. 29, brilliant flower-pin; No. 30, a diamond hoop-ring; and No. 37, hair locket set with diamonds.

In the second column, containing a list of the several articles, which, the Master was of opinion, were bequeathed to Mary Anne Catherine Bagshaw, were set forth the following particulars: viz. N^o. 2, diamond

bandeau; No. 8, diamond ring enclosed with hair (mother's), and one ring containing several links of gold; No. 10, one seal in case; No. 11, two ivory fans; No. 12, two pearl pins; No. 19, small locket, hair, set with pearls; No. 22, pearl necklace; No. 23, gold chain; No. 24, pair of gold bracelets, with topaz clasp, set with pearls; No. 25, crystal and pearl armlets, bracelets, and cross; No. 27, pair of large stump ear-rings (diamond); No. 28, small do.; No. 31, three hoop-rings; No. 32, one ring set with pearl; No. 35, pair of string pearl ear-rings; No. 36, pearl cross and bow; No. 38, ruby rings set with pearl; No. 39, topaz do. do.; No. 41, Scotch pebble ear-rings and brooch.

The third of the columns, containing a list of the articles which the said Master was of opinion were bequeathed to the testatrix's three cousins at Bath, contained the following things, viz. No. 4, enamelled watch and chain; No. 5, two gold watches and one seal; No. 6, two metal, do.; No. 13, garnet necklace, ear-rings and cross; No. 14, coral necklace, do. do., and bracelets; No. 15, amber necklace; No. 16, cornelian hoop, set with pearls; No. 17, gold chain, with cornelian medallion, set with pearls; No. 18, cornelian brooch; No. 20, cornelian ear-rings, set with gold; No. 21, cornelian brooch and locket; No. 33, Scotch pebble necklace; No. 34, mock pearl do. and clasp.

The personal representative of the testatrix presented a petition, praying the confirmation of the report, and directions conformable to the finding of the Master.

Lady Belmore and the two Misses Caldwell presented a cross-petition, insisting, "that the report was erroneous, in so far as the Master had found, that the several articles and things, numbered respectively in the schedule 1, 7, 9, 26, 30, and 37, were, by the said will of the testatrix, directed to be sold, and to form part of her personal estate and effects, not specifically bequeathed; and that the several articles and things, numbered respectively in the schedule 22, 23, 38, and 39, were, by the will of the said testatrix, bequeathed to Mary Anne Catherine Bagshaw,—and praying, that it might be declared, that the said articles and things, numbered respectively in the schedule annexed to the re-

port 1, 7, 9, 22, 23, 26, 29, 30, 37, 38, 39, were, by the will of the testatrix, specifically bequeathed to them, the last-named petitioners."

By an order, dated the 31st of March 1828, the *Master of the Rolls* declared,—"That the Countess Dowager of Belmore, Elizabeth Caldwell, and Emily Caldwell, the testatrix's three cousins, were entitled to all the testatrix's necklaces of every description, and to all her rings, except those specifically given to Lady Mary Duncan and Miss Bagshaw."

Against this order a petition of appeal was presented.

The Attorney General and *Mr. Sugden* were in support of the appeal:

Mr. Walker, contra, appeared for the legatees, the cousins:

Mr. Bickersteth and *Mr. Simpkinton* appeared for the executrix:

Mr. Sidebottom appeared for the niece.

In support of the appeal, it was urged, that the effect of the order of the Master of the Rolls was to withdraw the diamond necklace and the diamond rings, not bequeathed by express description, from the jewels, which were to be sold; and the consequence would be, that only a few insignificant articles would remain to pass under the description of jewels. The testatrix had various necklaces—a pearl necklace, a coral necklace, &c.; those necklaces, which were not jewel necklaces, were the articles she intended to denote by the phrase, "her necklaces of every description." It is not probable that she would have given so valuable an article as this diamond necklace, which was stated to be worth 1500*l.*, by the general description of "my necklaces."

When she gives her jewels, with the exception of one particular ring set with diamonds, it is manifest, that she considered her jewels as including her diamond rings; otherwise, the exception would have been unnecessary. Consequently, when she proceeds to bequeath the remainder of her rings, she means rings not included in the prior gift, that is, rings not being diamond rings, or jewel rings.

Besides, in a subsequent testamentary paper, she gives all her trinkets, her jewels

excepted, to her niece; and then orders her jewels to be sold. This would be a revocation of any prior gift of jewels. The diamond rings and the diamond necklaces are jewels; and they must, therefore, be included in the property which is to be sold.

On the other hand, it was contended, that the true construction was, to consider as not included in, or as excepted from, the gift of jewels, all those articles which were afterwards bequeathed by a more specific denomination—that is to say, the remainder of the testatrix's rings, her trinkets, necklaces, pearls, garnets, cornelians, and watches. Suppose there had been a watch set with diamonds, would it not have gone to the cousins?—"The remainder of my rings," coming immediately after the mention of a particular ring, must mean all her rings, except that particular one; and as that particular ring was a diamond ring, "the remainder of my rings," must include diamond rings.

Can a doubt be entertained but that a diamond necklace will pass under a bequest of "all my necklaces of every description?" What more comprehensive words could the testatrix have chosen?

December.—*The Lord Chancellor*.—The testatrix, by a testamentary paper, dated the 12th of March 1806, directs all her plate and jewels to be sold, with the exception of a particular ring set round with diamonds. The exception shews, that she considered rings set with diamonds as jewels. When she immediately afterwards gives the remainder of her rings, she must be considered as giving the remainder of her rings not falling within the description of jewels. The rings which come within the description of jewels are to be sold.

There was a very valuable diamond necklace and cross; and the principal question is, whether, under the subsequent gift of "all my trinkets, necklaces of every description, jewels, garnets, cornelians, and watches," she intended that particular necklace to pass. She had disposed of all her jewels, including in that term (as we have shewn) rings set with diamonds; and it is difficult to suppose, that she could intend immediately afterwards to give away the

diamond necklace and cross, under the words "trinkets and necklaces." If the diamond necklace were to pass under the term "necklaces," all jewel trinkets would, in like manner, pass under the term "trinkets:" and then there would scarcely remain anything to be sold, as included in the bequest of jewels.

The next testamentary bequest is in May 1811; and by it, she gives all her laces, and trinkets of every description, except jewels, to Miss Bagshaw. Having before given her trinkets (which I have construed, trinkets not being jewel trinkets,) to her three cousins at Bath, she now revokes that bequest, and gives the same trinkets to Miss Bagshaw. In the previous bequest, the testatrix had given her trinkets generally, without any express exception, because the exception followed from the previous gift of the jewels. In this bequest she had not previously mentioned the jewels; and she, therefore, excepts them by name.

There is a third testamentary instrument, executed in the following month, by which she gives to Miss Bagshaw, "all my laces, trinkets, pearls, unmade muslins, one bandeau of diamonds, and a pair of small stump ear-rings, which my dear mother gave me; and also, one pair of larger stump ear-rings, which belong to our family, my three pearl ear-rings, one rose diamond ring, one topaz ring, given me by my uncle General Caldwell, one brilliant diamond ring, enclosed with my dear mother's hair, one ring, containing several links of gold, and a small rose diamond in the centre, my father's picture, and my dear mother's hair, set with large pearls, and the initials, C. B., worked in small pearls." In giving the laces and trinkets, which she had before given to Miss Bagshaw, she merely repeats the gift; and the subsequent disposition, including particular jewels, shews that she did not mean, that jewels should be included in the preceding gift.

Taking these three papers together, it seems to me, that the intention of the testatrix was, that all the rings that come within the description of diamond or jewel rings, together with this diamond necklace and cross, should be sold: but in the third testamentary disposition, she has excepted

particular articles, which she has directed to be sold.

December.—It was stated that there was a question, whether the pearl necklace went to the three cousins at Bath, under the bequest of "necklaces," or to Miss Bagshaw, under the gift of "pearls."

The Lord Chancellor.—The necklaces of every description, and the pearls, are given to the three cousins by the first instrument. Under the gift of necklaces, the pearl necklace would pass; and pearls are mentioned in the same bequest. Therefore, when she afterwards gives her pearls to Miss Bagshaw, without making mention of necklaces, she did not mean to alter the disposition made of the pearl necklace by the former instrument.

Besides, in the third testamentary paper, after giving her pearls, she bequeaths to Miss Bagshaw a pearl ring specifically. Therefore, she did not think, that a gift of pearls included a pearl ring.

1828. }
November. } DE THEMINES v. DE BONNEVAL.

Monies in the English stocks were assigned to trustees upon trust to pay the dividends to the settlor during his life, and, after his death to apply them in printing and promoting the circulation of a book in the Latin and French languages, inculcating the peculiar doctrines of the Roman Catholic religion; and the deed contained a proviso, that if any of the trusts should be declared by a court of law or equity to be void, then the trustees should stand possessed of the fund in trust for the executors and administrators of the settlor:—Held,

That the trusts, after the limitation for life to the settlor, were in the nature of superstitious uses, and therefore void.

That the fund was not in the disposition of the Crown, to be applied to some other charitable purpose by the sign manual.

That the settlor was entitled to have the fund transferred to him.

That the Attorney General was a necessary party to a suit for that purpose.

The bill stated, that the plaintiff, who was formerly Bishop of Blois in France, and thirty-six other Gallican bishops, for the purpose of perpetuating their common tenets relating to certain points of doctrine and discipline appertaining to the Roman Catholic religion and to the Gallican Church (which church belongs to, and holds the Roman Catholic religion), did, by their solemn act of the 6th of April 1803, frame a certain manuscript, addressed to his Holiness Pope Pius the Seventh, and which was afterwards printed and published under the superintendence and at the expense of the plaintiff and the other bishops of the Gallican church, then residing in England, first in the Latin language, under the title of "*Canonicæ et reverentissimæ expostulationes, de variis actis ad Ecclesiam Gallicanum spectantibus, &c. &c.*," and shortly afterwards in the French language, under the title of "*Traductions des réclimations canoniques, et tres respectueuses adressées par les évêques sousignés à notre tres-saint Père Pius VII. par la providence divine Souverain Pontife, contre differens actes relatifs à l'Eglise Gallicane,*" &c.

That the plaintiff, being desirous of preserving and perpetuating in its original purity the book so printed, did, while residing in England, and previous to the execution of the indenture afterwards mentioned, transfer the sum of 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, into the names of himself, and the three defendants, the Marquis de Bonneval, M. de Braglie, M. de Merinville.

That, by an indenture bearing date the 25th of February 1823, executed in London by all the parties, and made between the plaintiff of the one part, and the plaintiff and the three defendants of the other part, it was mutually agreed between the parties, that they should stand possessed of the said 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, then standing in their names, and of the dividends arising therefrom, upon trust to permit the plaintiff to receive the dividends for his own use and benefit during his natural life; and, after his decease, that the defendants should, when and in such manner as they should think proper, lay out, pay, or apply all or any part of the annual interest of the said 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank

annuities, in printing or reprinting, and publishing and circulating in any part or parts of the world, either in the Latin or French languages, or in both of them, as they might think proper, the said book so printed and published; and upon further trust, that, if they, the defendants, should, at any time after the plaintiff's decease, discover or find any university, college or society, in any part of the world, which should profess and entertain the tenets and principles of the said book aforesaid, and should be desirous to support the same tenets and principles, and would agree to establish a chair or society in such university, college, or society, to support, maintain, and promulgate the said tenets and principles, then that it should be lawful for the defendants, if they should deem it prudent and advisable so to do, to nominate and appoint any such number of the members of the said university, college, or society, in manner therein stated, to be trustees for the intents and purposes hereinafter mentioned, and to pay over, transfer, and assign the said trust monies unto such trustees, upon trust from time to time to apply the dividends of the 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, as they, the said trustees of the said university, college, or society, should think proper, in printing or re-printing, and publishing and circulating the book so printed and published, either in the Latin or French languages, or in both of them, as they, the trustees for the time being, might think most proper for teaching and promulgating the tenets and principles of the said book, in its original purity, according to the true spirit and tenets of the Gallican Church from its first foundation, and its first pontiff and his legitimate successors, down to the said solemn act of the 6th of April 1803, addressed to his said Holiness Pope Pius the Seventh as aforesaid, as the same would be more fully explained in a preface which the plaintiff then intended adding to the next edition of the said book. And it was further declared and agreed, between the several parties, that if, at any time thereafter, the several trusts therein mentioned, or any of them, should, by any court of law or equity, be declared or adjudged to be void or incapable of being performed or carried into effect, then the defendants, or other the trustees for the time being, or the trus-

tees of the said university, college, or society, if any should have been appointed, should from thenceforth stand possessed of the said sum of 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, and of such part of the dividends arising therefrom as had not been applied in execution of the trusts therein stated, in trust for the executors and administrators of the plaintiff, and to be paid and transferred to them accordingly.

The bill then alleged, that the plaintiff was advised, that the trusts declared by the indenture concerning the dividends arising from the 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, after his decease, were, according to the laws of England, unlawful and void, and incapable of being performed or carried into effect, and that he was therefore entitled to have the stock transferred into his own name, for his own absolute use.

The prayer was, that, if necessary, the trusts declared by the indenture of the said sum of 3786*l.* 10*s.* 4*d.* three per cent. consolidated bank annuities, except as to the trust in favour of the plaintiff during his life, might be adjudged to be void, and incapable of being carried into effect; and that the stock might be transferred to him for his own absolute use.

The answer of the trustees admitted the facts as alleged in the bill.

Mr. Tinney, for the bill.

The limitation after the life interest of the settlor is in the nature of a superstitious use: 1 Edward 6. c. 14; *Smart v. Prujean* (1); *Cary v. Abbot* (2); *Attorney General v. Guise* (3).

Mr Swanston, contra.

This charitable purpose is one which may be carried into execution out of England: indeed, as the book is not in the English language, the intention seems to have been to establish a foreign charity; and there is no authority for saying that a gift to promote the Roman Catholic religion in a Roman Catholic country, is illegal.

(1) 6 Vesey, 560.

(2) 7 Id. 490.

(3) 2 Vernon, 266.

The Master of the Rolls.—I have looked into the papers in this case, and I have also looked a little into the treatise. It is not a treatise inculcating the general doctrines of the Roman Catholic church, but the object of it is to shew, that, according to the admitted principles of that church, the Pope has a supremacy with respect to ecclesiastical matters; that he is not at liberty to alienate it; and that he did in truth, by his concordat with the Emperor of France, alienate it, contrary to the principles of the church and that supremacy. Such is the object of the work. But, as it is certainly against the policy of this country to encourage, by establishing a charity, the publication of any work, which asserts an absolute supremacy in the Pope over the sovereignty of the country, I incline very much to the opinion, that it would be deemed, as against the policy of the country, a superstitious use. Although the words are so large, with respect to the tract which was to be published, that it might be argued that it could be fulfilled without infringing in any manner on the policy of this country, still I incline strongly to think it would be held otherwise.

But there is another difficulty, and a very considerable difficulty indeed. By the laws of this country, money given for the purpose of superstitious uses is a gift not absolutely void, but indicating a general disposition of the property to charity: and it will be for the King, under his sign manual, to direct the application of that money to other charities not superstitious. Now, in this deed of trust, there is an attempt to escape out of that rule of law, and with that view these words are introduced: "And it is hereby further declared and agreed by and between the said parties to these presents, that, if, at any time hereafter, the several trusts hereinbefore mentioned and expressed, or any of them, shall, by any court of law or equity, be declared or adjudged to be void or incapable of being performed or carried into effect, then the said M. de Bonneval, and the other trustees, are to pay or transfer the trust funds or monies to the executors or administrators of the grantor." Now the question is, whether this clause is valid. Can I here make a provision which is to defeat the settled principles of the law of the

country? Now, the settled principle of the law of the country being, that money given to superstitious uses belongs to the King, to be applied under his sign manual to other charitable purposes not superstitious,—can any man by his grant make a provision which shall defeat that rule of settled law? I give no opinion upon that point, but it is a point upon which, at least, I must hear the Attorney General; and the pleadings must therefore be amended by making the Attorney General a party.

The cause stood over, with leave to amend, by adding the Attorney General as a party.

The Attorney General being brought before the Court, the cause came on again,—

Mr. Tinney and *Mr. Russell* for the plaintiff.

It is evident, from the principles on which the decisions were pronounced in *Cary v. Abbot* and *De Costa v. De Pax* (4), and from the dicta of Lord Eldon in *Moggridge v. Thackwell* (5), that the rule is, that, where there is a general purpose to devote to charity, that general purpose shall not fail, because the grantor or deviser happens to have selected a particular purpose which is illegal. The Court proceeds upon the presumption, that it is giving effect to the general intention, where the law will not permit the particular intention to be executed. Here, there can be no such presumption. The settlor has said, "I mean to promote one specific charity: if that specific purpose cannot be effected, I mean not that the money should go to any other charity, but that it should revert to myself." There is nothing illegal in such a proviso. There is no attempt to escape from any rule of law: for the case was never brought within the rule.

Mr. Swanston, for the trustees, used similar arguments: he contended further, that, even if a general intention of charity could be presumed on a will, no such presumption could be raised on a deed.

(4) *Ambler*, 228; 7 *Ves.* 76.

(5) 7 *Vesey*, 77.

Mr. Wray, for the crown.

If the proviso contemplating the event of the preceding trusts being declared void had not been inserted, the case would unquestionably have fallen within the rule, which says, that property given to an illegal charity is to be applied to a lawful charity according to the direction of the sign manual. Now here there is an attempt to give to an unlawful charity : and if that attempt fails, then there is an endeavour to bring back the money into the settlor's own hands. In other words, there is a clear attempt to evade a settled rule of law.

The Master of the Rolls.—The policy of the Court will not permit the execution of a superstitious use; but the Court avails itself of the general intention to give the property to charity, although the particular charity chosen by the founder be superstitious; and it effectuates that general intention by giving the fund to some other charitable purpose. Here there is no general intention to give to charity; and the Court, at the same time that it declares that the particular purpose, to which the property is devoted, is a superstitious use, is obliged to state that the gift is altogether conditional. This is a gift to a particular purpose, provided the purpose be lawful; if not, the property is to revert to the donor.

It is said the condition is unlawful: I do not think so. Therefore the unlawful gift will not prevail: the condition will prevail; and the plaintiff is entitled to have the stock re-transferred to him.

But he must pay the costs of the suit.

July 1827. }
Dec. 5, 1828. } *VAWSEY V. JEFFERY.*

A man devises freehold and copyhold lands, and surrenders the copyholds to the use of his will: afterwards, by a settlement made previous to his marriage, he conveys the freeholds to trustees and their heirs to the use of him, the husband, for life; and, after his death, to the intent that his wife may have a yearly rent-charge during her life, with remainder to the husband and his heirs; and he further covenanted to surrender the copyholds to the uses of the settlement:—Held,

That the devise of the freeholds was revoked by the settlement:

That the devise of the copyholds was not revoked by the covenant to surrender them to the uses of the settlement.

Guylott Cowherd, by his will, dated in April 1794, devised various freehold and copyhold lands (which were afterwards surrendered to the use of his will,) to certain persons for life, with remainders over.

Afterwards, prior to, and in contemplation of, a marriage then intended to be solemnized between him and Anna Budd, Guylott Cowherd executed indentures of lease and release, bearing date the 14th and 15th of February 1800; the release being made between Guylott Cowherd of the first part, Anna Budd of the second part, and Charles Lea Jeffery and Daniel Barley of the third part. This release recited the intended marriage; that it had been proposed and agreed, that, in order that a provision might be made for the said Anna, in case the marriage took effect, and she should happen to survive Guylott Cowherd, he, Guylott Cowherd, should charge and make liable his real estates, thereafter mentioned, with the payment of an annual sum of 300*l.* by way of jointure during her life; and in case the same should not be sufficient for that purpose, that his, Cowherd's, executors or administrators should, within six months after his death, invest so much of his personal estate as, with the interest or dividends, together with the rents and profits of the premises to be settled as aforesaid, should be sufficient to make up the jointure of 300*l.* a year, which was to be in satisfaction of all dower and thirds, at common law. It then witnessed, that, in consideration of the said intended marriage, and in performance of the said agreement, he, Guylott Cowherd, did bargain, sell, alien, release and confirm, unto Charles Lea Jeffery and Daniel Barley, and to their heirs, various lands therein described, and in which were comprehended some of the devised lands both freehold and copyhold, to hold the same to them, their heirs and assigns, to the use of Guylott Cowherd and his heirs until the solemnization of the intended marriage; and, after the solemnization thereof, to the use of Guylott Cowherd and his assigns for the term of his life, without im-

peachment of waste, and with power of leasing for twenty-one years : remainder, after his decease, to the intent and purpose that Anna Budd and her assigns, in case the intended marriage should take effect, and she happened to survive her husband, should, from and immediately after his decease, receive during her life, in the nature of a jointure, and in bar of all dower and thirds, a yearly rent-charge of 300*l.*, to be issuing and growing out of all the aforesaid several messuages, lands, hereditaments and premises, with powers of entry and distress in case of non-payment at the times therein mentioned. And, as to the said messuages and premises so charged with the payment of the annuity of 300*l.*, and the powers and remedies for recovery thereof, and subject thereto, to the use of the said Charles Lea Jeffery and Daniel Barley, their executors, administrators and assigns, for the term of ninety-nine years from the death of Guylott Cowherd, without impeachment of waste, upon the trusts thereafter mentioned ; and from and after the expiration or other sooner determination of the said term, and subject thereto, to the use of the said Guylott Cowherd, his heirs and assigns, for ever.

The trusts of the term were declared to be for better securing the annuity of 300*l.*

By the same deed, Guylott Cowherd covenanted that the said premises should remain and be to the uses, intents and purposes therein declared, and be peaceably held and enjoyed accordingly, without any interruption or eviction by him, Guylott Cowherd, or any persons claiming through or under him, and absolutely exonerated and discharged from all former and other gifts, grants, bargains, sales, leases, mortgages and estates whatsoever. He also entered into a covenant with the trustees for the surrendering and assuring such parts of the said hereditaments and premises as were copyhold, to the uses, upon the trusts, and for the intents and purposes, and under and subject to the several powers, provisos, declarations and agreements thereinbefore declared.

No surrender was made pursuant to this covenant, and, in 1801, Guylott Cowherd died, leaving his widow him surviving.

The bill was filed by his heirs, praying that the marriage settlement, and the covenant

therein contained, as to the copyhold estates, might be declared to have revoked the will ; and that the trusts of the marriage settlement under the term of ninety-nine years might be performed and carried into execution.

The defendants, the devisees, insisted that the will was not revoked by the subsequent settlement and covenant, except only *pro tanto*, namely, so far as might be necessary to answer the particular purposes of the settlement.

The cause was heard before Sir Wm. Grant (1), who, by a decree made on the 8th of February 1810, declared that the will of the said testator, Guylott Cowherd, was revoked as to the freehold estate by the settlement, bearing date the 15th of February 1800, and that the said will, as to the copyholds, was revoked in equity by the covenant in the said settlement to surrender the said copyholds to the uses of such settlement.

From this decree the devisees appealed.

On the argument of the appeal, Lord Eldon held, that the decree was right in so far as it declared the will to be revoked as to the freeholds, by the subsequent conveyance. As to the other question, he directed a case to the Court of King's Bench. The case stated that Guylott Cowherd had made a surrender to the uses of the settlement ; and the question was, whether the devise of the copyhold estates in the will of Guylott Cowherd was revoked by the surrender of them to the uses of the settlement pursuant to the covenant therein contained.

The Court of King's Bench (2) certified, that the devise of the copyholds was not revoked by the surrender.

The case was again argued, first before Lord Eldon, and afterwards before Lord Lyndhurst, on the equity reserved.

LYNDHURST, *Lord Chancellor*.—This case of *Vauserv v. Jeffrey* came before the Master of the Rolls in the year 1810, and he pronounced a decree in it. It afterwards came by appeal, before the Lord Chancellor, and in the

(1) Sir W. Grant's judgment is reported in 16 Vesey, 517.

(2) 3 Barn. & Ald. 462.

year 1818, Lord Eldon, upon considering the subject, thought, that, with respect to one point, it was material to take the opinion of a court of common law. A case was accordingly stated for the opinion of the Court of King's Bench.

The case was argued in the Court of King's Bench, and the Judges of that court afterwards certified their opinion to the Lord Chancellor. It came again under consideration upon that certificate, in 1825, but no judgment was pronounced upon it. It was afterwards argued before me, and it now stands for judgment.

The facts of the case are these.—A person of the name of Guylott Cowherd was seized of certain freehold and copyhold estates. In 1794 he surrendered the copyhold estates to the uses of his will, and made his will, disposing of the freehold and copyhold estates in different portions to different individuals. Afterwards, in the year 1800, he executed a settlement in contemplation of a marriage, and the marriage afterwards took effect; that settlement contained a covenant to surrender the copyhold estates to the use of the settlement.

When the case came on before the Master of the Rolls, he was of opinion, and that point has not been questioned—at least, it is not now questioned—that the settlement was a revocation of the will as far as related to the freehold property. He considered that the question, as to the copyhold estate, came under, and was subject to, a different consideration. He said, upon the authority of several cases to which he referred, *Ryder v. Wager, &c.*, that an agreement to convey, would constitute, in a court of equity, a revocation; that here was a covenant to surrender; that, in his judgment, if a surrender had actually been made to the uses of the settlement, the surrender would have amounted to a revocation of the will; and that, as the covenant to surrender was equivalent to the surrender itself, he was of opinion the will was revoked as far as related to the copyhold property.

When the case came before Lord Eldon, he entertained doubts whether the surrender, if made, would have amounted to a revocation of the will as far as related to the copyhold property; and he accordingly directed a case for the opinion of the Court of King's Bench. He said, "The

effect of a surrender is a pure legal question; if it can be distinguished from *Cave v. Holford*, it is material that it should be so distinguished by a court of law, and to them the question must be addressed (quite clear of all considerations of equitable revocation), on the statement of the surrender being made."

In consequence of this opinion of Lord Eldon, it was referred to the Master to prepare a surrender conformable to the settlement. That surrender was prepared; was not questioned; and, as it appears to me, from the best consideration I can give to the instrument, it conforms substantially to the covenant, for the purpose of the present question.

The case was argued, and the Court of King's Bench came to a decision upon it, and upon the effect of the surrender,—that, in their judgment, the surrender of the copyhold property to the uses of the settlement, did not amount to a revocation of the will as far as related to the copyholds. That opinion of the Court of King's Bench seems to have been contested in argument here; but, it does not appear to me that it is contested upon any solid grounds. It seems to me impossible to impeach the grounds on which the decision of the Court of King's Bench was founded.

Where a copyholder surrenders to certain uses, all the estates that are created are not new estates: they are new estates, only so far as the uses, to which the surrender is made, differ from the estates which existed in the surrenderor at the time of the surrender. That is the doctrine to be collected from *Roe v. Griffiths* (3), and *Thrustout v. Cunningham* (4), but more fully and diffusely laid down in Mr. Fearne's book. Such is the doctrine to be collected from those cases; and it was upon the principles of those cases that the Court of King's Bench founded their judgment.

On looking at the surrender, its purpose appears to be merely to create a rent-charge; and, in order to give effect to that rent-charge and to secure the payment of it, new uses are created by the surrender: therefore, nothing more passed out of the surrenderor, than was necessary for that purpose. Where a surrenderor surrenders what in terms re-

(3) 4 Burr. 1934.

(4) 2 Black. 1046.

mains to himself, he takes, not as under the surrender, but as part of his old estate; he is in his old estate. In this case, therefore, all the estate which was not conveyed by the surrender, for the purpose of securing the rent-charge of 300*l.* a year, remained in the surrenderor, not as under the surrender, but in respect of his old estate. The estate did not undergo any change; if it did undergo any change, (and that, is clearly the doctrine of the cases which I have stated,) then it follows, that the surrender to the uses of the settlement is a revocation with respect to the copyhold property; that is, it is not an entire revocation, but is a revocation only as to the partial interest, the new estate that was created.

It was supposed, when the case came here, that the observation of the Master of the Rolls upon the case of *Thrustout v. Cunningham* was not sufficiently attended to by the Court of King's Bench; but on referring to the manuscript report of what passed in the Court of King's Bench, I find it was fully considered, and that the very observation, which the Master of the Rolls made, was pressed upon the Court by the Solicitor General, who argued in support of the revocation. But the case of *Thrustout v. Cunningham* is not a case of revocation; it is a case establishing the principle to which I have adverted—the legal effect of a surrender upon the estate of the surrenderor with reference to the estates that exist under the surrender.

Again, it was supposed, when the case came here (adverting to the short printed report of it), that the question did not undergo much consideration in the Court of King's Bench: but, on looking at the manuscript report, I find it underwent much consideration, and that the Court itself took a great part in the discussion; that, from the beginning to the end, the Court were actors in the argument; and it is impossible that a point like this, not being in its nature very extensive, could have undergone greater consideration.

If, then, this is a pure question of law; if it has been decided by a court of law; if, in my judgment, there is no ground for impeaching that decision; if the principles on which that decision rests are solid principles:—what is the consequence which follows?

VOL. VII. CHANC.

The judgment of the Court below was founded upon an assumption, that, if there had been a surrender, there would have been a revocation; that, there being a covenant to surrender, that was tantamount to a surrender, and therefore there had been a revocation. But the foundation fails, and the whole of that which is built upon it must fail also. Therefore I am of opinion, that the decree cannot be sustained, in as far as it declares that the will, with reference to the copyhold property, has been revoked by the covenant to surrender.

There was another point which was supposed not to have been sufficiently considered by the Court of King's Bench, namely, whether there was not in this case an intention to revoke. But, in fact, that question was fully considered in the Court of King's Bench. The greater part (adverting always to the manuscript report of what passed there,) of the Solicitor General's argument turned on that view of the case. It was contended that it was the intention of the testator, that the freehold and copyhold estates should go together; and that, as there was a revocation, with respect to the freehold, he must have intended to revoke the devise as to the copyhold also. But the answer, which the Court of King's Bench gave to that, was, that the will was revoked, not by any manifestation of intention of the testator, but by the change of the estate, which had taken place. Therefore, you cannot infer, from the revocation of the devise of the freeholds, that there was any intention to alter the will, as far as related to the copyhold property.

Upon the whole, this question was much considered by the Court of King's Bench; it does not seem to have been passed over hastily. I concur in the decision, and am of opinion, upon these grounds, that the decree of the Court below as to this point must be reversed.

1828. }
April—June 1. } BULL v. PRITCHARD.

A testator gives personally to his daughter for life to her separate use, remainder to her children who should attain twenty-three:—

Held, that the gift to the children is too remote.

The daughter taking the corpus of the fund as the sole next of kin of the testator, —Held, that she could not, during coverture, part with her interest in the corpus.

Thomas Evans devised his freehold estates to trustees and their heirs, upon trust to pay the rents to his daughter, Mary Bull, during her life, to her separate use; and, from and after her decease, upon trust to convey his said freehold estates unto and equally between and among all and every the child and children of his said daughter, Mary Bull, who should live to attain the age of twenty-three years, and to his, her, and their heirs and assigns, for ever, as tenants in common, and not as joint-tenants; and, if there should be but one such child, then to such only child, his or her heirs or assigns for ever; but, in case there should be no such child or children, or, being such, all of them should die under the said age of twenty-three years, without lawful issue, then upon trust for certain persons therein named. He afterwards gave the residue of his estate and effects to his executors, upon trust for Mary Bull, during her life, to her separate use; and, after her death, upon trust to pay, assign, or transfer all and singular the said rest, residue, and remainder of the stocks or funds in which the same should have been laid out, unto and equally between and among all and every the child and children of his said daughter, lawfully begotten, or to be begotten, who should live to attain the age of twenty-three years, share and share alike, with benefit of survivorship, in case of the death of any or either of them under the said age of twenty-three years, as tenants in common, and not as joint-tenants; and, in case there should be but one child, then upon trust to pay, assign, or transfer the same unto such only child, his or her executors or administrators; and, in case there should be no such child or children, or, being such, all of them should die under the said age of twenty-three years, without lawful issue, then upon trust for certain persons named.

Mary Bull was the sole next of kin of the testator.

At the hearing, Lord Gifford held, that, as the gifts to the children were to them as a class, and were not to vest till they respectively attained twenty-three, the consequence was, that, subject to the life-estate given to Mary Bull for her separate use, the residue of the personalty devolved to her as the sole next of kin of her father.

The decree made at the hearing declared, that the limitations, contained in the will of Thomas Evans, of the leasehold estates and residuary personal estate therein mentioned, after the death of Mary Bull, were void, as being too remote; and that James Bull, and his wife Mary Bull, in her right, were entitled to the said leasehold estates and residuary personal estate, subject to certain directions of the will and codicil.

Part of the residue consisted of stock. Her husband and she petitioned to have it transferred to him, and she appeared to consent in court.

The trustees objected, that her interest in the corpus of the fund was a reversion expectant on her own life-estate, and that she could not part with that interest during coverture.

On the other hand, it was contended, that her dominion over the fund was in the nature of a present interest, since no person but she, or those claiming through her, could ever have a right to a single shilling of the fund.

The Master of the Rolls was of opinion, that she could not part with such an interest, and refused to order the fund to be transferred to the husband.

Part of the personal estate consisted of leaseholds, of which the husband had been receiving the rents.

The trustees now presented a petition, praying, that the leaseholds might be sold, and the proceeds invested in three per cent. stock; and that he might account for the amount of the rents received by him beyond the sum which would have been coming to his wife if the leaseholds had been converted.

They submitted, that, as there was here a life-estate, with an interest expectant upon

the determination of that life-estate, it was necessary that the property should be converted.

On the contrary, the husband and wife insisted, that the case differed totally from the common case of a tenant for life and a remainder-man; that they represented the whole of the interest in the leaseholds, and that there was, therefore, no reason for conversion.

The Master of the Rolls was of opinion, that the tenant for life was not entitled to the rents of the leaseholds, but only to the interest of the money they would sell for, and ordered them to be converted.

1828. }
Nov. 3. } LEWIS AND ANOTHER v. GENTLE.

Demurrer for want of parties.

A suit cannot be instituted for an account of assets of a testator, possessed by an executor in Honduras, unless the will is proved here, or a sufficient reason assigned why it is not proved here.

The plaintiffs were creditors of their brother William Lewis, and also entitled to certain benefits under his will. The bill stated, that William Lewis had been in partnership with the defendant Gentle, as merchants in Honduras; that he made his will and certain codicils, whereby he appointed his brother, John Lewis, Mary Hawkins, and Patrick Waldron, his executors and executrix; that the testator shortly afterwards died; that Mary Hawkins and Patrick Waldron both died shortly after the death of the testator, without having proved the will or acted in execution of the trusts thereof; that the testator at the time of his death was possessed of slaves, cattle, estate, and other effects, in Honduras, which were his own individual property; that he and Gentle, as partners, were also jointly interested in partnership property of great value; that the testator died in England, and that, at the time of his death, Gentle was residing at Honduras, and, as the agent of the testator, had at that time the posses-

sion of all the private property of the testator at Honduras, and, as the partner of the testator, he had possession of all the said partnership stock and effects; that, in November 1815, Gentle was made acquainted with the death of the testator, and had possession of the will and codicils, and, in February 1816, he sold some part of the testator's personal estate and effects, which were sold for the sum of 9711*l.* 14*s.* 2*d.*; that he had settled accounts with, and received monies from, the London correspondents and agents of the testator's house; that he had charged the estate of the testator with large sums for his own commission, on effecting sales of the testator's private property, and for paying, remitting, and receiving monies in respect thereof, as executor.

The bill prayed (amongst other things) that Gentle might either admit assets sufficient to satisfy the claims of the plaintiffs, and might pay what was due to them, or that an account might be taken of the estate and effects of the testator, come to the hands of Gentle, or of any other person or persons, by his order or for his use.

The defendant, Gentle, demurred to the bill: assigning as cause of demurrer, that it appears by the said complainants' own shewing, in their said bill, that a legal personal representative of William Lewis, the testator in the said bill named, under probate or letters of administration, with the will of the said testator annexed, granted by the proper Ecclesiastical Court in this country, is a necessary party to the said bill, and yet there is no such legal personal representative of the said testator a party to the said bill.

Mr. Horne and *Mr. Richards* appeared in support of the demurrer.

There is no allegation in the bill that Gentle has proved the will in England; and the suit cannot proceed here, till there is a personal representative, invested with that character by the Prerogative Court. The allegations, which seem to point at Gentle as executor, refer all to what was done in Honduras. It may perhaps be assumed, on the fair construction of the bill, that Gentle was executor in Honduras: but that will not make him executor in England.

Mr. Treslove and Mr. Stinton were in support of the bill.

We allege that he was appointed executor; and that he has charged commission for what he has done as executor. It must therefore be assumed, that he is legally clothed with the character which the bill ascribes to him.

The Vice Chancellor.—On this bill it cannot be assumed that Gentle is executor anywhere except in Honduras. There has been no probate of the will here: and it is contrary to the practice of the Court to allow such a suit to proceed, when there is no reason assigned why the will is not proved here. If the will and codicils have been proved at Honduras, probate will be granted here upon a transcript of them sent from Honduras.

Demurrer allowed.

1828. } THE CORPORATION OF TRINITY
Nov. 19. } HOUSE, STROUD, v. BURGE.

To part of the discovery sought by a bill, a defendant pleaded clauses of an act of parliament inflicting certain penalties for doing the acts to which the discovery related: but, in the interval between the filing and the arguing of the plea, the period elapsed within which the penalties could be sued for:—The plea was overruled.

The bill stated, that the plaintiffs, the said corporation, are and for a great number of years last past have been seised in fee, to them and their successors, of and in the lastage and ballastage, and office of lastage and ballastage, of all ships and vessels which sail, pass, and re-pass in the river Thames or elsewhere between London Bridge and the main sea eastward, or any wharf, bank, creek, coast, shore, or any part of the same, or near or adjoining thereto, and the exclusive right of supplying ballast to all such ships and vessels as aforesaid, subject at this present time to the provisions of a certain act of parliament made and passed in the 45 G.3; that such sole and exclusive rights were granted to the plaintiffs and their successors to enable them the better to exercise and

fulfil the purposes expressed in certain acts of parliament in supporting, maintaining, and relieving of poor decayed seamen, their wives, widows and orphans, and also to enable them to cleanse and deepen the bed and channel and to preserve the navigation of the Thames; and that the defendant had taken upon himself to supply, and had, particularly since the 11th of February last, supplied great numbers of ships or vessels, sailing, passing, and re-passing in the said river Thames, between London Bridge and the main sea eastward, with large quantities of ballast.

It charged, that the defendant ought to set forth a full and particular account of the quantity and number of tons in weight of such gravel, earth, and rubbish, which had been sold or supplied by him to any ships or vessels since the 22d of September 1826.

The prayer was, that an account might be taken of all gravel, earth, rubbish, or other ballast, sold or supplied by the defendant, or by his order, since the 22d of September 1826, to any ship or vessel, sailing, passing, or re-passing on the river Thames, between London Bridge and the main sea eastward, and of the monies arising from such sales or supplies; and that the defendant might be decreed to pay to the plaintiffs what shall be found due from him, upon taking such accounts; and that he might be restrained from supplying any ships or vessels whatsoever, sailing, passing, or re-passing in the river Thames, between London Bridge and the main sea eastward, with any gravel, earth, rubbish, or other ballast.

The bill was filed on the 22d of April 1827, and, in the month of July following, the defendant put in a plea and answer. The plea was to nearly the whole of the bill: but the answer only admitted that the plaintiffs were a corporation, and were, or claimed to be, seised of the right mentioned in the bill, for the purposes therein mentioned. The matter pleaded was as follows:—

That, by a certain act of parliament, made and passed in the 45th year of the reign of his late Majesty, King George the Third, intituled, "An act to repeal two acts passed in the sixth and thirty-second years of

his late Majesty, for the regulation of lastage and ballastage in the river Thames, and to make more effectual regulations relating thereto," it is, amongst other things, enacted, that the sole right of supplying all ships and vessels with ballast, that shall pass and repass in the river Thames between London Bridge and the main sea, at the rates and prices accustomed, and of digging, raising, and taking up gravel, sand, and soil of the said river Thames, and every part and parcel thereof between London Bridge and the main sea, for the ballasting of such ships and vessels as aforesaid, shall belong to the said master, wardens, and assistants of the Trinity-house, for the uses and purposes therein mentioned, and for the ballasting of ships and vessels in the said river; and every person, not duly authorized by the said master, wardens, and assistants, who shall raise or take any gravel, sand, or soil, from the bed or channel of the said river, for the ballasting of any ship or vessel being, remaining, or lying in or going out of the said river or elsewhere, between London Bridge and the main sea, or any dock, wharf, bank, creek, shore, coast, or any part of the same, or near adjoining thereto, or who shall supply any other ballast to any such ship or vessel, contrary to the provisions of this act, shall, for every ton of ballast so raised or supplied, forfeit and pay the sum of 10*l.*: Wherefore, and as the discovery sought by the said bill of the said several matters, if made by the defendant, would or might expose him to the said penalties, the defendant did plead the said act of parliament, and the said matter in bar, to so much of the said bill as seeks a discovery from the defendant of such matters as are hereinbefore pleaded to.

On referring to the acts of parliament, it appeared that it was necessary to sue for the penalties within either six or twelve months (according to the amount of the penalties) from the time when they were incurred.

Mr. Roupell appeared to support the plea.

The defendant relies upon the common principle, that the plaintiff is not entitled to call for an answer to those parts of the

bill which charge the defendant with doing acts which will expose him to penalties.

Mr. Wigram, contra.

The penalties must be sued for within twelve months at the latest: that appears on the acts of parliament. It is clear, therefore, that the defendant cannot now expose himself to penalties by answering; for it is more than a year since the bill was filed.

Mr. Roupell, in reply.

The argument for the plaintiff is, that the plea, though good when it was filed, is now by the lapse of time become bad. The validity of the plea must be determined by looking at the case as it stood when the plea was filed. The plea cannot be affected by the time which has since elapsed. That is a mere accident depending on the state of business in the Court.

The Vice Chancellor was of opinion, that, as the time had gone by within which the penalties could have been recovered, the defendant ought to answer.

The plea was overruled; but the costs of it were to be costs in the cause.

1828. }
November. } REYNOLDS v. JOHNSTON.

A vendor sells certain property, and afterwards, in order to perfect his title, enters into an agreement with B. for the release of certain rights which B. has over the property: afterwards he files a bill against the purchaser, stating also the agreement with B., and praying that B. may be decreed to execute the release:—Held,

That such a bill was multifarious.

The case stated by the bill was as follows:—

Charles Hedge, a builder, being possessed of a house, yard, and premises, behind Crown-street, Soho, and also of three houses in Crown-street, made his will, whereby, after giving a rent-charge of 120*l.* a year, to be issuing out of the whole of the above property, to Dorothy Hedge, his widow,

he devised the whole of the property to the defendants, Samuel Simon Saxon and Joseph Reeve, upon certain trusts, by which the equitable fee in the house, yard, and premises behind Crown-street became vested in the plaintiffs, and the equitable fee of the three houses in Crown-street became vested in the defendant George Hedge.

On the 21st of April 1825, the plaintiffs caused the house, yard, and premises situate behind Crown-street, to be put up to auction, and the defendant, Robert Johnston (through his agent) became the purchaser. The property sold was stated, in the conditions of sale, to be subject to an annuity of 60*l.* to Dorothy Hedge, whereas it was subject, in common with the three houses in Crown-street, to the whole annuity of 120*l.* per annum. The plaintiffs therefore, after the sale, entered into a negotiation with Dorothy Hedge, and the bill stated that they concluded an agreement with her, whereby the annuity of 120*l.* was to be released, and two separate grants of annuity of 60*l.* each, one issuing out of the house and yard sold, and the other out of the three houses in Crown-street, were to be accepted in lieu of it.

Part of the property agreed to be sold was an exclusive right of way into Crown-street. George Hedge, however, claimed the soil and freehold of the way, and also a joint interest in the right of way as appurtenant to the three houses in Crown-street, of which he was *cestui que trust*; and his trustees, who were also the trustees of the plaintiffs, refused to convey unless such joint right was reserved to them.

The bill stated, that George Hedge had no title to this right of way or soil, but that the plaintiffs had entered into an agreement with him, by which they were to give him 150*l.* as a consideration for his waiver of his joint right of way.

The prayer was, that the agreement for the purchase of the messuage, yard, and hereditaments, by Robert Johnston, might be specifically performed; that the defendants, Samuel Simon Saxon and Joseph Reeve, might be decreed to execute a conveyance of the legal estate in the messuage, yard, and hereditaments, to Robert Johnston; that Samuel Simon Saxon, Jo-

seph Reeve, Dorothy Hedge, and George Hedge, might be decreed to execute a certain release of the yearly rent-charge of 120*l.*, and certain grants of two yearly rent-charges of 60*l.* each, in lieu thereof, and, if necessary, that George Hedge, Samuel Simon Saxon, and Joseph Reeve, might be decreed to execute a certain grant of an exclusive right of way to Robert Johnston, the plaintiffs being willing to pay George Hedge the sum of 150*l.* which they had agreed to pay him.

To this bill Johnston filed a general demurrer for want of equity.

At the bar, the defendant also demurred *ore tenus* for multifariousness.

Mr. Sugden and *Mr. Collinson* appeared in support of the demurrer.

The bill is in fact filed for the performance of three agreements—the first, with the defendant Johnston; the second, with Dorothy Hedge; and the third, with George Hedge. What has *Mr. Johnston* to do with the latter two agreements? If the plaintiff is in a situation to perform his agreement with Johnston, and has a right to compel the performance, let him file a bill for that single object: but he has no right to harass Johnston, by making him a party to a litigation relating to agreements with which Johnston had no concern. It may be true that the plaintiffs entered into the alleged agreements with Dorothy Hedge and George Hedge, in order to enable them to perform their agreement with the defendant Johnston. But if a man, in order to acquire a perfect title to a property which he has sold, finds it necessary to enter into half a dozen contracts, with half a dozen persons, can he, when he files a bill against his vendee, seek by the same bill to enforce all these different contracts, against those who have sold to him?

Mr. Stinton appeared in support of the bill.

There is no matter introduced into the bill, which is not subservient to the performance of the contract with Johnston; and the connexion of the other contracts with the title makes them parts of that one transaction to which the bill relates.

The Vice Chancellor was of opinion, that the bill was clearly multifarious. Johnston had no concern with the agreements with Dorothy Hedge and George Hedge, which the bill sought to enforce.

Demurrer allowed, with taxed costs.

1828. }
December. } STURZ V. DE LA RUE.

A patent was granted "for certain improvements in copper and other plate printing:" from the specification, it appeared, that the invention consisted in communicating to paper a glazed surface, by which the fine lines of the engraving were better exhibited:—Held,

That the invention was well described in the patent, and that the specification agreed sufficiently with the title.

The specification stated, that, in one part of the process, a certain use was to be made "of the purest and finest chemical white lead;" there was, however, no substance known here by that appellation: the best and finest white lead that could be gotten in the general London market would not answer the purpose; and, in fact, the substance, which was used, was a preparation of lead imported from Germany, and which could be obtained, under the description given to it in the patent, at one or two colour-shops in London:—Held,

That the specification was defective, and that, on that ground, the patent was void.

The bill stated, that his present Majesty by letters patent, under the Great Seal, dated the 14th of February 1827, did grant unto John George Christ, his executors, administrators and assigns, his special licence, and sole privilege and authority, during the term of fourteen years, to make, use, exercise, and vend, within England, &c. a certain invention, therein recited to have been, as it had in fact been, communicated to the said John George Christ, by a certain foreigner residing abroad, consisting of *certain improvements in copper and other plate printing.*

The specification declared the nature of the invention to consist in putting a glazed or enamelled surface on paper to be

used for copper and other plate printing, by means of white lead and size, whereby the finer lines of the engraving were better exhibited than theretofore; and also in a mode of polishing the said enamel and the impression, after it had been drawn from the plate.

Directions were then given for the preparation of a particular species of size, to which, when at or just under a boiling heat, was to be added a certain quantity "of the finest and purest chemical white lead, previously ground fine, with a little cold water." Directions were then given for applying the mixture to the surface of the paper: and the specification concluded as follows:—

"The surface of the paper having been glazed or enamelled as before described, is ready to receive the printers' ink or other material from the plate, and being placed on the press-board, the plate is applied and the impression drawn off in the usual manner; but it should be stated, that what is called the press-board should for this purpose be made of a plate of cast iron, ground to a perfectly smooth and level surface. The paper, with the impression so drawn off as aforesaid, should be then laid by for twenty-four hours, and, at the end of that time, placed with the impression downwards on a plate of finely polished steel, and passed several times through the press with a strong pressure, which will give to the glazed or enamelled surface of the paper, and also to the impression, its last and highest polish. Now, I claim, as the said invention, the glazing or enamel hereinbefore described, applied to paper, or card-board, in manner also hereinbefore described, for the purpose of copper and other plate printing."

The bill then stated, that Christ had assigned his interest in the patent to the plaintiff; and that the defendants had used and counterfeited the invention; and it prayed an injunction to restrain them from making, printing, engraving, preparing, selling, or disposing of, or causing to be made, printed, engraved, prepared, sold, or disposed of, any printings, engravings, cards, boards, or tablets, or other articles, made, printed, engraved, or prepared, according to the said invention or any part thereof, or otherwise in the infringement of the said patent.

On an affidavit, verifying the allegations

of the bill, an injunction, according to the prayer, had been granted *ex parte*.

The defendants filed affidavits, and gave notice of motion to dissolve the injunction.

The affidavits filed on the part of the defendants entered into various details, with a view to shew that the process which they had followed was different in important respects from that of the plaintiff, and that the proposed object could not be effected by following the process detailed in the specification. In the course, however, which the proceedings took, nothing turned on those allegations.

It was further stated, that the finest white lead which could be procured in this country, would in no degree answer the purpose; that there was no article known in the market by the name of the purest or finest chemical white lead; that they had applied for the article by that appellation at the shops of the principal chemists in London, but that no such substance was known to those chemists; that, in fact, the substance used in the composition of the size was a chemical preparation, which one of the defendants had met with on the continent, and which, he had lately discovered, was also imported and used by the plaintiff, and that it was not white lead, but appeared to consist of a preparation of lead combined with some other substance.

Affidavits were filed by the plaintiff in reply, in which he stated that the substance used by him in the composition of the size, was the purest and finest chemical white lead; that he imported it from Germany; and that it was sold by that name at two colour shops in London.

The defendants, it appeared, had inquired for it at these two shops, but had not been able to procure it at either. On the other hand, a person, named in the affidavit of the plaintiff, had bought a portion of the article at one of those shops.

Mr. Horne and *Mr. Sugden* moved to dissolve the injunction.

They first insisted that the patent was void, because the title and the specification did not correspond. The patent purported to be for improvements in copper and other plate printing: the actual in-

vention was an improvement in the preparation of paper.

In support of the objection were cited, *The King v. Wheeler* (1), and *Cochrane v. Smethurst* (2).

Mr. Tinney and *Mr. Rotch*, contra.

The Lord Chancellor was of opinion, that the mode of communicating to paper such a surface as would render the lines of engraving more distinct, might fairly be described as an improvement in copper and other plate printing. Copper-plate printing was a process consisting of various steps, and the preparation of the surface of the paper was one of the steps in that process.

A second objection to the patent was, that the substance used in the preparation of the size was not sufficiently described or designated. There was no substance, it was argued, known in the market by the name of the purest and finest chemical white lead: the article was not to be gotten by that name; it was an article not manufactured in this country, but imported from abroad. Thus the specification was calculated to mislead, and, at least, did not give that full and clear information, which the world had a right to require from the patentee.

The Lord Chancellor was of opinion, that, in this respect, the specification was defective, and did not give information sufficiently full and precise. There being no substance known in the market by the name of "the finest and purest chemical white lead," a person, who wished to use the invention, would be obliged to employ the purest and finest white lead: and it is proved that the purest and finest white lead that can be gotten in London will not answer the purpose. It was the duty of the patentee, therefore, to have directed the attention of the public specifically to the particular substance, by means of which the effect is produced.

The patent, therefore, is void, and the injunction must be dissolved.

(1) 2 Barn. & Ald. 350.

(2) 1 Starkie, 206.

1828. }
 Aug. & Oct. } PARTRIDGE v. USBORNE.

A supplemental bill, in the nature of a bill of review, may be filed in respect of new matter, even though the new matter be of such a kind, that it cannot be used as evidence of anything which was before in issue in the cause, but tenders an entirely new issue.

But, except under very particular circumstances, a party will not obtain leave to file a bill of review, or to proceed in it, unless he performs the original decree.

A party, however, may file a bill of review, and proceed in it, though he has not done what the original decree directs to be done, provided the proceedings under the decree are in such a state, that the other party could not, at the time of filing the bill and proceeding in it, have brought him into default for non-performance.

In a suit for specific performance by a vendor against a vendee, the only defence set up was, that the plaintiff could not make a good title: that defence failed, and a decree for specific performance was pronounced: in the meantime, the defendant had discovered that the representations of the vendor, as to the quantity of timber, which formed the principal value of the estate, were false: leave was given him to file a supplemental bill in the nature of a bill of review, on the ground of the subsequently discovered falsehood of the vendor's representations.

In such a case, the vendee will not be relieved from paying his purchase-money to the vendor, though the sum be very large.

But he has a right to file his bill without paying the money, if the time for the payment of the purchase-money, in the due course of the execution of the decree, had not arrived.

Semble, as soon as the time for the payment of the money arrived, in the course of the due execution of the original decree, the vendee would not be allowed to proceed in his bill of review, without paying the money to the vendor.

In October 1825, Partridge, alleging himself to be seised in fee simple of a freehold estate, situate near Ross, in the county of Hereford, consisting of the remains of Penyard Castle, with the park, wood, and the lawn, farm, and appurtenances thereto belonging, containing six hundred and forty-

three acres of land, and upon the greater part of which was growing a very large number of valuable timber and other trees, which constituted the principal value of the estate, caused the same to be advertised for sale by public auction, by Charles L. Hoggart, as auctioneer.

Hoggart, the auctioneer employed by Partridge to sell the estate, informed Usborne in September 1825, that he had a considerable timber estate for sale, and gave him one of the printed particulars and conditions of sale. Usborne, accordingly, on the 28th of September 1825, called upon Hoggart, and inquired of him, whether the timber, standing and growing on the said hereditaments and premises, had been measured, and whether the vendor would warrant the quantity thereof; and he, at the same time, stated to Hoggart, that, as there was not time to make an admeasurement of the timber on the estate before the day appointed for the sale, he could not form an estimate of the value of the said estate, and would not bid for it, unless the quantity of timber standing and growing thereupon were ascertained and warranted.

Hoggart's answer was, that the timber on the estate had been measured, but that he, Hoggart, was not then in possession of the particulars or of the result of such measurement; but that he would write to his employers for the same. Hoggart did (as he informed Usborne) accordingly write to Messrs. Tovey and James, the solicitors of Partridge, and informed them, that many persons, who applied about the property, were desirous of having a statement of the quantity of timber upon the estate, and the admeasurement thereof, with a view to ascertain its value; and requested them to furnish him with such a statement, if they possessed any such.

Messrs. Tovey and James, in consequence of that letter, sent to Hoggart, for the purpose of being produced to persons inquiring about the estate, a paper writing, purporting to be an account of the timber, stores, underwood, and saplings, upon the premises, which they assured Hoggart was the result of actual admeasurement, and had been made by a person well skilled in the admeasurement of timber.

On the 6th of October 1825, Usborne again called upon Hoggart, and inquired of

him, whether he had received the admeasurement of the timber on the estate. Hoggart then delivered to him the said account of the timber, stores, underwood, and saplings, which he had received from Messrs. Tovey and James as aforesaid, and in which there was stated the number of the trees and stores, in each of the sixteen cuts or divisions into which the said woodland was distributed, and the quantity of timber contained in such trees and stores, in loads and feet, except as to the stores in three of the cuts, which were stated to contain two and a half feet each; and, as a further inducement to Usborne to rely on the accuracy of the account, Hoggart stated to him, that government had contemplated the purchase of the estate for the sake of the timber, and had caused the timber thereon to be measured and valued, and that their measurement agreed with the admeasurement of the vendor; and, in proof thereof, he produced a paper or valuation, in which it was stated, that, according to such last-mentioned admeasurement, cut No. 2. on the said estate contained eight hundred and forty-one loads of timber, and that the government admeasurement made, in the same cut, eight hundred and thirty loads, and that the admeasurement of a Mr. Saitridge made the same eight hundred and forty loads; and Hoggart at the time informed Usborne, that he, Hoggart, had received the admeasurement from Messrs. Tovey and James, and was authorized by them, as the agents of Partridge, to warrant the quantities of the timber and stores, underwood, and saplings, to be correctly stated therein.

Usborne, having thus informed himself as to the quantity of the timber and stores, underwood, and saplings alleged to be on the estate, instructed his surveyors, Mr. Charles Pearson Charlton, and Mr. William Williams, to view and value the estate, and the timber trees, stores, underwood, and saplings growing thereon; assuming as the basis of such valuation, that the quantity of timber and stores, underwood, and saplings growing upon the hereditaments was correctly represented in the account furnished by Hoggart, and for such purpose he delivered to Williams a copy of the account, and forwarded to Charles Pearson Charlton another copy thereof; and he

at the same time informed Charlton by letter, that Hoggart had stated, that the vendor would guarantee the quantities of the timber and stores, underwood, and saplings to be correctly stated in such account, and that he, Charlton, in making his survey and valuation, would have to consider only the quantity and value of the timber. Similar instructions were given to Williams.

The petitioner, Usborne, went to Ross, in Herefordshire, on the 16th of October 1825, accompanied by Williams, and there met Charlton, when Williams and Charlton proceeded to view the estate, and to make their survey and valuation of the estate, timber trees, stores, underwood, and saplings, upon the basis and assumption, that the statement of the quantities thereof respectively contained in the aforesaid account was correct. Charlton having made such valuation, advised Usborne to bid for the premises to the amount of 73,000*l.*; and Williams delivered a statement of his valuation thereof, amounting to 74,647*l.* 12*s.*; but advised him not to bid to that amount for the estate, but to the amount of about 72,000*l.*

On the 20th of October, the sale took place, and Usborne was declared the purchaser, at the price of 72,900*l.* and paid his deposit and signed a contract in the usual manner.

Objections being taken to the title, Partridge, in Trinity term 1826, filed a bill for specific performance. Usborne, by his answer, admitted the contract; and the only defence he set up was, that various objections to the title of Partridge to the hereditaments and premises, which were taken by (his the defendant's) legal advisers, were valid objections to the vendor's title, and that Partridge had not shewn and evidenced a good and perfect title to the hereditaments and premises, and was not able to make, or procure to be made to him, the defendant, a conveyance thereof in fee simple.

On the 6th of November the usual order of reference of title was made: and, on the 1st of June 1827, the Master reported in favour of the title, and that it was first shewn that a good title could be made on the 17th of February 1827. To this report Usborne took exceptions.

In Trinity term 1827, Usborne filed his bill against Partridge, stating that the quantity of timber had been misrepresented by the vendor, and praying that this new or cross cause might come on to be heard with the cause instituted by Partridge against Usborne and Hoggart; and that, in case the Court should be of opinion, that Partridge could make a good title to the fee simple and inheritance of the hereditaments and premises so contracted to be purchased, and that Usborne ought specifically to perform the agreement, then that an account might be taken of the quantity of timber standing and growing upon the premises at the time of the sale, and of the value thereof at that time, and that a proper abatement or allowance might be made to him, out of the residue of his purchase-money remaining unpaid, in respect of such deficiency of the timber.

To this bill a general demurrer was filed.

The Vice Chancellor allowed the demurrer.

His Honour's judgment proceeded partly on the ground that it did not appear with sufficient distinctness on the bill, that the actual quantity of timber was materially less than the vendor had represented it to be; and, partly, on the ground that Usborne ought to have put the whole of his defence upon the record in the original suit.

The exceptions to the Master's report were over-ruled; and a decree made for specific performance.

Usborne now presented a petition, entitled in the original cause. Besides stating the matters which we have mentioned above, it alleged—

That the petitioner, at the time of filing his answer, and from that time until he received such information from Mr. William Loneragan, as thereafter mentioned, fully relied upon the statements contained in the account furnished to him by Hoggart, as to the quantity of the timber and stores upon the premises, and believed that such statements were in all respects correct and true;—that, in confidence and reliance in and upon those statements, touching the quantity of the timber and stores, he did not suppose that any of the matters aforesaid relating

to the quantity of the timber and stores, and the warranty thereof, were material to be stated in his answer, and he wholly omitted to state the same, or any of them, to his solicitor, before or at the time of filing his answer, and until the 1st of May 1827; but he did not intend to waive, nor did he suppose that, by such answer, he had waived, the benefit of the warranty given to him relating to the said timber and stores: neither did he intend to admit, or suppose that he had thereby admitted, that such warranty was not of the essence and part of the contract;—that, a few days previous to the 1st of May 1827, Mr. Loneragan recommended to the petitioner to be attentive to the quantity of the timber trees and stores on the estate, for that he, Loneragan, had been told that there had been great errors in making up the account thereof for the purpose of sale;—that the information thus given to the petitioner led him to suspect that the account furnished by Hoggart was not a correct account of the quantity of the timber in the trees and stores upon the said estate;—that, on the 1st of May 1827, he communicated to his solicitors the information which he had thus received; and that then, for the first time, he made them acquainted with the representations and warranty which had been made and given by Hoggart, as to the quantity of the said timber trees, stores, saplings and underwood as thereinbefore mentioned, and they advised him to make inquiry as to the character of the person who had made up the account for the vendor.

It then stated the steps which had been taken to ascertain truly the actual quantity of timber on the premises. The result was the following:—

That the whole quantity of timber contained in the timber trees, in the sixteen cuts or divisions of the woodlands, according to the account thereof furnished by Hoggart, amounted to 3779 loads, and thirty-one feet; and the whole quantity of timber contained in the stores, according to the same account, reducing into loads the stores in cuts 4, 5, and 6, therein stated to contain two and a half feet each, amounted to 3539 loads and thirty feet;—that the whole quantity of the timber contained in the timber trees in the said sixteen

cuts or divisions, as ascertained by Messrs. Attfield and Trumper, valuers employed by the purchaser, was three thousand seven hundred and twenty-two loads and twenty-eight feet, and no more ; and the whole quantity of timber contained in the stores upon the said estate, was ascertained by them to be two thousand six hundred and thirteen loads, and twenty-six feet, and no more ;—that the whole quantity of timber contained in the timber trees and stores upon the estate was less than the quantity represented to be contained therein by the account furnished by Hoggart, by nine hundred and eighty-three loads and seven feet, notwithstanding that there had been two years growth thereof, since the time when such account was so furnished.

It was further alleged, that the quantity of timber, according to the estimate made for the government, was much less than that stated in the account furnished by Hoggart ; and that the errors in the estimate, which had been made for the vendor, had been pointed out by the gentleman, who surveyed the timber on the part of the government, in such a manner, that they must have been known to the vendor.

The prayer was, that the petitioner might be at liberty to exhibit a bill of review, or a supplemental bill in the nature of a bill of review, (as the case might require,) to the intent that he might have in the cause, the same benefit of the warranty so made to him respecting the quantity of the timber upon the said hereditaments and premises, as he would have had, in case the same had been set forth by way of defence in his answer to the original bill.

The allegations of the petition were supported by affidavit.

August 8.—*Mr. Bickersteth, Mr. Knight, and Mr. Wigram*, were in support of the petition.

The matter, which the defendant sought to introduce into the suit, would form an effectual defence to the original bill : it consisted of new and material facts, not known to the defendant when he put in his answer. If the cause had not proceeded to a decree, the Court would unquestionably have permitted him to file a supplemental answer.

The existence of the decree rendered that course impracticable. The Court therefore would grant leave to file a supplemental bill in the nature of a bill of review, in order that the defendant might bring before the Court the misrepresentations of the plaintiff, as to the quantity of the timber, and have the decree varied accordingly.

Mr. Sugden, Mr. Preston, and Mr. Koe, opposed the petition.

Even if the matter brought forward by this petition were new, and were material, the rules of the Court furnished three objections to granting the present application :—

First—A supplemental bill in the nature of a bill of review must pray some relief, which might be prayed by an original bill. What this petitioner asks is, that he may have a written contract performed with a parol variation. The Court exercises no such jurisdiction.

Secondly—It is not enough that the matter stated in a petition for leave to file a bill of review, or a bill in the nature of a bill of review, be newly discovered by the party applying : it must be such as with reasonable diligence could not have been discovered previously. Here *Usborne* was called upon to perform his contract ; and, if he resisted it, he was bound to state the grounds of his resistance. He says, that there was a warranty as to the quantity of timber, and that he has since discovered that the actual quantity falls short of the quantity warranted. Why did he not ascertain the actual quantity sooner ? If it was or might be a material part of his case, how can he pretend that with due diligence he could not have ascertained the fact in due time ?

Thirdly—The new matter, on which bills of review have been founded, has always been new matter to be used as evidence, to prove the matter in issue in the original cause. The only matter in issue in the original cause was, whether the plaintiff could make a good title ; and the new matter sought to be introduced has no bearing upon that subject. The matter stated in this petition cannot be used as evidence of anything which is in issue in the cause. The petition seeks to tender a totally new and independent issue.

The observations and decision of Lord

Eldon in *Young v. Keighley* (1) were cited as an authority for these positions.

In reply, it was observed,—

First, that the object of the petitioner was not to seek a performance of the contract with a parol variation. It was the respondent who sought to enforce the contract: the warranty and the misrepresentation constituted a circumstance of defence to a suit for specific performance, of which the purchaser might undoubtedly avail himself, if there were any means of introducing it, in point of form, upon the record.

Secondly—The purchaser was entitled to rely upon the warranty of the vendor; it was not his duty to have ascertained, immediately after the contract, whether the fact corresponded with the warranty: he had a right to assume that the quantity of timber was what the vendor stated it to be; and it was enough, if, as soon as he had cause of suspicion, he investigated the matter with reasonable diligence. Here no cause of suspicion arose, till the decree had been made in the original suit.

Thirdly—Why should a party be permitted to introduce by a bill of review new evidence of matters, formerly in issue, and yet not be permitted to introduce in a similar way new matter which was not before in issue? The language of Lord Eldon in *Young v. Keighley*, amounted only to the expression of a doubt; and the decision there proceeded on the ground, that the matter brought forward there might, with reasonable diligence, have been used in the original suit. Lord Redesdale, after the case of *Young v. Keighley* was in print, had in a subsequent edition of his *Treatise on Pleading* expressed his opinion distinctly. "If," says he (2), "a case were to arise, in which the new matter discovered could not be evidence of any matter in issue in the original cause, and yet clearly demonstrated error in the decree, it should seem that it might be used as a ground for a bill of review, if relief could not otherwise be obtained." That rule applies exactly to the present case.

The Lord Chancellor was of opinion that a bill in the nature of a bill of review might

be founded on matter subsequently discovered, which could not be used as evidence of matter in issue in the original cause.

He was also of opinion, that there was no want of due diligence in the purchaser's not having ascertained that the actual quantity of the timber did not correspond with the quantity alleged to have been warranted, until cause of suspicion had occurred.

His Lordship therefore gave leave to file a supplemental bill in the nature of a bill of review.

The order for leave was to be on the usual terms.

Aug. 15.—A motion was made, on behalf of Mr. Osborne, that he might be at liberty, under the order pronounced on the 8th of August, to file a supplemental bill in the nature of a bill of review, upon the terms of paying into the Bank such a sum of money as the Court might think fit to order.

Mr. Bickersteth, Mr. Knight, and Mr. Wigram, were in support of the motion.

By the old rules of this court respecting bills of review, it is thus laid down (the order is one of Lord Bacon's): "No bill of review shall be admitted, or any other new bill to change matter decreed, except the decree be first obeyed and performed,—as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in: and so in other cases which stand upon the strength of the decree alone. But if any act be decreed to be done which extinguisheth the parties' right to common law, as, making an assurance or release, acknowledging satisfaction, cancelling of bonds or evidences, and the like, those parts of the decree are to be spared until the bill of review be determined; but such sparing is to be warranted by public order made in court." It stands perfectly clear, upon that order and the practice, that, if nothing is said, the original decree ought to be performed; but that it is in the power of the Court to stay any part of it, if the Court should think fit so to do. Now, if we were to file our bill without taking any notice of that decree, the defendant, against

(1) 16 Vesey, 348.

(2) Lord Redesdale on Pleading, p. 86, 4th edit.

whom the bill of review is to be filed, would be at liberty to plead in bar of the bill of review, that we had not performed the original decree; and the only way to protect ourselves against being met in that way is, to obtain leave to file it without having performed the original decree: that is the order we now apply for, and there are sufficient authorities for making it.

There is the case of *Saville v. Darcy*, which is in 1 *Chancery Cases*, p. 42. A decree was obtained for a great sum of money; a bill of review was brought and new matter assigned; the rule of court was pleaded, that the defendant ought first to pay the money before the bill should be brought into court, to which the Court said, "Let him give good security for the money, and we will dispense with the rule." Here, we offer to pay into court so much as your Lordship should think fit to order.

There is also the case of *Fitton v. Lord Moxfield*, in 2 *Freeman*, p. 88. In that case, it was said by the Court, "In a bill of review, all things are to be performed, according to the former decree, that do not extinguish the right, otherwise the non-performance is a good plea in bar, as, if writings are to be brought into court or tolls paid; but not to release the right, or make a conveyance, because that would destroy the right. Not bringing in writings according to the decree sought to be reversed, nor giving security for the costs in the bill of review, was pleaded in the cause between *Okeover and Poole*." In the same case of *Fitton v. Moxfield*, as it is reported in *Vernon*, it appears, that, upon the defendant stating that he had not 40*l.*, he obtained leave to file a bill of review without payment of costs. So that it is competent to the Court to do what is asked; and that it is reasonable in this case there can be no doubt. The residue of the purchase-money exceeds 65,000*l.* If we succeed in the case we make upon the bill of review, Mr. Partridge will have nothing to receive, but a large deposit to refund. We have no objections to bringing even the whole sum into court, together with any sum that may be thought reasonable for costs: but we object to paying the money to Mr. Partridge; for, if once it gets into his hands, his death, and a variety of other causes, may render it impossible for us ever to get it back again.

We are willing to take the property without further litigation (though, if there has been misrepresentation, he has no right to have the contract performed in any part), upon his making an abatement for the deficiency in the quantity of timber: but to such a proposal the vendor refuses to listen.

Mr. Sugden, Mr. Preston, and Mr. Koe, contra.

The order, which requires the party filing a bill of review to perform the decree, is imperative; and the practice of the Court has always been according to that order: why is it to be departed from in this case? No reliance can be placed on the cases which have been referred to. They are short notes, on which it is impossible to place much reliance; and they were decisions made in times of little authority, when Chancellors seem to have been too friendly to an unlimited dispensing power in themselves as well as in the King. Those cases, even if they are any authority, most probably were founded on very peculiar circumstances. Here no peculiar circumstances exist. But this purchaser, having been permitted to violate one rule of the Court, by being enabled to file a bill of review, now seeks to trample on another. No inconvenience can arise from his performing the decree. He has always the estate, an ample security for at least the greater part of his money. But if the money is paid into court, how many difficulties may arise from fluctuations in the price of the public funds.

They also referred to *Williams v. Mellish* (3) as an authority against the motion.

The Lord Chancellor suspended his judgment.

Before judgment was given on the motion, the defendant *Usborne* filed a supplemental bill in the nature of a bill of review.

October 28.—A motion was made on behalf of *Partridge*, that the bill of review might be taken off the file.

Partridge had not appeared to the bill, and the ground of motion was, that it had

been filed without the original decree having been first performed, and without having obtained from the Court any dispensation from the strict rule of practice. Even if the Court should ultimately relieve them from the rule, they had no right to exempt themselves from its operation at their own pleasure.

On the other hand, it was argued, that the question as to the obligation to perform the original decree had not yet arisen. Mr. Usborne was not in default or contempt for omitting to perform any order of the Court. It was true, that the decree ordered him to pay his purchase-money and the costs; but there were other things which must be done previously, and done by the plaintiff in the original suit. The plaintiff must get a conveyance approved by the Master; he must execute the conveyance so approved; and he must obtain the Master's certificate of such execution, before he could call on Mr. Usborne to pay the purchase-money. As yet, therefore, there was nothing for Mr. Usborne to perform.

It was also contended, that, even if the motion was right in principle, the objection ought to be taken by plea.

In reply, it was asserted that the conveyance had been approved of by both parties, and that the costs had been in part taxed.

The Lord Chancellor ordered the motion to stand for judgment along with the other.

October 31.—*The Lord Chancellor*.—This is a suit which was instituted by Mr. Partridge against Mr. Usborne for the purpose of compelling the specific performance of a contract for the sale of an estate. A decree was pronounced, directing a specific performance. The defendants were dissatisfied with the result of that suit, and they have applied to this Court for permission to file a bill of review, in consequence of the discovery of certain facts which they could not make use of, under the circumstances, in answer to the original complaint. The Court was of opinion, on hearing the arguments of counsel on both sides, and upon adverting to the facts, that it was a case in which a bill of review ought to be allowed.

After that order was pronounced, an application was made on the part of Mr. Usborne, the defendant in the original suit, to allow that bill of review to be put upon the file without performing the original decree. That point also was argued by counsel on both sides, and several authorities were referred to. The authorities that were cited were notes not stating with any distinctness or detail the circumstances under which the different orders were made; and the Court therefore was naturally desirous of obtaining more particular information as to the circumstances which had given rise to those particular judgments of the Court. An examination took place of the registrar's book, and I believe an examination also took place of the proceedings in the House of Lords,—it being stated, in one of the reports, that one of the cases had been decided before that tribunal. The result of that examination has been laid before me: I have considered those authorities, and have considered the other cases that have been referred to in the course of the argument.

But, before I had an opportunity of pronouncing judgment upon that original motion, during the vacation the bill of review was put upon the file, without waiting for the judgment of the Court. Immediately upon the meeting of the Court, an application was made to take that bill off the file. I have heard counsel on both sides with respect to that second motion; and I thought it better to defer giving any judgment on that motion, until I had had an opportunity of making up my mind with respect to the original motion made during the last Sittings.

The order of Lord Bacon appears to me, as far as relates to this part of the case, to be very precise and distinct in its terms and meaning; and the only question is, whether this Court, under the circumstances of this particular case, will feel itself justified in dispensing with that order. That the order has been dispensed with upon several occasions, does not admit of dispute; but it is material to consider under what circumstances the order has, upon the occasions adverted to, been dispensed with by the Court.

The first case that was referred to was, I think, a case of which a note has been sent

to me, a case of *Cock v. Hebb*; that was a case where the decree had directed the payment of a large sum of money to a person who was resident in Amsterdam. The Court thought it a case in which a bill of review ought to be allowed; the defendant in the original suit stated, that, if he was compelled to pay the money before he proceeded in the suit upon the bill of review, the consequence would be that there would be a failure of justice, since he could have no means of compelling the appearance of the defendant; and if he obtained a decree in his suit upon the bill of review, there would be no means of procuring any fruit of that decree. The Court, under those circumstances, gave him permission to proceed upon his bill of review, upon condition that he should bring the money into court. The case appears to have been brought before the Court a second time, upon an application, made by the plaintiff in the bill of review, to vary the order on the ground of his poverty; he had no means of paying the money into court, and he prayed, therefore, that he might be allowed to give security; and the Court, considering all the circumstances of the case, ultimately gave him leave to give security instead of paying the money into court. That case came three successive times before the Court; the orders were pronounced, I think, so far back as the year 1635. The circumstances of the case were very special and particular; and perhaps, if the rule could with propriety be dispensed with in any case, that was a case in which it was proper the Court should dispense with the rule.

The next case to which I have been referred, was the case of *Balston v. Biron*, which was supposed to have been decided in the House of Lords; but, on examination, it does not appear—at least that part of it does not appear—to have come before that tribunal. It was a case, in which the defendant in the original suit was directed to re-assure certain mortgaged premises to the plaintiff. He objected, that that would extinguish the right, and therefore he prayed, that that part of the decree might for the present be dispensed with. That case also came on several occasions before the Court; and the Court ultimately, in one of its orders, directed, that the assurance should be made

to one of the clerks in court, in trust for the person who, in the ultimate issue of the cause, should be considered by the judgment of the Court as entitled. That was a case, therefore, in which the Court dispensed with the order (that was in the year 1655); but that also was a very special case, and the object was to prevent the failure of justice.

A third case which has been referred to is the case of *Saville v. Darcy*, which was decided in the year 1662, and is reported in *Freeman's Reports*. The note of it is very short: it was a decree for the payment of a certain sum of money, and the Court dispensed with the order, directing security to be given for the payment of the money: founding its judgment on the decision in the last case to which I have referred, namely, the case of *Balston v. Biron*, in which case it was stated that the rule had been dispensed with.

In the case of *Saville v. Darcy*, the particular circumstances are not stated; nothing appears upon the report, except simply the fact that it was a decree for the payment of a large sum of money, and that the Court founded its decision on the case of *Balston v. Biron*, which was founded on special circumstances. It is not improbable that the case of *Saville v. Darcy*, although the facts are not stated, had in it some special circumstances to justify the judgment of the Court. That, I would remark, is the only case which is open to the observation that was made at the bar, of its being a judgment pronounced immediately after the Restoration, and therefore not entitled to much weight. It was decided, in the year 1662, by Lord Clarendon.

The next case in point of date was the case of *Williams v. Mellish*, reported in *Vernon*, which was decided by Lord Keeper North. In that case the learned Judge said, that he would see the original decree performed to a tittle, before he would allow a bill of review to be filed. The party having pleaded his poverty, and his utter inability to pay the money, the Court, before it would dispense with the rule, required in the first instance, an affidavit that he was not worth 40*l.*; and further, that he should surrender himself a prisoner in the Fleet, there to remain in custody until the decision should be pronounced upon the bill of

review. Upon those terms, and those terms only, it consented to dispense with the order.

The next case was a case also decided before the same learned Judge, which was the case of *Filton v. the Earl of Moxfield*, reported in the same book, and which was decided in the year 1684. In that case, which was also a case where the party set up his inability on account of poverty to perform the original decree, the Court insisted, that, before it dispensed with the order, he should make oath that he was not worth 40*l.* besides the matter in dispute in the cause.

There is another case also, which was referred to, (a note of which has been sent to me,) which was the case of *Palmer v. Danby*, which was decided in the year 1695, and which was repeatedly before the Court. In the case of *Palmer v. Danby*, the objection was raised upon the record by demurrer, and the Court overruled the demurrer; but it does not appear what were the particular circumstances which led to the decision of the Court.

It does not appear that there are any other decisions since that time relative to the point, a period of more than a century; so that in no instance, during a hundred years, has the rule in this respect been dispensed with; an observation, however, which would be entitled to much greater weight, were it not also accompanied by another observation which was made at the bar, that very few instances had occurred during that period of bills of review having been allowed to be filed.

Under these circumstances, it does appear to me, that the Court has upon all occasions been extremely jealous not to allow the rule to be dispensed with; because in all the cases,—at least in almost all the cases to which I have referred, the permission was founded on very particular and special circumstances; and it seemed absolutely necessary in almost every one of those instances that the rule should be dispensed with, otherwise the party would not have been capable of receiving any benefit whatever from his bill of review.

That brings me, therefore, to the consideration of the question, whether there are in this case circumstances that can justify the Court in dispensing with the rule. I

have attentively considered the facts and circumstances of the case, bestowing upon it the best attention that I am able to direct to it; and, I think, independently of the consideration of the large sum of money, there are not circumstances that would lead the Court to interpose; and I do not think that the single consideration of the amount of the sum at stake, can justify the Court in interposing for the purpose of dispensing with this order. With respect, therefore, to the original motion, made during the last Sittings, I am of opinion that it cannot be granted. That motion, therefore, must be refused.

That brings me, therefore, to the consideration of the motion which has been made at these Sittings. That motion is, that the bill should be taken off the file. It was stated, that the circumstance of filing the bill of review before the original motion was disposed of, was in the nature of a contempt of the authority of this Court. I am quite sure that it was not so intended; I am quite satisfied that the party putting that bill on the file meant only to assert what he considered his just right; and the argument, that has been urged in support of the motion, is this:—that, even if the Court had pronounced the decision which I have now pronounced in respect of the first motion, the putting the bill upon the file would not have been at all at variance with or inconsistent with that decision. They say, that the true interpretation of Lord Bacon's order is this: that, before you are entitled to file your bill of review, you must perform so much of the decree as they can shew that you are bound to perform; and, after considering the order, and after considering the nature of the subject, I am of opinion that that is the true construction of the order. Whatever the party is bound to do at the time when the bill of review is put upon the file, he must do before the bill is filed. But, as the permission to file a bill of review is always given upon the assumption, and the implied understanding and engagement, that the original decree shall be performed, I am also of opinion, that, if, after the bill is filed, the period arrives when money ought to be paid, it is incumbent upon the party to pay that money, otherwise an application may be made to the Court on that ground to

dismiss the bill,—he having filed the bill upon an understanding and engagement which he has failed to comply with.

That renders it necessary, therefore, to consider the particular circumstances of this case, and the particular position of the cause. And, first, as to the terms of the decree. The decree is for a specific performance. The defendant in the original suit is bound to pay the stipulated residue of the purchase-money, amounting to 65,000*l.* and upwards, but he is bound to pay that money after the execution of the deed of conveyance, the execution certified by a Master, and the delivery of the title-deeds: he is not bound to pay the money till that has been done; and these things to be done in the first instance by the plaintiff in the original suit. This consideration, therefore, renders it necessary to inquire, what was the particular position of the parties at the time when the bill was filed. If I was satisfied that the plaintiff had done what it was necessary for him to do in the first instance, in order to put the other party in default for not paying the money, there would be an end of the case; but that renders it necessary for me to consider how the evidence in this respect stands before the Court. The party who makes the motion to have the bill taken off the file, must himself establish his case. I look, therefore, at the affidavit upon which this motion is founded. The only allegation in that affidavit applicable to this point is, that the defendant in the original suit has not yet performed the decree, or had not performed the decree at the time when he filed his bill. He may not have performed the decree, because it may not have been requisite for him to do anything. If it was incumbent upon the plaintiff in that suit to do certain things before it could be required, on the other side, that the defendant should pay the money; it is not sufficient—with reference to the terms of the decree, for the purpose of making out an affirmative case against the defendant—to allege in the affidavit that the decree has not been performed: it would be necessary to go further, and to shew that there had been this default on the part of the defendant. Now, nothing of that sort appears upon the face of the affidavit.

Looking, therefore, at the mere allegation in the affidavit, that the defendant has not

performed the decree; and finding, upon advertent to the decree itself, that the defendant is not bound to pay the money until certain acts are done by the plaintiff; finding no statement in the affidavit, that those acts have been done; considering the onus of proof to be thrown upon the party making the application to have the bill taken off the file,—I am of opinion that a sufficient case has not been made out to sustain that motion. It does not appear to me that there has been any default; it does not appear to me, that, at the time when the bill was put upon the file, it was incumbent upon the plaintiff in the new suit to have paid the money. As that does not appear, I think there is not sufficient to justify me, upon the facts as they now stand, to direct the bill to be taken off the file.

If it should appear, however, upon the result of the inquiry, when the period shall arrive—or now, if the period has already arrived—for the payment of the money, that it has not been paid, and an application is made to me founded on that default, that would lead me to a different consideration of the subject; and I might, under those circumstances, direct, that no further proceedings should take place under the bill of review, till that money was paid.

The present motions must be dismissed; and, I think, that the justice of the case is, that, both motions being dismissed, the costs of each should follow the fate of the application.

1828. } *Ex parte* GRUNDY, in the
November. } *matter of* RUSSELL.

Under a commission of bankrupt issued prior to the 1st of September 1825, a debt, which was contingent at the issuing of the commission, but, before that date, had ceased to be contingent, cannot be proved.

The petition stated, that, by an indenture bearing date the 18th of February 1772, and made between George Russell of the first part, Joshua Grundy and Sarah his daughter of the second part, and Nicholas Grundy and Thomas Russell of the third part,—after reciting, that a marriage was intended to be had between the said George

Russell and Sarah Grundy; and that the said George Russell had agreed, in case the said Sarah, his intended wife, or any issue of his body by her should survive him, as a further provision for her and them, to secure by his covenant the payment of the sum of 2000*l.* to the said Nicholas Grundy and Thomas Russell, or the survivor of them, his executors or administrators, immediately upon such his decease, or within one month after, upon the trusts thereafter stated,—it was witnessed, that the said George Russell, in consideration of the said intended marriage, &c., did covenant with the said Joshua Grundy, his executors and administrators, that, in case the said intended marriage should take effect, and the said Sarah, his intended wife, or any child or issue of any child of her body by him, should survive him the said George Russell, his executors or administrators should and would, immediately upon his decease, as a further provision for her and them, pay or cause to be paid unto the said Nicholas Grundy and Thomas Russell, or the survivor of them, his executors or administrators, the further sum of 2000*l.* upon certain trusts, for the benefit of the issue of the marriage. The performance of the covenant was further secured by the bond of George Russell.

The marriage took effect.—On the 14th of July 1803, a commission of bankrupt issued against George Russell, under which he was declared a bankrupt. He died on the 21st of February 1825, leaving three daughters, the only issue of the marriage, him surviving.

The petition was presented by one of the daughters and her husband. It stated, that a renewed commission had issued in May 1828; that five dividends were made under the original commission in the lifetime of George Russell, amounting together to twelve shillings in the pound; that a considerable sum of money, which had arisen from the estate of the bankrupt, remained to be divided; that proof ought to be admitted in respect of the aforesaid debt of 2000*l.* under the renewed commission, the contingency, upon which the same was payable, having happened; that Thomas Russell and Nicholas Grundy, the trustees named in the indenture, had been long dead, and it was not known which of them had sur-

vived the other. The prayer was, that the petitioner, Joshua Grundy, might be admitted to prove the debt of 2000*l.* under the commission, on behalf of himself and the other *cœstui que trust*, and to receive a dividend thereon.

Mr. Merivale appeared for the petition.

The 56th section of the New Bankrupt Act provides, “that, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person, with whom such debt has been contracted, may, if he think fit, apply to the Commissioners to set a value upon such debt, and the Commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends: provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.”

Here the contingency has happened, and the amount of the demand is ascertained. The clause is retrospective, and applies to commissions existing before the date of the act, as well as to subsequent commissions. The words of the clause are general.

Mr. Russell appeared for the assignees.

This demand is not proveable; it had ceased to be a contingent demand before the act was passed, and would not come within the clause, even if the 56th section extended to commissions previously existing. Here was a demand, which, for a quarter of a century, had not been proveable: and the legislature never meant to give a new existence to such demands. Besides, the 135th section provides, “that nothing herein contained shall render invalid any commission of bankruptcy now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, or affect or lessen any right,

claim, demand or remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued, except as is herein specifically enacted." Now, to make such a debt as this proveable, which was not proveable before, would be to affect rights under the commission, and also rights against the bankrupt. It would lessen the rights of the creditors who had proved before: it would give a new right under the commission to persons who previously had no right under it: and it would take away the right, which the party, having the contingent demand was entitled to, against the assets which the bankrupt might leave behind him. Now, the 135th section declares, that the act is not to have such an operation; except where it is specifically enacted;—that is, except where there are direct, express, and specific words, enacting, that rights shall be affected or lessened. Here there are no such specific words.

The Vice Chancellor was of opinion, that this demand was not proveable, and that the 56th section could not be construed retrospectively: but the petition was ordered to be put in the paper to be spoken to on a subsequent day.

Mr. Merivale cited *Bell v. Bilton* (1), in which it was held that the 55th section was retrospective: and, from the language used by the Lord Chief Justice of the Common Pleas on that occasion, it seemed to be his opinion, that every clause, which was not expressly made prospective only, was to have a retrospective operation.

Mr. Russell, contra.

Bell v. Bilton does not apply, because the decision there did not affect or lessen any right which any person had under the commission, or against the bankrupt at the date of the passing of the act. The annuity was proveable under the commission before the act of 6 Geo. 4. as well as after. If every section, in which the language is not expressly prospective, is to be construed retrospectively, the proviso in the 135th section becomes absurd: for that proviso must then be read thus—"that nothing herein

contained shall affect or lessen any right, claim, demand or remedy which any person now has thereunder, or upon or against any bankrupt against whom any commission has or shall have issued," except so far as is herein enacted by prospective words. Now, clauses expressed in language exclusively prospective, could not possibly be retrospective, and could not affect any right under a previously existing commission: in other words, the proviso will be a declaration, that nothing is to affect an existing right, except what could not possibly affect an existing right.

The Vice Chancellor continued to be of the opinion which he had before expressed. *Bell v. Bilton* did not come within the proviso of the 135th section: and it was too much to say, that every section was to be retrospective, unless it was couched in words which were expressly prospective.

The petition was dismissed with costs (2).

1828. }
August. } In the matter of SHEPPARD.

Construction of the 132nd section of the 6 Geo. 4. c. 16.

The 132nd section of the 6 Geo. 4. c. 16. is not retrospective.

In this case, the creditors under the commission, had, previously to the year 1825, received dividends, amounting in the whole to twenty shillings in the pound; and a surplus remained.

The question was, whether the bankrupt was entitled to have the surplus paid over to him, or whether the simple contract creditors were entitled, under the 132nd section, to have interest on their debts.

The 132nd section provides, that the assignees shall not pay the surplus to the bankrupt, "until all creditors, who have proved under the commission shall have received interest upon their debts, to be calculated and paid at the rate and in the order following; (that is to say,) all creditors whose debts are now by law entitled to

(1) 4 Bing. 615; 6 Law Journ. C.P. 141.

(2) An appeal from this order has been presented and is still pending.

carry interest, in the event of a surplus; shall first receive interest on such debts at the rate of interest reserved, or by law payable thereon, to be calculated from the date of the commission, and after such interest shall have been paid, all other creditors who have proved under the commission shall receive interest on their debts from the date of the commission, at the rate of 4*l.* per centum."

Mr. Montague was for the bankrupt.

The Vice Chancellor was of opinion, that to give interest to the simple contract creditors, would be to affect and vary their rights under the commission, and against the bankrupt. He therefore thought that they were not entitled to interest:

1828. } In the matter of THE ELEC-
December. } TION OF A CORONER FOR THE
COUNTY OF NOTTINGHAM.

A freeholder of the county, having a place in the county, where he has a right to reside, is capable of being elected coroner.

Such a person, being elected coroner, will not be removed from the office, because he has also a residence in a town comprised within the ambit of the county, but not being part of the county, which has been his more usual place of abode.

Quære,—whether a coroner will be removed on account of his more usual place of abode being in a town situate within the ambit of the county, but not part of the county, when no inconvenience has arisen from the circumstance.

This was the petition of *Mr. Shilton*. It stated, that, *Mr. Wright*, the coroner for the Southern Division of the county of Nottingham having died, the election of a new coroner was fixed for the 13th of May; that there have, for time immemorial, been two coroners of and for the county of Nottingham, one of whom has resided in, and usually acted for, the Southern Division, and the other, in and for the Northern Division thereof; that, besides some other persons, whose names were afterwards withdrawn,

the petitioner and *Christopher Swann* became candidates for the office.

That the petitioner, for some years before, and at the time of the decease of *Mr. Wright*, resided, and had ever since continued to reside, and still resides at *Sneinton*, being a convenient place within the Southern Division of the said county, and within one mile of the town of Nottingham; that *Christopher Swann*, for some time before, and at and after the time of the decease of *Thomas Wright*, resided, and did, at the time of the election hereinafter mentioned, really reside, and has ever since really resided at the town of Nottingham, being within the town and county of the town of Nottingham; that, the town and county of the town of Nottingham is, and from very ancient time hath been, a distinct county, having coroners of its own, and being wholly separate from, and independent of the county of Nottingham; and the freeholders and residents of and in the town and county of the town of Nottingham, have not been, as such, either freeholders or residents of or in the county of Nottingham, nor entitled to, nor subject to any rights, privileges, or burdens belonging or incident to the freeholders and residents of and in the county of Nottingham; that *Christopher Swann*, on becoming a candidate for the office, published advertisements thereof in the provincial newspapers circulated in the county and otherwise, in which he described himself as of the town of Nottingham; that, afterwards it was suggested to him, that his residing out of the county of Nottingham might render him ineligible; and he thereupon observed, that, if there were anything in such objection, he could obviate it, by taking lodgings within the county for a short time, and until the election should be over, or to that effect; that, afterwards, and about fourteen days before the day of election, *Christopher Swann* published and circulated another advertisement of his being a candidate, and in such advertisement he described himself as of *Beeston*, in the county of Nottingham; that *William Hurst*, the brother-in-law of *Christopher Swann*, is in the actual possession of a house and premises at *Beeston*, in the county of Nottingham, and duly assessed and rated to the parochial rates of the parish of *Beeston* for the same;

that, about the time of issuing such second advertisement, Christopher Swann went with his wife to the house of his brother-in-law at Beeston, and slept there two or three nights in each week; but, that except as aforesaid, Christopher Swann continued to reside in the town of Nottingham, and to occupy his house, and carry on his business as an attorney there; and that, during such his residence in the house of his brother-in-law, his said brother-in-law continued to reside there; that Swann never described himself as of Beeston, or otherwise than as of the town of Nottingham, except in matters relating to his being a candidate for the said office; that both he and the other members of his family and his friends gave out and declared, that his residence within the county of Nottingham was a temporary residence only, and was with a view to his being elected to the office of coroner for the county; that, at the county court holden on the 12th of May, the petitioner and Swann were both put in nomination for the office; and Swann, being then publicly asked as to his place of residence, declared himself to be of the town and county of the town of Nottingham, and of Beeston in the county of Nottingham; that the petitioner publicly objected to the eligibility of Swann, on the ground of his not being *bona fide* resident in the county of Nottingham, but resident in the town and county of the town of Nottingham, out of the county of Nottingham; and he gave notice to the freeholders, that votes given to Swann would for such reason be thrown away; but that Swann was returned as duly elected, and the return of such election had been in the usual manner transmitted to the High Court of Chancery; that Swann, if he had since resided in any manner at Beeston, or in the county of Nottingham, had done so colourably, and with a view to support his said election; and that his intention, at the time of his election was, and still continued to be, to reside permanently in the town of Nottingham, out of the said county of Nottingham.

The prayer was, that the election and return of Swann might be declared void and set aside, and that it might be declared that the petitioner was duly elected; or otherwise, that Swann might be removed from the office of coroner as not qualified, by

reason of his residence out of the county; and that a writ might be issued for that purpose; and, in that case, that a new writ might be issued for electing a coroner of and for the county of Nottingham.

The allegations of the petition were verified by the affidavit of Mr. Shilton.

Mr. Swann, by his affidavit, stated, that, in June 1821, he purchased a dwelling-house, garden, orchard, out-buildings, and about seven acres of land, at Beeston, which were duly conveyed to him in fee; that, in the month of July 1821, he went to reside upon the premises he had so purchased, and continued to reside there until August 1823; that, during the summers of 1821, 1822, and 1823, he verbally agreed with his brother-in-law, William Hurst, who then occupied a dwelling-house in the town of Nottingham, and has ever since that time continued to occupy the same, to let to him certain apartments in the house at Beeston for a pecuniary rent; and that when he, the deponent, left his house at Beeston in August 1823, he returned to the town of Nottingham to reside, and verbally let the whole of his house and premises at Beeston to William Hurst, as tenant from year to year; and that Hurst had continued to occupy the same, as such tenant, without any lease or agreement in writing; that he, the deponent, some time in the beginning of April last, applied to Hurst to let him, the deponent, live in his said dwelling-house at Beeston in the same way that Hurst lived therein with the deponent, whilst the dwelling-house was in the deponent's occupation; which William Hurst agreed to do, and upon the same terms on which William Hurst had so previously occupied the same; and that thereupon he, the deponent, and his wife, went to his house at Beeston, and occasionally slept there; that the deponent still continues in such possession thereof; and immediately after he had so agreed with William Hurst, published to the freeholders of the county of Nottingham, that his residence was at Beeston, by dating his addresses to them from that place; that it was suggested to him, that his residing out of the county of Nottingham might render him ineligible to the office, and that he thereupon observed, that, if there were anything in such objection he could obviate it by

taking lodgings within the county; but he denied that he observed—"for a short time and until the election was over," or to that effect; and he did at the same time further observe, that, as he did not know whether a residence in the county of Nottingham was required by law or not, he would take apartments in the county for the express purpose of making him legally qualified by law to act as coroner, and of preventing any objection being thereafter made to his eligibility on the ground of his non-residence; and that he did enter into such agreement, and reside and sleep in the county, in manner and for the particular purposes before mentioned. He admitted that, except as aforesaid, he had resided, and still continues to reside in the town of Nottingham, and to occupy his house and carry on his business as an attorney there; and that he never described himself as of Beeston, except in matters relating to his being a candidate for the office; but he denied that he ever gave out that his residence within the county of Nottingham was a temporary residence only; that the town of Nottingham is within the ambit of the South Division of the county of Nottingham, and is the most convenient place for the residence of the coroner for the South Division, inasmuch as it is most centrally situated, and as there is a constant communication from it with all parts of the county of Nottingham, by means of mails, coaches, carriers, and postmen, to the town of Nottingham; and that the residence of the deponent in the town of Nottingham is within a short distance of the county-hall and county gaol, and not more than about four hundred yards from the county of Nottingham;—that the petitioner Shilton resides within about four hundred and fifty yards of the town of Nottingham; and that he has an office in the town of Nottingham, where he usually transacts his business, and where he is usually to be found during the day-time; and that he seldom returns to his residence at Sneinton after breakfast-time in the morning until the evening. He denied that he resided at Beeston colourably, or that he did, at the time of his election, and does intend permanently to reside at Nottingham out of the county of Nottingham; but he admitted that he resides at Beeston aforesaid with a view to support his election;

and that he intends to continue, and is quite willing to continue his residence there, if the Lord High Chancellor should decide that such a residence is legally necessary.

There were affidavits, stating that the coroners for the counties of Norfolk, Northumberland, Kent, York, Lincoln, Worcester, Warwick, Gloucester, and Chester, had often been, and some of them at present were, persons who resided respectively in the cities of Norwich, Newcastle, Canterbury, York, Lincoln, Worcester, Coventry, and Chester, and had no residence in the counties for which they were coroners; those several cities being separate jurisdictions, and forming counties by themselves.

Mr. Sugden appeared to support the petition.

By the 3 Edw. 1. c. 10. it is provided, "that through all shires sufficient men shall be chosen to be coroners, of the most wise and discreet knights, which know, will, and may best attend upon such offices, and which lawfully shall attach and present pleas of the Crown.

The 14 Edw. 3. c. 8. enacts, that the coroner shall have in the county lands in fee, sufficient to answer to all people.

The 28 Edw. 3. c. 16. enacts, "that all coroners shall be chosen in the full County Court, by the commons of the county, of the most fit people who shall be found in the county." The class from whom the choice is to be made, are 'persons in the county,' that is, persons residing in the county. Now, it is clear, that the actual residence of Mr. Swann was not in the county, but in the town of Nottingham, which it completely severed from the county: his occasional residence at Mr. Hurst's house does not constitute a residence in the county, unless a man may be actually resident at one and the same time in two different places.

The notice of a death ought to be communicated to the coroner by the peace officer of the parish. How could a constable be required to go out of his county, in order to give the requisite information? The charge to the county will also be increased, if the coroner may be resident out of the county, as his remuneration is given him in the shape of mileage,

It is in vain to say, that here there is no practical inconvenience. The rule of law cannot vary with the greater or less degree of mischief actually resulting. If the office of coroner may be filled by a person who resides not within the county, but at a distance of five hundred yards from it; it may on the same principle be held by an individual who resides at a distance of five miles.

Mr. Bickersteth, contra.

Mr. Swann, even supposing his residence to be in the town of Nottingham, answers the description of "a person to be found in the county," for the town, though a separate jurisdiction, is locally within the ambit of the county. But how can it be said, that residence in the county is a requisite, merely because the election is to be made by the freeholders, and out of the people who shall be found in the county? If residence in the county at the time of the election be necessary, how comes it not to be expressly required by unambiguous words? Is it sufficient, if he begins to reside as soon as the election has taken place; or must the residence have commenced with the election?

This gentleman has a house in the county belonging to himself, in which he and his family occupy apartments. This is a residence in the county, in the strict sense of the words: and, for all practical purposes, whether at Beeston, or in the town of Nottingham, he is resident in the county.

The general practice with respect to coroners, shews, that the law has never been construed as disqualifying a man for being coroner of a county, because he resides in a town, locally situate within the county, but constituting a county by itself.

The following authorities were referred to:—

- 4 Co. 46, b.
- 2 Inst. 31.
- 1 Lord Raymond, 736.
- 7 Dowling and Ryland, 340.
- Woodward v. Booth, 7 B. & C. 801; s. c.
- 6 Law Journ. K.B. 115.
- Williams v. Pritchard, 4 T. R. 2.
- Kerry v. Richardson, Pop. 16.
- Johnson v. Dealtry, B. & A. 72.

The Lord Chancellor.—The question on this petition has turned on the construction of three statutes, made before the end of the reign of Edward 3: namely, 3 Edw. 1. c. 10; the 14 Edw. 3. c. 8; and the 28 Edw. 3. c. 6. It seems to me unnecessary to refer to the two first: the question, in truth, turns on the 28 Edw. 3. c. 6. The words are—"It is ordained and accorded, that all coroners of the counties shall be chosen in the full counties by the commons of the same counties, of the most meet of the most lawful people that shall be found in the said counties to execute the said office: Saved always to the King and other lords which ought to make such coroners, their seignories and franchises." Now under these words, and looking at the particular situation of Mr. Swann, was he capable of being elected?

I do not find, that personal inhabitation at the time of the election is required by the words of the statute. This gentleman was a freeholder; he had lands in the county, and a place in it, where he might reside and perform the duties of his office. On the language of the act, my opinion is, that a freeholder of the county, having lands in fee in the county, and a place within it, where he has a right to reside, is capable of being elected. The election of Mr. Swann, therefore, was not void.

One branch of the prayer of the petition is, that Swann may be removed from the office on account of his non-residence.

It was argued on his behalf, that a residence in the town might be considered as a residence in the county. But the charter says, in the most expressive terms, that the town, and a certain distance around it, shall be severed from the county of Nottingham, and shall be a distinct county by itself. A residence, therefore, in the town of Nottingham, cannot be considered as a residence for this purpose within the county.

Mr. Swann has a place within the county, where he is entitled to reside: he says, that he will reside there; and it does not appear that any inconvenience had been sustained, when this petition was presented. To remove him under such circumstances, would be going too far. It is not necessary to anticipate what the decision would be, if this gentleman should continue to re-

side out of the county, and especially if any inconvenience should be sustained, and a petition should be presented by the freeholders. Generally speaking, the presenting of such a petition would have the effect of depriving the county of the services of those who are best qualified for the office.

Let the petition be dismissed; but, as the question turns on the construction of an act of parliament, which has never been before the Court, I will not give costs.

1828. } TAYLOR v. BARCLAY.

It is illegal to purchase obligations or securities purporting to be granted by the government of a foreign country, which government has not been recognized by the King of England.

A court of equity will not entertain a bill of discovery in aid of an action to recover money, alleged to have been obtained from the plaintiff by the fraud of the defendants, where the transaction, in which the fraud was practised, was a contract for the purchase of securities purporting to be granted by a foreign government not recognized by our own.

If a foreign government has not been recognized by the King of Great Britain, the Court will, upon demurrer, consider such government as not recognized, notwithstanding an allegation in the bill, that the government has been recognized by us.

The transactions stated in this bill were substantially the same with those which were brought under the consideration of the Court in *Thompson v. Barclay* (1). The present bill, however, was a bill not for relief (as in the former case), but for discovery in aid of an action at law, which the plaintiff intended to bring in order to recover the money which the defendants had obtained from him, as he alleged, by fraud.

The bill, after stating that six of the defendants constituted the firm of Barclay, Herring, Richardson & Co., and the other two of them the firm of J. and A. Powles & Co., alleged, that, about August 1825, Barclay, Herring, Richardson & Co., re-

presenting themselves to be the agents of the government of the federal republic of Central America, (which federal republic then was and still is a sovereign and independent state, recognized and treated as such by his Majesty, the king of these realms, and in a state of amity with this country,) publicly announced their intention of raising a loan for the said republic by open competition, to be paid by instalments;—that Barclay, Herring, Richardson & Co. proposed to raise such loan upon the security of the bonds or special obligations of the said government, whereby the said government agreed to pay the sums of money mentioned in the said bonds or special obligations, with interest thereon, to the holders thereof;—that Barclay, Herring, Richardson & Co. represented, that the said bonds or special obligations were not in the first instance to be delivered to the subscribers to the said loan, but that in lieu thereof certificates of obligations (2), purporting to be issued by the said government, should be given to them upon payment of the first instalment, and that such certificates would contain a receipt for the said first payment, and blank forms of receipts to be filled up and signed, on payment of the subsequent instalments respectively; and that, on payment of the last instalment, and on production of the certificates by the then holders thereof, to the then contractor for, or buyer of the loan, special obligations of the said government, equal in amount or value, would be delivered to the holders in exchange for such certificates;—that Barclay, Herring, Richardson & Co. stated, that they were in possession, as such agents as aforesaid, of certificates of obligation of the said government to the amount of 1,428,571l. 8s.; and in or about August 1825, they announced, by public advertisement, their intention of disposing of the said certificates of obligation to such persons who should, on or before the 22d of August, make the highest tender to them.

The proposal of Powles & Co. to become the purchasers, was then stated in the

(2) What are here called the "certificates of obligation," appear to have been merely the scrip receipts. In the former bill these receipts were set forth at length; in the present bill they were not set forth; probably, because, as they were headed "six per cent. loan," a question of usury might have been raised.

(1) See 6 Law Journ. Chan. 93.

same manner as in the former bill (3), with this difference only, that (in order, probably, to avoid any objection on the ground of usury,) the price which they offered, and which in the former bill was stated to be 68*l.* for each certificate of 100*l.*, was not specified.

The bill then stated, that it was afterwards announced publicly that Messrs. J. and A. Powles & Co. were the best bidders, and had contracted for the said loan; and various advertisements and other public notices were issued, in all of which the said two firms were represented as distinct parties to the said transaction, having no common or joint interest therein;—that Messrs. J. and A. Powles & Co. being intimate friends of the plaintiff, informed him that they had just entered into a contract to take the Guatemala loan, which they fully expected would bear a premium, and strongly advised him to purchase of them a portion of such loan; and that, upon such representation, the plaintiff was induced to purchase of them certificates of obligation of the said government for the sum of 8,500*l.* at a price exceeding that at which the same had been purchased by Messrs. J. and A. Powles & Co.;—that, on or about the 27th of August 1825, plaintiff duly paid the first instalment of 10*l.* per cent. on the amount of the certificates of obligation so purchased by him, amounting to the sum of 850*l.*, and thereupon, the said Messrs. J. & A. Powles & Co. delivered to the plaintiff seventeen certificates of obligation for the sum of 500*l.*, each distinguished by a certain number, and all of them dated on or about the 27th August 1825, and signed by J. and A. Powles & Co.; whereby, upon payment of the remainder of the purchase-money, which was declared to be payable in nine instalments, the last of which would fall due on the 10th of August 1826, J. and A. Powles & Co. agreed to deliver to the bearer special obligations of the said federal republic of central America for the amount specified in the certificates;—that the plaintiff regularly paid the second, third, fourth, and fifth instalments, amounting in the whole to 3400*l.* 8*s.* 6*d.*; and that all these several payments were made by the direction of said Messrs. J. and A. Powles

& Co. into the banking-house of Messrs. Barclay, Tritton & Co. on the account and to the credit of Messrs. Barclay, Herring, Richardson & Co.;—that, at the time when the sixth instalment became due, he offered to pay it, but was prevented from so doing by Messrs. J. and A. Powles, who advised him not to make such payment, on account (as they asserted,) of a disagreement having taken place between Barclay, Herring, Richardson & Co. and the said government, which rendered it not safe or expedient, until such difference had been settled, to make any further payment; and the plaintiff, although then perfectly ready to make such payment, in consequence of such advice, refrained from so doing;—that the said advice was given by the said Messrs. J. and A. Powles & Co. to the plaintiff with the view of causing him to commit a forfeiture of the instalment already paid by him;—that, at the times of his making those several payments, and when the sixth instalment became due, he understood and believed that Messrs. Barclay, Herring, Richardson & Co. were duly authorized, as the agents of the said government, to make the said contract for the loan, and that the said Messrs. J. and A. Powles & Co. were *bonâ fide* the contractors for the said loan;—that he hath lately discovered, and the fact is, that Messrs. Barclay, Herring, Richardson & Co. were not authorized by the said government to make the said contract which they proposed to make, or to bind the said government thereby; and that the said defendants, Messrs. J. and A. Powles, well knew that the said Messrs. Barclay, Herring, Richardson & Co. were not authorized to make the same, or to bind the government thereby;—that he hath recently discovered, and the fact is, that the representations made by the said defendants, with respect to the nature of the contract entered into between them, for the sale and purchase of the said certificates of obligation, were untrue; and that, instead of Barclay, Herring, Richardson & Co. having sold the said certificates publicly by tender to the highest bidder, as they professed, it was privately and clandestinely arranged and agreed between J. and A. Powles & Co. and Messrs. Barclay, Herring, Richardson & Co., that Messrs. J. and A. Powles & Co. should become the nominal contractors for

(3) See 6 Law Journ. Chanc. 93.

the loan and purchasers of the said certificates, but that Barclay, Herring, Richardson & Co. should be secretly partners with them in the said transaction, and should have a larger interest therein than Messrs. J. and A. Powles & Co.; and Messrs. Barclay, Herring, Richardson & Co. were in fact themselves the purchasers of 1,000,000*l.* of the certificates; and it was agreed between the said Messrs. J. and A. Powles & Co. and Messrs. Barclay, Herring, Richardson & Co. that the aforesaid arrangement between them should be kept secret from all persons who should purchase such certificates, and from the public in general;—that such arrangement or agreement was acted upon, and the whole of the said certificates of obligation were sold by Messrs. J. and A. Powles & Co. in their own name, but on account of themselves and of the other defendants;—that the conduct of the defendants was a fraud upon the persons who purchased such certificates in ignorance of the real nature of the transactions, and, amongst others, upon the plaintiff;—that, until after the sixth instalment had become due, he did not know the real nature of the transactions, and had no means whatever of becoming acquainted therewith;—that, the sum of 3400*l.* 8*s.* 6*d.* having been obtained from him by such fraud, he is entitled to call upon the defendants to repay the money so advanced by him, with interest thereon, at the rate of 5*l.* per cent. from the date of each advance;—and that, in order to compel payment, he is about to commence an action at law against the defendants, but he is unable to maintain such action without a discovery from the defendants of the several matters in the bill mentioned, and without an inspection and examination of the books, documents, and writings, now in the possession or power of all or some or one of the defendants relating to these matters.

The bill also charged, that the monies received by Barclay, Herring, Richardson & Co. on account of the said loan were not remitted by them to the government of Guatemala, or laid out on their account, as ought to have been done, if the said contract had been subsisting; but the same, or some considerable part thereof, were shared between the said last-mentioned defendants and J. and A. Powles & Co., pursuant to the secret arrangement and agreement.

To this bill the defendants put in a general demurrer, shewing for cause of demurrer, “that the complainant has not, by his bill, made such a case as entitles him in a court of equity to any discovery whatever from these defendants, touching the matters in the said bill mentioned.”

Mr. Sugden and *Mr. Pepys* argued in support of the demurrer.

This case is the same with that which was formerly decided under the name of *Thompson v. Barclay*. That was a bill for relief; this is a bill for discovery in aid of an action: but the demurrer was allowed in the former case, on the ground, that, the government of Guatemala not being acknowledged by this country, the whole transaction was illegal. As, therefore, a court of equity would not interfere to relieve, neither will it give discovery in aid of any other proceedings. To escape from that principle, the plaintiff has introduced an allegation, that the government of Guatemala is recognized by this country. But that allegation is notoriously false; and the Court is presumed to know, and is bound to take judicial notice of the relations subsisting between this country and other countries. Lord Eldon did so in the case of *Jones v. Del Rio*.

It is a fact, that the government of Guatemala has never been recognized by this country. On the contrary, there are existing treaties between us and Spain, which give us the right of cutting logwood in some part of the country, and acknowledge the rest of that alleged state as belonging to Spain. There is also a treaty between us and Spain, by which, in reference to the revolts of the subjects of Spain in South America, we engage to prohibit the export of arms and munitions of war from this country, for the benefit of those subjects so in a state of revolt. So that we not only have the fact, that we have ourselves acknowledged that portion of territory, which is supposed now to be under this new government, as belonging to the parent country Spain, but, we have also entered into a treaty, by which we have engaged not to permit the exportation from this country of articles of war which might assist those revolting subjects. Suppose that this bill had stated something which it called an act of parliament, and had

said, "By an act of parliament, passed by the authority of his Majesty, the king of these realms, who, by the constitution of this country, has a sufficient authority to give validity to the said act, it was enacted" so and so. We should have demurred; the plaintiff would say, "You admit the facts stated; and I have stated, that the king alone by the constitution can pass an act of parliament." We would reply, "To be sure you have said so, but you have stated that in which the Court will correct you at once, and tell you that the fact is not so." In a common case, where a fact is not alleged, or is falsely stated, on the face of the bill, you are forced to plead: but here the Court knows the fact; it supplies the true fact from its general knowledge of state affairs; and it is not a mis-statement of such a fact on the face of the bill, that can exclude the knowledge of the Court. The bill must be considered to be precisely the same as if this false allegation were not contained in it. The Judge, knowing judicially that the allegation is not true, must treat it as a nullity.

Mr. Bickersteth, Mr. Pemberton, and Mr. Hill, contra.

It cannot be disputed, that the case, stated on the record, is such as, supposing the facts therein alleged to be true, would enable the plaintiff to maintain an action at law against the defendants. It is said, however, that there are certain objections arising out of facts, within the cognizance of the Court, which would prevent the parties from maintaining their action. And that, inasmuch as no action can be maintained in a court of law, no discovery can be enforced in equity in aid of such a proceeding. It is said that, supposing this country has not recognized the state of Guatemala, it follows as a necessary consequence, that the bill cannot be supported; and it is said, that the Court is bound to take notice of what the defendants say is notorious, although the record contains an allegation contrary to that notorious fact; and this allegation, we are told, is like an assertion that there is an act of parliament which has no existence, or a statement contrary to the known law, which statements would not bind the Court, because the Court would know them to be utterly untrue and ground-

less. But what is the kind of notoriety, upon which the defendants rely in this case?—that Guatemala has not been treated as a recognized government. We allege the contrary. In October 1823, that which had been done practically by our government for a series of years, in their permitting all kinds of communication and intercourse between the revolted colonies of Spain and our subjects, was legally and formally sanctioned by sending consuls to every part and place in Spanish South America in which the protection of British commerce required the presence of such residents. Now, the grounds, upon which Lord Eldon proceeded in *Jones v. Del Rio*, were grounds totally inapplicable to the circumstances, out of which the present question arises. The argument in *Jones v. Del Rio*, took place in the month of July 1823; and there Lord Eldon, without deciding the point, suggested great doubts about it. He expressed the inclination of his opinion on the subject; but the grounds of that opinion and of those doubts were these:—not that the transaction in question had taken place between an unrecognized government and the subjects of this country, but that this country was at that time in a state of amity with Spain, of which country Peru was a part; and, although, in point of fact, Peru might be actually severed from Spain, or no longer subject to the Spanish sovereignty, still, until the king's government had done something to recognize that separation, no court of justice could recognize it. Is that the case now? Will any man argue, that, after commerce has been permitted to be carried on with Guatemala year after year, after resident ministers have been actually sent to various ports and places in South America, that there is still that difficulty which struck the mind of Lord Eldon? Again, in the king's speech in the year 1824, we find a distinct recognition of the same fact. His Majesty says, "With respect to the provinces of America, which have declared their separation from Spain, his Majesty's conduct has been open and consistent, and his opinions have been at all times frankly avowed to Spain and to other powers. His Majesty has appointed consuls to preside at the principal ports and places of those provinces for the protection of the trade of his subjects. As to any farther measures his

Majesty has reserved to himself an unfettered discretion, to be exercised as the circumstances of those countries and the interests of his own people may appear to his Majesty to require." It will be said, perhaps, that there is no diplomatic minister of Great Britain appointed to this particular province or state, and that we have no treaty with it. But is it necessary that there should be a resident minister in, or an actual subsisting treaty with, a foreign country, in order to give validity to the contracts of subjects of this country with subjects of that country? Have we any resident minister in Hayti and Timbuctoo, or any of the central provinces of Asia? If nothing has taken place between this country and those states, or any other foreign country, to prevent friendly intercourse; no treaty of commerce, no express recognition, no interchange of courtesies between the two governments can be necessary to legalize transactions between the subjects of the one government and the subjects of the other: *Vattel's Law of Nations*, book ii. chap. 2.

Further, even if the original contract were illegal, it does not follow that the plaintiff could not maintain an action for the recovery of his money. If a contract be illegal as against public policy, or against the positive words of a statute, so long as that contract remains unexecuted,—so long as there remains a single thing to be done to complete it,—either party has a *locus penitentiae*, and is entitled to rescind it and to call upon a court of law to enable them to do so effectually. That rule is to be collected from all the cases, and is laid down in *Schoyn's Nisi Prius*, where the authorities are collected under the title *Assumpsit*, p. 82. In *Aubert v. Walsh* (3), an action for money had and received was brought to recover back the premiums which the plaintiff had paid to the defendant upon an instrument or policy, dated the 15th of September 1808, by which, in consideration of forty guineas for 100*l.*, and, according to that rate, for every greater or less sum received of B. Aubert, jun., the defendant promised to pay the plaintiff the sum of money which he had thereunto subscribed, without any abatement whatever, in case a cessation of hostilities between

Great Britain and France did not take place, followed up by a peace previous to the recommencement of hostilities, or preliminaries of peace were not signed, on or before 1st of September 1810. There was, therefore, a wager upon the continuance of the relation of war as between this country and France; which, as being against public policy, was considered to be illegal. And, after a full review of all the authorities, and a learned argument, it was decided by the Judges, that the party was entitled to recover back the money, because there was a sound distinction between contracts executed and contracts executory; and that, until the contract was executed, the party, who desired to retire from it, had a right to do so. Now, according to the facts stated here, this case is one of a contract remaining to be performed. What was the contract? The contract was, that, in consideration of certain sums to be paid by the plaintiff at certain intervals, the defendants would deliver over certain securities to the plaintiff. That was not to be done, until all the instalments were paid. Before they had all been paid, the plaintiff is induced, according to the representation on this bill, to retire from it. Having done so, he is told, "This contract, in respect of which you have made certain payments, is illegal; the policy of the law will not permit us (anxious as we are) to discharge ourselves of the obligation that we have incurred." Has not the plaintiff a right to come into a court of justice and say, "I have been fortunate enough to discover my mistake before I had gone to the full extent to which I might have gone. I do not desire to insist on the performance of an illegal contract; but give me back that which I have paid under this mistake, and which has been paid as a part consideration for that contract still remaining executory, and utterly unperformed by the defendants in any one part."

Mr. Sugden, in reply.

It is unnecessary to enter into the question, as to whether particular transactions do or do not amount to a recognition of the government of Guatemala; because, the Court can at once send to the proper officers of state in this country and ask the simple question of fact, is or is not the government of Guatemala recognized by England as an

independent state?—How is the fact? Up to this moment we have recognized but three of the sovereign states of South America,—Mexico, Colombia, and Buenos Ayres. How have we recognized them? Why, by solemn treaties entered into with them, and by the admission of ministers residing here representing those sovereign states. In a case of *Byerly v. Thompson*, which related to a contract with the Colombian government (and let it be remembered that a consul was sent to Colombia, according to that circular of 1823), an application was made to the Lord Chancellor by Mr. Shadwell; and the indorsement on his brief is, “The Lord Chancellor refused the application, because, he said, he could not take notice of the republic of Colombia. June 4, 1824.” Upon principle therefore, as well as authority, there is entirely an end to the question which has been raised on the other side.

Vice Chancellor.—I wish to know if the counsel for the plaintiff mean to put it as at all doubtful, whether the state of Guatemala has been recognized as an independent state; because, if they do so, I will have that point ascertained from the best authority. When it is said that Judges have a judicial notice of these affairs, it is meant that there are some matters of such public importance, that those in the king's courts will not act otherwise than in unison with the government. Therefore I will have the matter inquired into, if there is a dispute about it.

On a subsequent day, the Vice Chancellor stated, that the republic of Guatemala had not been recognized by this country; and, for that reason, the demurrer must be allowed.

1828. } ROBINSON v. DICKENSON.

A & B, in contemplation of marriage, made a settlement of real estate belonging to B, the wife, and of personality belonging to the husband: a marriage was solemnized; but, some time afterwards, it was discovered to be void: the parties then executed a deed purporting to revoke the settlement, and, some

time afterwards, executed, in contemplation of marriage, a new settlement, altogether different from the former, as to the provisions in favour of issue:—Held,

That, under such circumstances, the first settlement was not binding on the parties; and that the rights of the issue were regulated by the second settlement.

The bill was filed by Thomas Robinson and Frederica his wife.

On the 10th of August 1798, Dame Eliza Boughton, the mother of the female plaintiff, intermarried with Sir George Charles Brathwaite. At the time of such marriage, the said Eliza was an infant; but a licence was duly procured for such marriage, and the same was solemnized, by and with the consent of the persons who were by the Court appointed her guardians.

By indenture of settlement, bearing date on the 6th of August 1798, and made and executed by and between George Charles Brathwaite of the first part, Eliza Boughton and the persons appointed her guardians of the second part, and certain other persons of the third part,—after reciting that the said Eliza Boughton was, under and by virtue of the will of Sir Edmund Boughton, bart., seised for her life in possession, with remainder to the heirs of her body, in tail, with divers remainders over, of divers hereditaments in the county of Hereford, subject to a mortgage to Peter Holford, for 25,000*l.* and interest; and that, upon the treaty for the intended marriage, it was agreed that these hereditaments, when Eliza should attain the age of twenty-one years, should be settled upon the said George Charles Brathwaite for life, with remainder to Eliza for life; remainder to the issue of the intended marriage, in manner therein mentioned; and that, in consideration thereof, G. C. Brathwaite had agreed, that he would pay, or effectually secure the amount in value of 36,000*l.*, in manner therein mentioned,—it was witnessed, that from and after the solemnization of the marriage, the trustees, who were the parties of the third part, should stand possessed of 8000*l.* Navy five per cent. Bank Annuities, (valued then at 6100*l.*) upon trust, to pay the dividends to Eliza Boughton during her life, to her separate use; after her death to George C.

C. Brathwaite, the father of the husband, for life; and George Charles Brathwaite thereby covenanted to pay or transfer, within eighteen months to the trustees, 29,900*l.* (being the residue of the 36,000*l.*) in money or stock, upon trust to pay the dividends to John Brathwaite during his life; and after his death to G. C. Brathwaite for life. After the expiration of those prior interests, the trustees were to stand possessed of the 8000*l.* Navy five per cent. stock, and the 29,900*l.*, upon trusts for the benefit of the issue of the marriage, subject to a power of appointment.

The marriage was solemnized some time afterwards.

Miss Boughton, who was supposed to be the natural daughter of Sir Edward Boughton, by a woman commonly called Davies, attained twenty-one, suffered the recoveries of her real estate, and settled it, not exactly according to the articles, but with some variations.

Colonel Brathwaite took the name of Boughton, and became Sir George Brathwaite Boughton.

After this, it was discovered that Mrs. Davies, the mother of Lady Boughton, had a husband living at the time of the marriage of her daughter; and it was therefore apprehended that the marriage was illegal and void, on account of its having been solemnized during her minority, without the consent of the person, who, being the husband of her mother, was *prima facie* her legal father. Accordingly deeds were prepared for the purpose of declaring all the former settlements void and at an end, and with a view to relieve each party from all contracts for marriage settlement, or otherwise.

One deed, which bore date the 16th of July 1800, was executed by and between Sir George Charles B. Boughton of the one part, and Eliza Boughton of the other part. It recited the indenture of the 6th of August 1798; that the marriage had taken place; that the discovery of its invalidity had been made; and that, inasmuch as the indenture of the 6th of August 1798, was made and executed, and the marriage was contracted and attempted to be solemnized, without the consent of John Kaye, the father and natural guardian of Eliza Boughton, it was considered and understood that the said supposed marriage,

between Sir George Charles B. Boughton, and Eliza Boughton, and also the said recited indentures, and all other settlements and contracts, or agreements for settlement whatsoever, made, entered into, or executed in contemplation or consideration of such marriage, were and was absolutely null and void: and that Sir G. C. B. Boughton and Eliza Boughton were then at full liberty either to marry again, or to remain single and unmarried, as they might think proper; and that, if Sir G. C. Brathwaite Boughton, and Dame E. B. Boughton, should determine to marry again, then that they were competent and at full liberty, either before or after such new marriage, to enter into, and make such other articles or settlements, of or concerning their estates or fortunes, or to refuse, or omit making any such articles or settlements as they might think proper. It also recited, that the before-mentioned capital sum of 8000*l.* Navy five per cent. annuities, then remained vested in the names of William Fulke Greville, Richard Sandilands, Thomas Coutts, and Edmund Antrobus, (the trustees,) but no part of the before-mentioned sum of 29,900*l.*, or of stock to that amount, and of that value had been paid or transferred to them, pursuant to the covenant; that the said G. C. B. Boughton, and Eliza Boughton, were agreed and determined not to marry again upon the terms, or under any of the conditions or engagements for making settlements mentioned in the before-recited indenture; and, in order that, if they should thereafter determine to marry again, there might be no reason or pretence to contend, insist, or suppose that such second or new marriage was agreed upon, or had and solemnized upon any such terms, or under any such conditions or agreements, for making settlements as aforesaid, they had mutually and respectively agreed to rescind, revoke, and declare absolutely null and void the before-recited indenture, and all and every the covenants, contracts, agreements, trusts, powers, provisos, and declarations therein contained; and George Charles Brathwaite Boughton had agreed to release Eliza Boughton from all sums of money which had been paid to or received by her, for or on account of the dividends and annual produce of the before-mentioned sum of 8000*l.* Navy five per cent. annuities. The

deed then witnessed, that, in pursuance of the said determination and agreement, and for divers other good causes and considerations, they, George C. Brathwaite Boughton and Eliza Boughton, did thereby severally and respectively rescind, revoke, and declare absolutely null and void the before-recited indenture of settlement, and all and every the covenants, contracts, agreements, trusts, powers, provisos, and declarations therein contained; and Geo. Charles Brathwaite Boughton and Eliza Boughton, did thereby severally and respectively order, direct, and appoint, that William Fulke Greville, Richard Sandilands, Thos. Coutts, and Edmund Antrobus, their executors, administrators, and assigns, should from thenceforth stand and be possessed of, and interested in the sum of 8000*l.* Navy five per cent. annuities, and the dividends or annual proceeds thereof, or to arise therefrom, in trust only for George C. Brathwaite Boughton, his executors, administrators, and assigns, and to assign, transfer, and pay the same, and every part thereof respectively, unto him and them, or as he or they should direct or appoint; and George Charles B. Boughton did fully release unto Eliza Boughton, her executors, and administrators, all sums of money, which, at any times since the said marriage was so intended or attempted to be had and solemnized between him and her, she or any persons on her account, or by her order or directions, had received out of the dividends or annual produce of the 8000*l.* Navy five per cent. annuities.

After the execution of the last-mentioned deed, Eliza Boughton, and Sir George C. Brathwaite Boughton, remained single and unmarried two years; at the expiration of which time they agreed to re-marry, not however upon the terms on which they had formerly intended and agreed to marry, but upon different terms, and upon an entirely new settlement, both of their real and personal property. They accordingly re-married in 1802. Previously to, and in contemplation of such re-marriage, an indenture, bearing date the 3rd of April 1802, was made and executed by and between the said Sir G. C. B. Boughton of the first part, Eliza Boughton, by the description of Eliza Boughton, otherwise Eliza Kaye, otherwise Eliza Davies, spinster, of the second part,

and William Fulke Greville, Thomas Coutts, and Sir Edmund Antrobus of the third part: whereby, after reciting that a marriage was intended to be had between Sir G. C. B. Boughton, and Eliza Boughton; and that, upon the treaty for such marriage, it was proposed and agreed by and on the part of George C. B. Boughton, that, in consideration of the said marriage, and of a settlement agreed to be made by Eliza Boughton, of all her freehold estates in the county of Hereford, to such uses, and in such manner as were mentioned in a certain indenture of even date with the now reciting indenture, he, George C. B. Boughton, would secure to be transferred or paid unto William Fulke Greville, Thos. Coutts, and Edmund Antrobus, 8000*l.* Navy five per cent. annuities, and 29,900*l.* money, or so much stock as should be of the full value of 29,900*l.*,—it was witnessed, that G. C. B. Boughton did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with William Fulke Greville, Thomas Coutts, and Edmund Antrobus, their executors, administrators and assigns, that, in case the said then intended marriage between him, G. C. B. Boughton, and Eliza Boughton, should take effect, then he would, within the space of twelve calendar months after the solemnization thereof, cause to be assigned and transferred unto the said trustees the sum of 8000*l.* Navy five per cent. annuities, standing in the joint names of William Fulke Greville, the Rev. Richard Sandilands, clerk, and the said Thomas Coutts, and Edmund Antrobus; but to which said capital sum of 8000*l.* Navy five per cent. annuities, he, G. C. B. Boughton, was beneficially entitled for his own absolute use and benefit; and further, that if the said then intended marriage should take effect as aforesaid, then he, G. C. B. Boughton, his heirs, executors, or administrators, should and would, within the space of three years next after the death of his father, John Brathwaite, pay or transfer to the said three trustees the sum of 29,900*l.*, or an amount of stock of equal value. The first trusts declared by this deed were to pay the dividends of the 8000*l.* Navy five per cents. to the wife for her separate use, and after her death, to the husband for life; and to pay the dividends and interest of the

29,900*l.* to the husband during his life. The subsequent trusts as to the 8000*l.* and the 29,900*l.* were,—in case there should be but one child of the body of the said G. C. B. Boughton, on the body of Eliza Boughton begotten, to raise and levy for the portion of such only child, such sum, not exceeding in the whole 15,000*l.*, as the husband and wife should jointly appoint; and, in default of such joint direction or appointment, then as the husband alone should appoint; and, in default of such appointment, then to raise for the portion of such only child the sum of 15,000*l.*; such portion to become a vested interest at the time fixed by the deed of appointment, or, if there was no appointment, to vest in and be paid to a son at twenty-one, and in or to a daughter on her attaining that age or marrying. Other trusts were declared in the event of there being more than one child of the marriage; and there was a proviso, that if there should be only one child, who should live to attain a vested interest in his or her portion, such child should not have more than 15,000*l.* The residue of the stock and monies was to go to the husband absolutely, if he survived his wife, or, if she was the survivor, to such persons (subject to the wife's life interest in the 8000*l.* stock) as the husband should appoint, and, in default of appointment, to the wife absolutely.

The plaintiff, Frederica, was born in 1805, after the second marriage. Two other children were also born, but they died in their infancy, and in the lifetime of their father.

In 1806, a suit was instituted by Sir G. C. B. Boughton and his wife, and Caroline Boughton and Lucy Boughton, her sisters, for the purpose of having the will of Sir Edward Boughton established, and the accounts of his real and personal estate taken.

After the birth of the present plaintiff, Frederica, a supplemental bill was filed.

Sir G. C. B. Boughton died in March 1809, without having made any appointment of any part of the 8000*l.* stock, or of the 29,900*l.*

In March 1810, the widow, Lady Boughton, intermarried with Mr. Dickenson, and on that occasion she executed an instrument

by which she affected to settle the 8000*l.* stock, and the 29,900*l.*

In the suit which had been instituted, an issue was, at the hearing, directed to try whether the first marriage was valid. The marriage was found not to be valid; and, on the cause coming on upon the equity reserved, a case was directed for the opinion of the Court of Common Pleas on several points, the object of which was to ascertain which of the settlements of the real estate was at law the valid settlement. A certificate was given(1), declaring the first settlement of the real estate to be the existing valid settlement.

No further proceedings were had in that cause, till after the marriage of Frederica with Mr. Robinson, when they filed their bill, insisting, that it was not competent for Sir G. C. B. Boughton, and Eliza Boughton, upon the occasion of their new marriage, to revoke the indenture of settlement of the 6th of August 1798, and the covenants and agreements therein contained; and that the several deeds and instruments whereby they revoked, and attempted to revoke the said last-mentioned indenture of settlement, and the covenants and agreements therein contained, and more especially the provision thereby made for the issue of such marriage, were null and void; the more especially as the indenture of settlement of the 6th of August 1798, was an actual settlement of money made in consideration of a marriage which ultimately took place, though not within the period originally contemplated between the parties.

The prayer was, that the trusts of the indenture of the 8th of August 1798, might be carried into execution, and the rights and interests of all parties under the same ascertained; and especially that it might be declared, that, by virtue of such settlement, the plaintiff, Frederica, was, or, on her attaining the age of 21 years, would become entitled to the 29,900*l.*, with interest thereon since the death of her late father; and also to the 8400*l.* four per cent. annuities, (the produce of the 8000*l.* Navy five per cents.) subject nevertheless to the power of appointment in the said indenture of settlement mentioned.

(1) See *Boughton v. Sandilands*, 3 Taunt. 342.

There was also an alternative prayer for the execution of the trusts of the second settlement, if it should be held to be the valid one.

The defendants by their answer insisted, that it was competent for Sir G. C. B. Boughton, and Eliza Boughton, upon the occasion of their re-marriage, to revoke the indenture of settlement of the 6th of August 1798, and the covenants and agreements therein contained; and that the indenture of the 16th of July 1800, was a valid revocation of the preceding indenture of settlement; and that the said indenture of the 3rd of April 1802, was a valid settlement.

The question in the cause was, whether, as to the 8400*l.* four per cent. stock, and the 29,900*l.*, the first settlement or the second was to prevail.

Mr. Sugden and *Mr. Phillimore*, for the plaintiffs.

The Court of Common Pleas has decided, that, with respect to the real estate, the first settlement is the valid one: *Boughton v. Sandilands*. Though the Court had not before them the settlement of the money, the same principles must rule every part of the case. Indeed, it would be a fraud, if the settlement were binding as to one part of the property—the lady's estate, and not binding as to the husband's. The settlement of the real estate being unquestionably the valid settlement in law, and the second settlement being totally void at law, what equity can the wife have to set up the settlement, which is at law void, against the valid settlement, and the issue claiming under it? The uses and trusts declared by the first settlement, were to arise from and after the marriage of the parties: to give them effect, it is not necessary that the marriage should take place immediately; whenever it does take place, the uses and trusts arise.

Mr. Shadwell and *Mr. Pemberton* were for the defendants.

When the Court of Common Pleas held, that the first settlement was valid, they decided merely that the legal estate passed, and that the subsequent contract, and acts of the parties could not at law annul that con-

veyance. But here is a contract made before marriage: afterwards, and before marriage, they agree to annul that contract, and they do actually marry upon terms totally different. Have not all the parties to the contract a power to vary it, so long as all are competent to act for themselves? The legal conveyance was executed under a mistake of their actual situation: and though it passed the estate at law, that legal estate must be bound by the trusts of the new agreement.

The Lord Chancellor.—The material question in this cause relates to the personal property; and that question depends upon the power which the parties had to revoke the settlement of August 1798.

So far as relates to the 29,900*l.* the settlement was a covenant on the part of Brathwaite to pay, within a certain time after the marriage, that sum to the trustees upon the trusts mentioned: and the question is, whether, afterwards, the parties being of full age, and under no disability, and no marriage having taken place, it was not competent to them, by mutual agreement to put an end to that contract. I am of opinion, that there is no principle of law or equity to prevent them from putting an end to a covenant of that description.

It was argued that the decision in *Boughton v. Sandilands* was adverse to this opinion: but in fact, that case has nothing to do with the present question.

At the conclusion of the argument, the Lord Chief Justice made the following observations:—

"The cases cited for the defendant are very strong to put the operation of a fine or recovery upon the will of the parties; and to guard against that it is, that all settlements are made to give the use to the settlor until the marriage: if that intermediate use were not limited, the settlee might alien before the marriage. No argument has been raised from the cases of contracts for the sale of goods, for building houses, or the like. Such contracts, whether under seal or not under seal, if they proceed on a clear mistake on both sides, are void. Suppose a man and woman covenant to marry, both being married, but both understanding their husband and wife to be dead:

would not that covenant be void? And here, if, instead of a conveyance having been actually made, the contract had still rested in covenant, Sir G. Boughton would never have had the estate: so that it all rests upon the difference between a covenant and an actual legal conveyance."

It is clear, therefore, that the principle of the decision of the Common Pleas, has no application to the question, as to the covenant with respect to the 29,900*l*.

Another important consideration arises; the parties intended to put an end to the whole arrangement—to put an end to it, as to the realty, as well as in respect of the personality; and if it should turn out that they were mistaken as to their power to put an end to it as to the realty, it might seem hard to put an end to it as to the personality. That makes it necessary to consider the question with respect to the real estate.

At the period when the settlement of Lady Boughton's real property was made, the parties considered that they were actually married; and it was in contemplation of that supposed actual state of things, that the settlement was entered into. That turned out to be a mistake: the whole proceeding was founded in misapprehension. Under such circumstances, this Court would not consider that the settlement ought to have effect. The judgment of the Court of Common Pleas was founded on the principle, that, at law, the estate actually passed by the conveyance; and had the transaction rested in covenant, even a court of law would have refused to give effect to that covenant. This Court has power to operate on the transaction, in a manner which a court of law could not: and it will not consider that a transaction founded entirely on mistake, and on the misapprehension of the parties, ought to be considered as binding upon them. In this view of the matter, the distinction between the covenant to pay and the sum that was actually paid, becomes immaterial. The consequence is, that the rights of Mrs. Robinson must be regulated by the second settlement.

1828. { *Ex parte* ROBINSON, in re
FREER.

Construction of 6 Geo. 4. c. 16. ss. 18. and 127.

The 6 Geo. 4. c. 16. s. 18. applies not only where there is a deficiency in the amount of, but also to any original defect in, the petitioning creditor's debt.—And

Though, previous to a petition for a substitution, there must be an application to the commissioners to expunge such debt, yet an actual order for such expungement is not absolutely necessary.

Under a second commission, where the bankrupt has not paid fifteen shillings in the pound, although he obtains his certificate:—Held, that, the assignees take, from the date of the assignment, a present vested interest in all his after-acquired property, and consequently a commission of bankrupt, in which he is the petitioning creditor, cannot be supported.

This was a petition for the substitution of a debt to support a commission of bankruptcy, under 6 Geo. 4. c. 16. s. 18. By which it is enacted,

"That if after adjudication the debt or debts of the petitioning creditor or creditors, or any of them, be found insufficient to support a commission, the Lord Chancellor, upon the application of any other creditor or creditors, having proved any debt or debts sufficient to support a commission, provided such debt or debts has or have been incurred not anterior to the debt or debts of the petitioning creditor or creditors, may order the said commission to be proceeded in, and it shall by such order be deemed valid."

The petition proceeded on the ground that the petitioning creditor had been twice a bankrupt; and although he had obtained his certificate under both commissions, no dividend had been declared under the second: so that in fact, under 6 Geo. 4. c. 16. s. 127, the debt supposed to be due to him was vested in the assignees, under such second commission (1).

The present petitioner had proved a debt under the commission against Freer, not anterior to that of the petitioning creditor, for which it was now sought to be substituted; and, an action having been brought against the assignees, and the petitioning creditor's debt being considered insufficient

(1) See Abridgment of Statutes, 1825, p. 28.

to support the commission, he had applied to the commissioners to certify that fact; but they being divided in opinion on the subject, one of them had declined to sign such certificate, and thereupon this petition was presented.

Mr. Rose, and *Mr. Swanston*, for the petitioner :

Mr. Montagu, for the petitioning creditor, and the bankrupt.

For the petition, the 6 Geo. 4. c. 16. ss. 18. & 127, and *Ex parte Hall*, in re *Mott* (2) were relied upon.

Against the petition, it was urged, that "if the debt is found insufficient," required an actual finding of such insufficiency previous to the application to this Court: *Ex parte Chappell* (3); and that if this petition could be entertained, sec. 18. would amount to a virtual repeal of sec. 15. of 6 Geo. 4. c. 16. (4)

The Vice Chancellor.—Under the 6 G. 4. c. 16. s. 127, whenever there is an acquisition of future estate by a bankrupt after a second commission; that estate vests absolutely in the assignees under such second commission. The effect of the statute is to take all property out of the bankrupt, and to vest it in the assignees from the date of the assignment to them, and consequently

(2) *Ex relations*.—This was a petition heard before the Vice Chancellor in July 1828, for substituting the debt of a creditor, who had proved, for the debt of the two petitioning creditors, upon which the commission issued;—that debt being insufficient, inasmuch as it was due to them, together with two other persons with whom they were in partnership, instead of being due to them alone.

The ground of objection was, that the object of sec. 18. of 6 Geo. 4. c. 16. was not virtually to supersede sec. 15. of that act; but that it was intended thereby, that the Court should be enabled to exercise a discretion in cases where the commission had issued upon a debt insufficient in amount, which the creditor at the time the commission issued, supposed to be sufficient.

The question, whether there should have been an actual finding by the Commissioners, of the insufficiency of the petitioning creditor's debt, previous to this application, was waived by consent.

The Vice Chancellor thought, that section 18 was applicable not only to a case of deficiency in the amount, but to any original defect in the nature of the debt of the petitioning creditor, and the petition for substitution was allowed accordingly.

(3) 2 G. & J. 131.

(4) See *Abridgment of Statutes*, 1845, p. 16.

the supposed right of the bankrupt does not exist. In this case, the question, whether when a petition is presented for a substitution of another debt for that of the petitioning creditor, it is necessary that the petitioner should make a previous application to the commissioners to have the petitioning creditor's debt expunged, can hardly be said to arise, inasmuch as here the parties have been before the commissioners, who were divided in opinion; but it does not appear to me to be necessary that there should be an absolute finding by the commissioners to authorize the calling upon this Court. It is sufficient to have a reference to them.

This is a proper case for a substitution.

Order accordingly, and the costs of the petitioner to be paid out of the estate.

1828. } In the matter of GRANT.
October. }

Money remaining in the hands of the assignee to answer the dividend on a claim, which had not been matured into a proof, being lost by the bankruptcy of the assignee, and the proof being afterwards perfected:—
Held,

That the creditor must bear the loss, and that he cannot claim the amount of the dividend out of assets of the bankrupt realized subsequently.

Under a commission of bankrupt issued against Grant, the Royal Exchange Assurance Company claimed to prove a debt of 2000*l.*, on a bond into which Grant had entered as surety. As the amount due was not then ascertained, the proof could not be perfected, but the claim was received and entered:—a dividend of 4*s.* in the pound was declared. The assignee became bankrupt, while the amount of the dividend on the claim of 2000*l.* was in his hands. Afterwards the proof of the Royal Exchange Assurance Company was admitted; and, a new assignee having been chosen, and further assets having been realized, the commissioners ordered, that out of those assets there should first be paid to the Royal Exchange Assurance Company the amount of the dividend of

4s. in the pound previously declared, and then a further dividend to them and all the creditors.

The assignee petitioned, that this order might be rescinded, so far as it directed that the amount of the dividend of 4s. in the pound should be paid out of the assets.

Mr. Horne, for the petition.

The money in the hands of the assignee was an appropriation: it was there at the risk of the creditor; his dividend was satisfied by that appropriation; he must go against the bankrupt assignee, and not diminish funds which belong to the rest of the creditors. If he is permitted to receive his dividend out of the assets since realized, the amount of dividend to all the creditors will be lessened; and either the surplus coming to the bankrupt, or the allowance to which he may be entitled (according as the event may be), will be lessened.

Mr. Bickersteth, contra.

There never was a time, when the creditor could have demanded this money from the assignee, who is now bankrupt. The money in the hands of the assignee was part of the general assets of the bankrupt's estate, set apart by the order of the commissioners to await an uncertain event. There could be no appropriation, till the proof of the debt was perfected; and there was no negligence in making that proof.

The Vice Chancellor was of opinion, that the amount of the dividend was appropriated specifically to answer the claim of the Company, and that they were the persons upon whom the loss ought to fall.

1828. }
November. } *In the matter of STEPHENS.*

An order to enrol the proceedings under 6th Geo. 4. c. 16. s. 96, must be made on petition, and not on motion.

In this case, an application was made, on behalf of the messenger under the commission, that the assignee, who was also

the petitioning creditor, might be ordered to enrol the commission, adjudication, and assignment.

The object of the messenger was, to support an action which he had commenced.

Mr. Montagu applied, that that order might be discharged.

The ground was, that it had been made on motion, without petition.

On the other side, it was contended, that, though in general, orders in bankruptcy must be made on petition, yet the words of the 96th section of the act gave a discretionary power of making such orders on motion: for the clause provides, "that every such instrument shall be so entered of record upon the application of, or on behalf of any party interested therein, and on payment of the several fees aforesaid, without any petition in writing presented for that purpose; and the Lord Chancellor may, upon petition, direct any depositions, proceedings, or other matter relating to commissions of bankruptcy, to be so entered of record, and also appoint such fee and reward for the labour therein, as the Lord Chancellor shall think reasonable." It was obviously most convenient, in order to save expense, that such applications should be made without petition.

It was answered, that the direction for enrolling the proceedings without petition, referred to applications by the assignees to the officer: if the messenger had a right to apply to the enrolling officer, let him do so; if an order of the Chancellor was necessary, that order could be made only upon petition.

The Lord Chancellor held, that the order could not be made without a petition; and discharged the order.

The messenger then presented a petition for the enrolment of the proceedings.

The Lord Chancellor made the order, and directed that the assignees should pay the costs of the application.

1828. } *In the matter of M'NEIL.*

*Construction of the 48th section of the
6 Geo. 4. c. 16.*

*Who are "servants" within the meaning
of that section.*

The bankrupt was a coachmaker.

The petitioners were workmen who had been employed by him. They did not receive daily, or weekly, or monthly, or yearly wages; but were paid so much for each particular job. They were bound to do their work on the premises of their employer, and might be discharged by him at any moment; but they could not quit him, until the particular job which they had in hand was finished, and were not at liberty to work, during the continuance of the engagement, for any other master. They, from time to time, drew what monies they wanted, and were supplied with materials by the master.

At the date of M'Neil's bankruptcy, a considerable balance was due from him to the petitioners. They prayed that they might be declared entitled to have six months' wages paid to them out of the bankrupt's estate, and that they might prove the residue of the balance due to them.

They grounded their claim on the 48th section of the Bankrupt Act (1), which provides, "That, when any bankrupt shall have been indebted, at the time of issuing the commission against him, to any servant or clerk of such bankrupt, in respect of the wages or salary of such servant or clerk, the commissioners, upon proof thereof, may order so much as shall be so due, not exceeding six months' wages or salary, to be paid to such servant or clerk out of the estate of such bankrupt; and such servant or clerk shall be at liberty to prove under the commission for any sum not exceeding such last-mentioned amount."

The question was, whether such workmen as the petitioners, were servants within the meaning of that clause.

Mr. Bickersteth appeared to support the petition:

Mr. Boteler opposed it.

The Vice Chancellor held, that the petitioners were within the 48th section, and that they were entitled to receive in full the sum which they earned during the six months preceding the bankruptcy.

(1) 6 Geo. 4. c. 16.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery,

COMMENCING

BEFORE HILARY TERM, 10 GEO. IV.

1829. }
Jan. Feb. May. } HARRIS v. KEMBLE.

A, B and C, being jointly interested in certain property, A contracts with B, to take a lease of the whole of it; and the contract expresses that B is to be bound by the contract, only so far as it is to be performed by him; but that A is to be answerable to B, even for what is to be done by C:—Held,

That B will be precluded from enforcing the contract against A, by the circumstance that C, under a deed, which the parties either were not aware of or had forgotten, has taken proceedings in a court of equity, which deprive A of that possession and enjoyment of the property, the subject of the contract, which it was the purpose of the contract to give him:

That it is a defence to a bill for specific performance, if the plaintiff has made inaccurate representations with respect to the property which was the subject of the contract, although those representations proceeded upon, and had reference to, sources of information which were open to all parties, and which might have enabled them to detect the alleged inaccuracies:

That in such a case the Court will not decree specific performance, even though the

defendants have taken possession of the property, and materially altered its management or lessened its value.

The bill was filed for the specific performance of a contract to take a lease of Covent Garden Theatre on certain terms: and after a very elaborate argument, a decree for specific performance was pronounced by the Vice Chancellor. The facts, so far as they are material to the points decided, are stated in the report of his Honour's judgment (1).

The defendants appealed.

Mr. Sugden and Mr. James, were for the plaintiff:

Mr. Pepys, Mr. Pemberton, and Mr. Lowndes, were for the principal defendants.

The topics, insisted on by the appellants, were the same as the grounds on which the specific performance of the contract had been resisted in the court below.

The respondents relied on the topics suggested in the Vice Chancellor's judgment.

(1) See 5 Law Journ. Chanc. p. 131.

The Lord Chancellor.—This was an appeal from the judgment of the present Master of the Rolls, when sitting as Vice Chancellor. It is unnecessary for me to enter minutely into the facts of the case, because they were stated with great precision by the Master of the Rolls, in giving his judgment. I shall, therefore, only state so much of the facts, or refer to so many of the circumstances, as are necessary for the purpose of explaining the grounds on which my opinion in this case has been formed.

It appears, that Mr. Harris was a proprietor of seven-twelfths, I think, of Covent-garden Theatre; Mr. Const was a proprietor of one-eighth of the same concern; and the residue of the interest belonged to Messrs. Kemble, Willett, and Forbes. Mr. Harris's father had been the manager of the theatre, and, after the death of the father, Mr. Harris himself succeeded to the management, and was paid out of the funds of the theatre 1000*l.* a year, as a compensation for his trouble as manager. It appears, that Messrs. Kemble, Willett, and Forbes were dissatisfied with the manner in which the theatre was conducted; they were desirous of removing Mr. Harris from the management, and of taking the whole conduct of the concern into their own hands; and a treaty was entered into between them and Harris for that purpose.

The manner in which this was proposed to be effected, was by the grant of a lease of the whole interest in the concern, with the exception of Mr. Const's share, to a trustee, Mr. William Harrison; and that Mr. William Harrison should underlet the same premises to Messrs. Kemble, Willett, and Forbes. It was not intended that this lease should be executed to these parties with a view of their deriving any profit from the concern, but solely for the purpose of giving them the management and controul of the theatre. A considerable time was occupied in endeavouring, with that view, to fix the amount of the rent which should be paid by Messrs. Kemble, Willett, and Forbes. The stipulation was, that they were to pay all the charges and expenses of the theatre, and that the rent that was to be reserved should be paid to the trustee; in order that, out of that fund, the debts due from the concern should be liquidated. It was material,

therefore, to ascertain what was the average profit of the establishment; for these parties were willing, and there was the understanding, as it appears, on both sides, that the average profit of the establishment should be taken as a measure of the rent that was to be reserved, and which should be applied, in the manner I have stated, to the liquidation of the debts of the concern.

It was at first, after a great deal of treaty, and much examination, and much discussion, settled, that the entire rent of the concern (estimated on the principle I have stated) should be taken at 12,000*l.*, and that of course the proportion of the interest which was to be leased to these individuals, should be taken at 10,500*l.* a year. When this arrangement was completed, the agreement in question, of March 1822, was settled and executed. Mr. Harris withdrew from the management; and from that time Messrs. Kemble, Willett, and Forbes continued to direct the concerns of the theatre, up to the time when this suit was commenced.

Mr. Robertson was placed in the situation of Mr. Brandon, as the treasurer; not, however, with precisely the same power and authority as Mr. Brandon had possessed with respect to the money part of the concern; but, in other respects, he was invested, I believe, with powers similar, or in the nature of those which had been possessed by Mr. Brandon.

Mr. Robertson, in directing his attention to the accounts, from time to time reported, that he had discovered great errors and misrepresentations, to which I shall by and by particularly allude. And, after a considerable interval, towards the close of two years from the expiration of the period when these defendants, Messrs. Kemble, Willett, and Forbes, were put into the possession and the management of the theatre in the manner I have described, Mr. Const produced a deed, dated in the month of March 1812, which was the foundation of the suit which he instituted, and in which suit a receiver has been appointed. The effect of appointing that receiver has been to deprive Messrs. Kemble, Willett, and Forbes of that entire controul over the funds of the theatre, which it was their object to attain by virtue of the agreement of March

1822. Partly, as they state, in consequence of the misrepresentation which had been made to them with respect to the value of the profits of the theatre and other circumstances to which I shall presently allude, and partly also in consequence of the suit of Mr. Const, and the appointment of a receiver on his application, Messrs. Kemble, Willett, and Forbes declared their intention to renounce the agreement of March 1822; and therefore Mr. Harris has filed the present bill.

The first question which presents itself naturally to consideration, is this:—supposing that nothing had been done under the agreement of March 1822—suppose these gentlemen had not entered into possession of the theatre, whether, under the circumstances of this case, this Court would direct the agreement of March 1822 to be specifically performed—specifically performed generally, or specifically performed subject to any, and what, modifications. And if the Court, under these circumstances, would not have felt itself justified in directing a specific performance of this agreement, the next question that arises, and naturally presents itself is this,—whether, in consequence of what has taken place under this agreement; and whether, in consequence of the conduct of the parties, their situation is so altered, and the circumstances are so changed, as to induce the Court, in that position of things, to direct that this agreement should be specifically performed, either in general, or subject to any modification. These are the two views of the case which naturally present themselves to the consideration of the Court.

The first point that occurs is with respect to the deed of March 1812. In looking at all the evidence, I am satisfied, that, at the time when the agreement of March 1822 was entered into, none of these parties had in their view or consideration the deed of March 1812. There is no evidence to satisfy my mind that they actually knew of that deed. If they did know of it, their whole conduct, and the whole negotiation must have proceeded upon the assumption, that it was no longer binding, and no longer operative between them. The agreement of March 1822 seems to have proceeded entirely on the assumption, that no such deed as that of March 1812 existed, or, if

it ever did exist to their knowledge, that it was then entirely given up and abandoned; and, in point of fact, it was acted upon only for a short period of time—I believe for about two years; and the payments were never afterwards made on the footing of that deed. It does not appear to me that there is any evidence to satisfy my mind these parties knew of the deed. Certain it is, that their attention was not directed to the deed; and that the agreement of March 1822 was framed on the assumption, that no such deed existed, or, at all events, if it did exist, that it was not binding, or capable of being put in operation against these parties.

But the provisions of the deed of 1812 are directly (as far as they go) at variance with the provisions of the agreement of 1822; they cannot both of them stand together. I should say then, according to what I understand to be the practice of this court with respect to decreeing the specific performance of an agreement, if these parties entered into the contract of 1822 upon a misapprehension of the state of facts—upon a misapprehension of their respective rights—upon a misapprehension of the obligations under which they were placed with reference to that deed of 1812,—that, whatever may be the effect of such a state of things upon the agreement itself, if the agreement were sued upon in a court of law, this Court would not, under those circumstances, interpose for the purpose of compelling the specific performance of an agreement entered into under such circumstances.

It is suggested, that, although they did not actually know of the deed, in point of law they must be considered as having had knowledge of it. But that is not a material consideration, where the question is as to specific performance. If, in point of fact, they did not know of that deed (Mr. Harris, I believe, was also a party to that deed), or if, knowing of the deed, they considered that it was operative and binding, and that it had been given up and abandoned; and if they entered into this treaty and agreement upon that state of things, or upon that supposition, this Court will not, under such circumstances, interfere for the purpose of compelling a specific performance.

The next point that presents itself for consideration is, as to the amount of the

rent. It is said, that the amount of the rent was fixed in consequence of misrepresentations (whether wilful or otherwise, perhaps it is not very material to inquire) made by Mr. Harris; and amongst other documents, two exhibits, described as G. and H., are relied upon.

Looking at those documents, it appears, that in the seasons of the years 1819-1820, and 1820-1821, taking them together, a very considerable profit was realized. It is not material to fix the precise sum; but, I think, according to one of those documents, the profit in the latter of the two years amounted to about 18,000*l.* and upwards, though in the former of the two years there was a loss; but, taking the two seasons together, there was a very large profit.

Those statements have been since investigated by a close inspection of the books; and it turns out, that the representations made in those two documents were grossly erroneous; for, far from there being a profit, taking the two seasons together, there was actually a loss amounting to more than 800*l.*

Those documents were sent to Mr. Harrison, who acted as the agent for the parties—was their friend, for the purpose of settling the terms of the agreement—was their friend, for the purpose of carrying into effect every part of this transaction. Undoubtedly, therefore, there was a gross misrepresentation (I have already said, whether intentionally or otherwise, it is not perhaps material to inquire,) with respect to the profits of the theatre in those two seasons.

It is said, that Mr. Harrison or the parties had access to the books, and that by inspecting and examining certain books they might have corrected those documents. It appears from all the evidence, that the books were kept in such a manner as to render it extremely difficult, without bestowing a great deal of time and attention, and exercising the skill of an accountant, to deduce any certain conclusion from them; and it does not appear in evidence, whether, if those documents had been examined by the books, the error contained in them could have been easily detected; but, at all events, it was a misrepresentation made by Mr. Harris with a view to this agreement, and to fixing the terms of the amount of the rent.

The extent of this misrepresentation also was very large; and it appears, as far as we can conjecture from the probability of the case, that the parties must have been misled by it; because, if it had been represented to these gentlemen, Messrs. Kemble, Willett, and Forbes, that, in the seasons 1819-1820, and 1820-1821, there had been an actual loss on the theatre, it is almost impossible to suppose, that, under those circumstances, considering the manner and principle on which the rent was meant to be estimated, they would have agreed to have given a rent to the extent of 12,000*l.* a year.

But the matter does not rest on these documents alone. Mr. Harrison, who has no interest whatever in this question, who acted in the transaction merely as the friend of the parties, is most precise and distinct in his evidence. He says, "Not upon one occasion only was it represented to me that the profits in each of those years amounted 10,000*l.*, and that 20,000*l.* of the old debt had been paid off, and little or no new debt created, but that this, in the course of the negotiation, had been repeatedly stated." From the manner in which the evidence is given, and from the circumstances under which these communications were made, it appears to me perfectly impossible to suppose that Mr. Harrison could have been mistaken.

It is stated, however, and was suggested at the bar, that, if such misrepresentations had really been made, they would have been stated on these proceedings. It appears to me that the circumstance of these misrepresentations not having been stated, when other misrepresentations are supposed to have been particularly stated, does not afford any argument whatever as to whether or not those misrepresentations were really made. But it is said those statements and those supposed representations, which are mentioned to have been repeatedly made to Mr. Harrison, are directly at variance with the statements contained in the documents G. and H. They are at variance with the representations made in the documents G. and H., if you take the representations strictly and literally. There was no profit in the season 1819-1820; on the contrary, there was a loss. But there was a very large profit in the season 1820-1821; and taking the two seasons together, the ap-

pearance of profit, as represented by those documents, correspond with the aggregate profit as supposed to have been stated by Mr. Harris to Mr. William Harrison.

I do not think, therefore, there are circumstances in this case, arising out of these particular documents, to lead me to the conclusion, that Mr. Harrison can be mistaken in the evidence which he has given. Mr. Harrison states his evidence in the most distinct and positive terms: he is not referring to one conversation only; but he is referring to repeated conversations, and not to conversations casually made, for he was the actor and the agent in this transaction. His attention must have been particularly directed to it: and the very point to which his attention was directed, and the very point to which these conversations were addressed, was the amount of rent which ought to be fixed, which amount was to be measured by the profit.

I think, under all these circumstances, I must come to a conclusion different from the conclusion to which the Master of the Rolls arrived with respect to Mr. William Harrison's evidence. I cannot take on myself to say, that there is anything to lead me to the conclusion, that he was mistaken with respect to the evidence which he gave.

The next point for consideration was, that which arose out of the box, which is described as the box of Sir Edmund Antrobus.

It appeared, according to the statement of the case, and according to the evidence, that, several years ago, a contract had been entered into by Mr. Harris the father, and Mr. Harris the plaintiff, with Sir Edmund Antrobus, to sell to him for the sum of 2000*l.* the interest in this box for the term of twenty-one years.

The present plaintiff was a party to that transaction. The money, on the face of the deed, is described as paid to both of them: how it was afterwards applied, is altogether immaterial,—whether it was applied to the purposes of the father only, to the purposes of the son only, or to both their use jointly. That this was a transaction of a very incorrect nature, to use the mildest term, no man can possibly doubt. It was concealed from the proprietors; and, for the purpose of rendering that concealment effectual, Mr. Brandon, who was the trea-

surer acting under the superintendence of Mr. Harris the manager, from time to time accounted for the rent, as if that rent had been regularly paid by Sir Edmund Antrobus; and the whole machinery was contrived for the purpose of imposing on the proprietors.

This state of things existed at the time when the contract of March 1822 was entered into. Mr. Harris was aware of it—he did not at that time disclose to the parties, with whom he was negotiating, the actual state of things, which it was his duty to have done; on the contrary, in the second schedule to the agreement of March 1822, this box is specifically enumerated, and forms a part of the property conveyed, transferred, or meant to be conveyed and transferred, under that agreement. And it is a principle established in this court, that, where a party calls for a specific performance of a contract, he must, as to every part of the transaction, be free from every imputation of fraud or deceit.

It is not sufficient to say, that compensation may be afforded, that security may be given in some other way, or that security may be obtained upon the property itself. Such conduct is a personal bar to a proceeding of this kind,—it is a personal bar to a person making an application for a specific performance.

The next matter for consideration is the transaction with respect to Lord Holland's box, equally incorrect with the former. Though not, perhaps, liable equally to the same objection, it is of the same class, and to the same effect.

I think then I am justified in saying, that, according to the uniform practice of this Court,—if nothing had been done under this agreement, if the parties had not taken possession under it, if Mr. Harris had not given up the management, but the agreement alone had subsisted;—under these circumstances, it appears impossible to suppose, that this Court could have listened to an application for the purpose of enforcing a specific performance of this agreement, either generally or subject to any modification. And the question therefore comes to this, whether, in consequence of the conduct of the parties—in consequence of their taking possession, as they have done—holding possession for so long a period of time under

the terms, and according to the agreement—interfering as they have done with the property,—whether that state of things is such as to lead the Court to enforce this agreement by a decree for a specific performance.

Mr. Harris had given up the management and whole controul of the theatre at the period when this bill was filed; and it was transferred to these gentlemen in conformity to the stipulations of the agreement.

They have altered the theatre, as it is said, contrary to the covenant contained in the instrument, and have thereby materially injured the property. They have also, it is said, by the manner in which they have conducted the theatre, affected materially and essentially its interests. It is obvious, however, that all these evils are matters of account and compensation, and that it is unnecessary on any of these grounds to enforce this agreement by a decree for a specific performance.

It appears to me, therefore,—considering that, at the time when the bill was filed, two years only had elapsed, and eight years more remained;—taking into consideration what I have observed with respect to the conduct of the parties during the negotiation for the treaty, and the situation in which they were placed;—that this Court ought not under these circumstances, to interfere for the purpose of compelling a specific performance, which would throw upon them for the subsequent period of eight years, all the conditions of this original agreement, and the lease that was to be granted under it. I do not think, therefore, there is anything arising out of the conduct of the parties, taking possession under this agreement, holding it in the manner in which they did during the time which they were in possession, employing their agent gradually to investigate those accounts and finding out successively those misrepresentations and those incorrect transactions, and the whole terminating by Mr. Const's bill being filed, and the appointment of a receiver;—there is not sufficient arising out of the conduct of the parties, under the agreement of 1822, to justify the Court in interposing for the purpose of compelling a specific performance.

In the agreement of 1822, Kemble, Willett and Forbes, contract that they will be

bound by the agreement, so far as it is applicable to Mr. Const.

It is supposed that those words by which they have bound themselves to perform the agreement as far as it relates to themselves, and so far as it is applicable to Mr. Const, had or might have relation to the transaction of 1812. That particular passage is sufficiently explained by the contents of the agreement itself, and the particular situation of Mr. Const; and there is sufficient in evidence to shew, that, the deed of 1812 not being in the contemplation of the parties at the time when the agreement of the 12th of March 1822, was entered into, it never was intended that that particular phrase, and that particular part of the introduction of the deed, was intended to apply to the deed of March 1812.

Upon the whole, then, I feel myself bound to come to a conclusion opposed to that of the Vice Chancellor. I have done it with great hesitation, on account of his great experience, on account of the great attention which he paid to this subject, and on account of the elaborate manner in which he investigated it: but I have had an opportunity of seeing the reasons on which his judgment is founded; I have read them with very great attention and care; they are not satisfactory to my mind, and therefore I am bound in duty to follow my own judgment.

Under these circumstances, I am of opinion, that this agreement of 1822 ought not to be specifically performed; and as I cannot direct it to be specifically performed in general, and without modification, I am of opinion it ought not to be specifically performed with any modification; but that the parties ought to be left to the remedy which they may have on that agreement, either in this court or in a court of law, as they may be advised.

1829. } THE EARL OF WINCHILSEA V.
January. } WAUCHOPE.

Doctrine of presumption as to the attestation of wills in the presence of the testator.

After two verdicts in favour of the due execution of a will, a third trial of an issue was directed, though the question was one



not of direct evidence, but of inference and presumption from probabilities.

An issue had been directed to try the validity of the will of the late Duke of Roxburgh; the alleged objection to the validity of the will being, that the attesting witnesses had not attested it in the testator's presence.

The issue was tried in the Court of King's Bench, and the jury found in favour of the will.

The heir moved for a new trial, and the Master of the Rolls directed the issue to be tried again (1).

The issue being tried a second time in the Court of King's Bench, the jury again found in favour of the will.

The heir again moved for a new trial.

Mr. Horne and *Mr. Pemberton* were in support of the motion;

Mr. Bickersteth, and *Mr. Bligh* opposed it.

The new trial was asked on the ground, that the verdict was not justified by the evidence; there being no proof that the will was duly executed, and every reasonable presumption being the other way.

On the other hand, it was said, that it was impossible now to have decisive evidence, either the one way or the other; the matter was necessarily one of inference—of presumptions—of probabilities. Two juries had drawn the inference,—made the presumptions,—estimated the probabilities; and a jury was the proper tribunal for the performance of such a duty. On such a question to direct a third trial, would in fact be saying "this shall go back to a new trial times without end, until there be found a jury who shall give a verdict against the will." It would be better for the judge in equity at once to assume the whole jurisdiction to himself, and not expose the parties to the useless expense of an unavailing trial before a tribunal, whose judgment was thus to be set at nought.

(1) See his Honour's judgment on that occasion, *Law Journ. Chanc.* p. 167.

The Master of the Rolls.—This is an application for a new trial of an issue *devisavit vel non*, after two trials at law already had, and two verdicts found in support of the will. The objection made to the will is, that it was not attested in the presence of the testator. If in this case I were to confine my attention to the report of the Judge who presided at the trial, I must necessarily refuse this application.

It appears by that report, that, in support of the will, the testimony of four witnesses was relied upon. *Mr. Winter*, one of the witnesses, attended the execution of the will. He is now dead, and his deposition in the Ecclesiastical Court, in a suit considered to be between the same parties, was read. *Mr. Winter* deposes, that the will was attested in the Duke's bed-room, and consequently in his presence. Another witness was *Batiste*, an old servant of the Duke's, who attested the execution of the will. An affidavit was made by a surgeon, that *Batiste* was too ill to attend the trials, and a deposition made by him in the Court of Chancery was also read. He then deposes, that, to the best of his belief, the witnesses attested the will in the same room in which the Duke signed it; that is to say, in the bed-room. *Sir Coutts Trotter*, who also attested the execution of the will, was a third witness, and was examined *visd voce*; the effect of his evidence is, that he could not say with certainty, but that the strong impression on his mind was, that the witnesses attested the will in the adjoining room.

The fourth material witness was a person who produces a plan of the Duke's bed-room, and the adjoining room, for the purpose of proving, that, if the door between these two rooms was open, which seems to be admitted, there was a space in the adjoining room, where, if the will had been attested, it would have been, on settled principles, an attestation in the presence of the Duke.

No evidence was given on the part of the defendants; and, considering that two of the attesting witnesses swear positively that the will was attested in the bed-room; and that the third attesting witness only says, that he cannot say with certainty, but that his impression is, that it was executed in the adjoining room, it seems the natural inference, that the jury must have yielded to

the weight of evidence, and have been of opinion that the will was actually attested in the bed-room, and therefore in the presence of the Duke : and if my attention were to be confined to the Judge's report, I could not possibly find there, any room for disturbing the verdict.

My opinion, however, is, that, the assistance of the jury being only one of the means by which the conscience of the Court is to be informed, it is the bounden duty of the Court, before it comes to its decision, to consider all the means by which the conscience of the Court may be informed, and to give its deliberate attention to all the evidence which is judicially before it.

Before I enter into consideration of the evidence, I must premise that the applicant here has some reason to complain of surprise, from the manner in which the last trial was conducted. It is true, that the leading counsel in support of the will, did, upon the first trial, open his case as an attestation in presence of the Duke, either in the bed-room, or in the adjoining room ; but, in his reply, he seems to have lost sight of any attestation in the bed-room, and to have relied upon such an attestation, in the adjoining room, as would have amounted to an attestation in the presence of the Duke ; and the former argument before me, upon the application for a second trial, proceeded altogether on the question—in what part of the adjoining room the attestation was had ; and, not being satisfied that the attestation could have taken place in any part of the adjoining room in which by possibility the Duke could see the witnesses, I found it my duty to direct a second trial. Under these circumstances, the defendants to the issue might reasonably expect that the same point, as to the part of the adjoining room in which the will was attested, would be the question between the parties upon a new trial, and not that the defendant would desert that case, and rely, as they seem to have done, upon an attestation in the bed-room.

Assuming for the present, that the jury founded their verdict upon an attestation in the bed-room, I come now to the consideration, whether, upon all the materials which are judicially before me, I can possibly adopt that conclusion,

In the Ecclesiastical Court, Mr. Winter deposed, that the attestation was had in the Duke's bed-room, and on a table moved near to his bed.

In the Ecclesiastical Court, Batiste deposed that the will was attested in the adjoining room.

Upon a commission from the Court of Chancery in this cause, Mr. Dundas, a writer to the signet, who wrote the will, deposed, that he believed that the witnesses attested in the adjoining room ; and he uses the strong expression, that " he was sure that none of the witnesses attested the will in the Duke's bed-room."

On his examination in Chancery in chief, Sir Coutts Trotter says, he believes, and has no doubt it was in the adjoining room ; and this deponent and the witnesses signed it at the table ; but that he cannot speak as to the exact size of it.

On his cross-examination, Sir Coutts Trotter says, that the deponent and the other witnesses retired into the adjoining room, and attested upon a table, and that he was not aware that the place of attestation was material ; and that he placed himself in that part of the room which appeared most convenient for the purpose of signing his name.

Upon his examination in Chancery, Batiste, to whose examination in the Ecclesiastical Court I have before adverted, deposes, that the witnesses attested in the bed-room.

Considering the testimony as to the adjoining room, given by Mr. Dundas and Sir Coutts Trotter, is it possible that my conscience can be satisfied with a verdict, which seems to affirm an attestation in the bed-room, and especially when it is considered that Winter and Batiste are the only witnesses who speak of the bed-room ; and that when Batiste was examined in the Ecclesiastical Court, about twenty years before he was examined in Chancery, and two years only after the fact, when his memory must have been fresh, he deposed the other way—that the attestation took place in the adjoining room ? and as to Mr. Winter, a witness of the name of Garraty, who was examined in Chancery, deposes, that, about the time of the transaction, he conversed with Winter upon the subject of the Duke's

will, and repeatedly heard him declare that the attestation was in the adjoining room.

If, therefore, I am to assume that the jury proceeded upon a supposed attestation in the bed-room, it is not a conclusion, which, upon the whole case before me, I can possibly adopt and act upon.

If, upon the other hand, I am to assume, upon the loose evidence of Sir Coutts Trotter, that the jury proceeded upon the ground of an attestation in the adjoining room, so as to be constructively in the presence of the Duke, then there is a want of evidence to support the verdict. The plan produced manifests, that, in order to be attested in the adjoining room in the presence of the Duke, it must have been attested within the space of five feet from the windows, the room being twenty-one feet nine inches long, and three-fourths of the room being therefore out of the Duke's presence; and the circumstances of the case do not permit me to say, that, if attested in that room, it must be presumed to be attested in the proper part of that room, because Sir Coutts Trotter says, he was not informed that the place of attestation was material, and that he looked out only for the most convenient place for the purpose of signing his name.

It is said, that no further information can be given on the subject, and therefore it would be useless to direct a new trial. It may be true that no further information can be given upon the subject; but the whole case may be a second time submitted to a jury, as it seems nearly to have been after the first trial, and which was in truth my purpose and expectation.

The policy of the law, which requires the attestation to be in the presence of the testator, may not be obvious to a jury, and the question may be thereby prejudiced; and it was for that reason, that, if the parties would have consented, or any precedent could have been produced, I would have taken upon myself the decision of the question, without giving further trouble to the jury. It is now, I think, reduced to this mere question of presumption—whether the will, being attested in the adjoining room which was called the writing-room, and was provided with a large round table in the middle of it, upon which it is to be inferred that Mr. Dundas had immediately before

written the will from the instructions of the Duke, was attested on that round table, remaining in its usual place, or upon a moveable pembroke-table, removed to the presence of the Duke, or upon a pier-table or commode, about two feet wide, upon which, Mr. Dundas says, papers were laid: it being admitted, that the witnesses were ignorant that the place of attestation was material.

This is a case which more especially requires the direction of the Judge for the assistance of the jury, and they will doubtless receive it. Upon the whole, therefore, let a new trial be had; and, considering the pressure of business upon the Court of King's Bench, and that the learned Lord who presides in that court has twice been troubled with this case, let the new trial be had in the Court of Common Pleas.

June.—The devisees appealed to the Lord Chancellor.

The Solicitor General, Mr. Bickersteth, and Mr. Bligh appeared to support the motion, to discharge the order of the Master of the Rolls.

Mr. Horne and Mr. Pemberton appeared in support of the order.

The Lord Chancellor.—I do not order a new trial upon the ground of those who are in support of the will, not having examined Mr. Dundas, but because I am not satisfied upon all the evidence in this case, that the jury has come to a right conclusion. I am not satisfied to adopt the verdict of the jury; and upon that ground I direct a new trial.

July 20, 1829.—This case being again under discussion,

The Lord Chancellor.—All I mean to say upon this subject is, that the trial will be very unsatisfactory to my mind, unless the evidence of Mr. Dundas is in some way or other obtained; but I do not think I should give any specific or particular direction as to what is to be done in that respect. The parties must exercise their own discretion and judgment upon the subject. It appears to me there is no evidence, from which you can infer that the will was attested in

the presence of the testator. If there were any facts from which I thought the jury might fairly infer that it was executed in that part of the room where it would have been in the presence of the testator, I should not disturb their verdict : but I do not find any facts upon which they can come to the conclusion.

The evidence preponderates so strongly on one side, that it is almost impossible to come to the conclusion in a court of justice, that this will was attested in the bed-room. Then, if it was not attested in the Duke's bed-room, but in the adjoining room, it does not appear that there is a single fact from which the presumption can be raised that it was attested in that part of the room which was opposite to the door, communicating between the one room and the other. If it had been proved that Mr. Dundas, or any of the parties, knew that it was necessary that the will should be attested in the presence of the testator, that would be a fact upon which the jury might have come to the conclusion, that they had drawn the pembroke-table from its usual place, or had taken some proceedings, in order that the attestation might be made in such a way as to comply with the requisition of the law ; but there is nothing at present in the case to lead to such an inference. I do not say that it is impossible to bring such evidence, but the onus is upon the party setting up the will. If the question came before me without the judgment of the Master of the Rolls, I should have no hesitation about it ; but I am fully confirmed in my opinion, my judgment according with his, although my mode of coming to the result is not precisely the same.

1829. } CREMORNE v. ANTROBUS AND
January. } OTHERS.

What will be included under the description of furniture in a bequest.

A testator by his will bequeaths his leasehold messuages, together with all his pictures, prints, drawings, or paintings in miniature or enamel, with all his gold and silver coins, medals, watches, and trinkets, of every kind whatsoever ; as also his coaches, carriages, harness, and furniture to the same be-

longing ; also, all and singular the fixtures, appurtenant to his said leasehold messuage, together with the household furniture, plate, linen, wines, liquors, and other his estate and effects whatsoever, in and about the same, and that should be in his possession at the time of his decease, or in and about his said dwelling-house, or the outhouses and offices appurtenant thereto, and by him held, used, occupied, and enjoyed therewith : by a codicil he makes a different disposition of the house, "with all its furniture and appurtenances thereunto belonging :"—Held, that pictures placed in the house as ornamental furniture, and plate (including plate deposited for safe custody at a banker's), and linen, passed by the codicil ; but that the disposition of the other articles mentioned in the will, not being household furniture, was not affected by the codicil.

Thomas Lord Viscount Cremorne duly made and published his last will and testament, bearing date the 26th of December 1811, whereby he devised to and to the use of trustees and their heirs, all his freehold manors, hereditaments, and premises in the counties of Waterford, Louth, and Monaghan, upon trust, for Richard Thomas Lord Cremorne, then Richard Thomas Dawson, and his assigns, during his life, without impeachment of waste, save voluntary or permissive waste, with remainder to the use of trustees, and their heirs, during his life, to preserve contingent remainders, with remainders to the use of the first and other sons of the body of the said Richard Thomas Dawson, lawfully begotten, severally and successively, in tail male, with remainder over. The testator afterwards proceeded to give and direct as follows :—
"Next I give and bequeath unto my said dear wife, all that my leasehold messuage or dwelling-house, with the outhouses, buildings, ground, and appurtenances thereunto belonging, situate in Stanhope-street, May Fair, in the county of Middlesex, and in my own occupation, which I now hold on lease, for a long term of years, and of which there is now about nine hundred years to come and unexpired, and which messuage, or tenement and premises is subject to a yearly ground-rent of 31*l.*, payable in respect thereof ; to have and to hold the said leasehold messuage or tenement, and

premises, with the appurtenances for all such estate, term, or interest, as I shall have therein at the time of my decease, unto my said wife, for and during the term of her natural life, together with all the pictures, prints, drawings, or paintings, in miniature or enamel, except the picture of my dearest Lady Ann Dawson; with all my gold and silver coins, medals, watches, and trinkets of every kind whatsoever; as also my coaches, carriages, harness, and furniture to the same belonging; as also all and singular the fixtures appurtenant to my said last-mentioned messuage, together with the household furniture, plate, linen, wines, liquors, and other my estate and effects whatsoever, in and about the same, and that shall be in my possession at the time of my decease, or in and about my said dwelling-house, or the outhouses and offices appurtenant thereto, and by me held, used, occupied, and enjoyed therewith, and, as appurtenant thereto, also given to my said wife, and the stables and coach-houses that I now occupy for all the estate and interest I have therein, for her life, she paying the rent, and performing the covenants contained in the lease, under and by virtue of which I hold the same; and after the death of my said dear wife, I give all the aforesaid leasehold premises, situate in Stanhope-street aforesaid, so as aforesaid devised to her for her life, to hold the said leasehold messuage and premises, for all the term I have therein, unto the said Richard Thomas Dawson, his executors, administrators, and assigns, for his and their own use and benefit, together with all the aforesaid pictures, drawings, coins, medals, trinkets, coaches, carriages, and furniture to the same, and together with all the aforesaid furniture, plate, liquors and every other article and thing whatsoever mentioned and included in the aforesaid devise, as shall be found to be in and within my said messuage, dwelling-house, and premises, so as aforesaid devised to her for life at the time of her decease, for his own use and benefit, and subject to the rents and covenants aforesaid."

The testator afterwards made a codicil, dated the 13th day of March 1812, part of which was in the words following—"and as to my leasehold messuage or dwelling-house in Stanhope-street, wherein I now dwell, I do declare my will and desire to

be, that my said dear wife shall and may have and enjoy the same, with all the furniture and appurtenances thereunto belonging, during the term of her life; and from and after her decease, that the same messuage or dwelling-house, with such furniture as shall be in, about, or belonging thereto at the time of such her decease, shall go unto, and be held and enjoyed by the said Richard Thomas Dawson, or such other person or persons as, by virtue of the limitations in my said will contained, shall for the time being be entitled to the bulk of my freehold estates,—it being my desire and intention, that my said leasehold house shall be held and enjoyed after the decease of my said wife, together with my said freehold estates, so far as the nature of the property, and the rules of law will permit; and I do hereby, so far as I have any power or authority in that respect, give and bequeath the said leasehold messuage, or tenement, and premises accordingly, for all the residue of the term or estate now to come and unexpired therein: Provided always, and I do expressly declare my will to be, that no person, who shall or may, under or by virtue of the limitations of the settlement by my said will directed to be made of my said freehold estates, be entitled to an estate tail, in the same freehold premises, shall be entitled to take or be considered as having taken an absolute interest in the said leasehold premises, or any part thereof, until such person shall have attained the age of twenty-one years, or shall sooner depart this life, leaving lawful issue living at his or her death, or born in due time afterwards, which shall first happen."

The testator died in 1813; his widow, in 1826; and Richard Thomas Lord Cremorne, in 1827; when his son Richard Lord Cremorne became tenant in tail of the real estate.

A question then arose between the present Lord Cremorne, and the personal representatives of the deceased Lord Cremorne, as to what articles were affected by the codicil. The present Lord Cremorne insisted, that the codicil was meant to embrace all the furniture and other property enumerated in the will; and therefore that he was, under the codicil, entitled to the whole. On the other hand, the personal representatives of the deceased Lord Cre-

morne insisted, that the will remained unrevoked, as to all the different species of articles mentioned in it, except what was, strictly speaking, furniture; and that they were therefore entitled to those articles absolutely.

In the suit, reference had been directed to the Master to inquire what furniture was in, about, or belonging to the messuage or dwelling-house and premises in Stanhope-street, at the time of the decease of the late Viscountess Cremorne. The Master found, that, in May 1826, an inventory was made of the fixtures, household furniture, pictures, linen, china, and other effects, formerly belonging to Thomas Lord Viscount Cremorne, which were in, about, or belonging to the dwelling-house and other premises in Stanhope-street, at the time of Lady Cremorne's decease; and this inventory the Master divided into four parts, which he set forth in the schedule to the said report. The first part contained fixtures and household goods; the second part, plate, linen, and china, which had been in the common and ordinary use of the said testator; the third part, books, which were kept in the book-cases, or in shelves, both fixed to the walls, and prints and pictures, which had been framed and hanging up, or had been framed and were usually hung up, in the lifetime of the testator respectively. These three parts contained such articles as, in the Master's opinion, were considered furniture, according to what he conceived to be the construction of that word usually given by the Court to bequests of furniture; and such furniture, he found, was in, about, or belonging to the messuage, dwelling-house, and premises in Stanhope-street, at the time of Lady Cremorne's decease.

The articles comprised in the fourth part of the schedule, were medals, coins, trinkets, &c.

Lord Cremorne preferred his petition to the Master of the Rolls, praying that the Master's report might be confirmed; and that the pictures, household goods, plate, linen, china, books, prints, and pictures, and other articles mentioned and comprised in the first, second, and third parts of the schedule to the report, together with the leasehold messuage and premi-

ses in Stanhope-street, might be assigned in trust for him, and the other person or persons for the time being entitled to the freehold estates in remainder, expectant on the determination of his estate in tail male.

On the other hand, the personal representative of the late Lord Cremorne presented his petition, stating, that the several articles in the second and third parts of the schedule, are not, and ought not to be considered furniture according to the construction of that word usually given by the Court in bequests of furniture; and that, if even the said articles should, according to such construction, be considered furniture, yet, according to the true construction of the said will and codicil, and the true intent and meaning of the said testator, they ought not to be so construed in this case; and praying that it might be declared that he, as the personal representative of the deceased Lord Cremorne, was entitled to the several articles comprised in the second and third parts of the schedule; and that the same might be delivered to him, together with the several articles mentioned in the fourth schedule.

The Master of the Rolls, on the 5th of June 1828, made an order, whereby he declared, that, according to the true construction of the codicil, all the articles and things, by the will specifically given with and belonging to the leasehold house in Stanhope-street, May Fair, were, subject to the life-interest therein of the late Viscountess Cremorne, given together with the leasehold house, to the person for the time being, entitled, by virtue of the limitations in the will, to the bulk of the testator's freehold estate, to be held and enjoyed, together with the said freehold estate, so far as the nature of the property and the rules of law would permit; and his Honour ordered, that it should be referred to the said Master, to approve of, and settle a proper assignment of the leasehold house, and of all the several articles comprised in the four schedules to his report, to proper trustees.

From this order, the personal representatives of Richard Thomas Lord Cremorne appealed.

Mr. Bickersteth and *Mr. Lynch* appeared to support the appeal.

Mr. Sugden, Mr. Pepys, and Mr. Knight, appeared to resist the appeal.

The topics urged in the argument are stated in the judgment.

The Lord Chancellor.—By the will, made in 1811, the testator devised the bulk of his real property to Richard Thomas Dawson, afterwards Lord Cremorne, for life, with remainder to his first and other sons in tail male. The testator was then in possession of a house in Stanhope-street, May Fair, under a lease for nine hundred years; and in it there was a considerable quantity of valuable furniture. The testator gave to his wife, all the prints, pictures and drawings, together with his gold and silver coins, medals, watches, and trinkets whatsoever; also his coaches, carriages, harness, and the furniture belonging to them, together with the fixtures appurtenant to the dwelling-house, and the household furniture, plate, linen, wine, liquors, and other his estate and effects whatsoever, in and about the same;—that is, in and about the dwelling-house. Nothing can be more precise or particular than the enumeration of the property he intended to pass by the bequest. He intended not only that the furniture, properly so called, should pass, but every species of personal property which should be in the house at the time of his decease. After the death of his wife, he gave this property absolutely to Richard Thomas Dawson, and then he again enumerated the property, almost in the same terms. It is true, that, in the second enumeration, some particular articles, or some particular terms, were omitted; but they were supplied by general expressions, at the end of the bequest, so as to be co-extensive (as far as related to the disposition of the property,) with the original bequest to the widow. There can be no doubt with respect to the construction of the will.

Three or four months afterwards, the testator made a codicil, and the object of the codicil was to make a new disposition with respect to the leasehold house. Instead of giving it absolutely to Richard Thomas Dawson, it was the testator's wish, that, after the death of the wife, the property should, as far as the rules of law would allow, go with the freehold estate. Richard Thomas Dawson was to take it, if he took

the freehold estate; if he did not, it was to go to the next person who took the freehold estate. In the codicil, the testator does not make use of the same expressions in describing the property, as he had previously made use of in the will. He makes use of terms of a more general description; and it is upon the meaning and import of those terms, not merely taken by themselves, but in connexion with, and in reference to the will, that the present question has arisen. The words of the codicil are these—"I do declare my will and desire to be, that my said dear wife, shall and may have and enjoy the same (that is, the dwelling-house in Stanhope-street), with all the furniture and appurtenances thereunto belonging, during the term of her life; and, from and after her decease, that the same messuage or dwelling-house, with such furniture as shall be in or about or belonging thereto at the time of such her decease, shall go unto, and be held and enjoyed by the said Richard Thomas Dawson, or such other person or persons as, by virtue of the limitations in my said will contained, shall for the time being be entitled to the bulk of my freehold estates,—it being my desire and intention that my said leasehold house shall be held and enjoyed after the decease of my said wife, together with my said freehold estates, so far as the nature of the property and the rules of law permit." The question is, whether the articles enumerated in the will and bequeathed together with the leasehold house, are to be comprehended in the codicil, or whether only a part of them were intended to pass by the operation of the codicil.

Some stress was laid, in the course of the argument, upon the words "and appurtenances thereunto belonging." When the testator gave to his wife the house, "with all the furniture and appurtenances thereunto belonging," it was argued at the bar, that the effect of the word "furniture" was extended by the words "appurtenances thereunto belonging," and, by the operation of those words, had a more extended sense than, in the common and ordinary acceptation of the word "furniture," it would be entitled to. Now, it appears to me, that there is no weight in that argument, because, upon adverting to the will, I find precisely the same expressions made use of, not with reference

to the furniture or the articles that were in the dwelling-house, but with reference to the leasehold premises themselves. In the will, he bequeaths his leasehold messuage, "together with the outhouses, buildings, ground and appurtenances thereunto belonging," precisely the same phrase as in the codicil; and, in grammatical construction, the words "appurtenances thereunto belonging," relate to the messuage, as clearly and as satisfactorily as in the will itself; because he gives the messuage to his wife for life, with the furniture and appurtenances thereunto belonging,—that is, the furniture belonging to the dwelling-house, and the appurtenances belonging to the dwelling-house. It appears to me, therefore, there is no real weight or solidity in the argument, which was addressed to the Court upon that point.

The codicil must be taken, therefore, as if these words "and appurtenances" were omitted; and then it amounts to this—"my will is, my wife shall have and enjoy my leasehold house, with all the furniture thereunto belonging." Now, I think, if the construction had depended upon the codicil alone, these words would have embraced the pictures, because, by the finding of the Master, the pictures were part of the ornamental furniture of the house; they would have embraced the plate, because the plate was in use in the family; they would have embraced the linen, because that was part of the furniture of the house.

Then, it was said, that the terms of the codicil ought to be controuled and governed by the terms of the will, and that it was clear from the disposition in the will, that the testator did not mean to include under the description of furniture, either the pictures, the plate, or the linen. That argument resolves itself into two parts; and it is necessary, in order that it may be understood, that I should again advert to the terms of the will. The testator gives the dwelling-house with the pictures and drawings, together with his gold and silver medals, watches and trinkets, together with his coaches and carriages, together with the fixtures appurtenant to the dwelling-house, and then his household furniture, linen, plate, &c. It was said, that, by reason of this special enumeration, it was clear, that the testator did not consider those different articles as included under the term "furniture." Now, when the testator

gives his household furniture, plate, linen, &c., I think it cannot be argued with any shew of reason, that, because he specially enumerates the plate and linen, he did not consider they passed under the word "furniture." He makes the enumeration for the purpose of preventing any doubt upon the subject. The argument has no force, as applicable to the plate and linen, which follow the term "household furniture." It is different with respect to the pictures, because he gives the pictures first, together with the household furniture, and seems therefore to draw a difference between them in the will. Still, however, when I consider that three or four months elapse, after the date of the will, before the codicil was executed, and when I find, that in the codicil he gives the house, together with all the furniture thereunto belonging, and that the pictures formed a part of the furniture—whatever doubt the expressions in the will may throw upon the subject,—I think that doubt is not sufficiently strong to lead me to say, that those articles did not, in the codicil, pass under the description of "all the furniture belonging to the dwelling-house." I am of an opinion, therefore, concurring with that of the Master of the Rolls, as far as relates to the pictures, the plate, and the linen. They passed by the codicil.

I imagine it is unnecessary for me to say anything with respect to the coaches and carriages. Lord Cremorne died in the year 1812, and the tenant for life, in the year 1826; therefore the coaches and carriages, must have been worn out during the life of the tenant for life.

The question then remains as to the bequest of the gold and silver coins, and things of that nature. Now those articles would not pass under the description of "all the furniture belonging to the dwelling-house" generally. Unless, therefore, there are some special circumstances in this case, shewing that those articles were so used and disposed of in the house, as to be part of the ornamental furniture of the house, or in some way connected with it, I think they would not pass by the codicil.

It afterwards appeared, that, so early as the year 1805, there was a considerable quantity of plate deposited at the house of

Messrs. Hoares the bankers, where it remained during the rest of the testator's life, and during the life of his widow.

It was submitted, that at least this portion of the plate was not affected by the codicil; for, not being in use, it could not be considered as furniture.

The Lord Chancellor was of opinion, that it did pass by the codicil as furniture.

1829. }
Jan. 27. } CROWDER v. STONE.

A testator gives a fund to his wife for life; and, after her death, to five persons, A, B, C, D, and E, equally; and he directs, that in case of the death of any of these five persons, without lawful issue, before his or her share should become payable, the share of him, her, or them, so dying, should be equally divided between the survivors of them. A. died, leaving a son; then B. died, leaving issue, who survived the tenant for life; then the son of A. died, without issue; then C. died, without issue; next D. died, leaving issue; and lastly, the tenant for life died:—Held,

That, upon the death of A.'s son, A.'s share went over.

That C.'s accrued share of A.'s original share did not go over, on C.'s death, without issue.

That the shares, which went over, accrued only to such of the five persons as were living at the time of the accrual.

John Lloyd, victualler, by his will, bearing date the 27th April 1787, after disposing of various parts of his said personal estate, bequeathed as follows:—

"And whereas I have the sum of 1100*l.* in the new 4*l.* per cent. bank annuities, and also the sum of 900*l.* in the 3*l.* per cent. reduced bank annuities, and also the sum of 500*l.* in the 3*l.* per cent. consolidated bank annuities, standing in my name in the books of the Governor and Company of the Bank of England,—now, I do hereby give and bequeath the same unto my brother, Edward Lloyd, and Richard North, of Lombard-street, London, silversmith, and the survivor of them, and the executors and

administrators of such survivor, upon the following trusts, that is to say, as to the said sum of 1100*l.*, and as to the said sum of 700*l.*, part of the said sum of 900*l.*, so standing in my name as aforesaid, upon trust, to pay the interest, dividends, and proceeds thereof, unto my said wife Catherine, or duly to empower and authorize her to receive and take the same, from time to time, for and during the term of her natural life, to and for her own use and benefit; and, from and after the decease of my said wife, in case my said brother, Edward Lloyd, shall survive my said wife, I do hereby will and direct, that the interest, dividends, and proceeds of the said sums of 1100*l.* and 700*l.* shall be received and taken by the said Edward Lloyd, for and during the term of his natural life, to and for his own use and benefit; and, from and after the decease of my said wife Catherine, and my said brother Edward Lloyd, and the survivor of them, my will is, that the said sums of 1100*l.* and 700*l.* shall be sold by my said trustees, or the survivor of them, or the executors and administrators of such survivor, and the produce or money arising therefrom shall be paid to, and equally divided between my said nephew and nieces hereinbefore mentioned, [he had before named one nephew and four nieces,] share and share alike; and my mind and will further is, that, in case of the death of my said nephew, or of any, or either of my said nieces, without lawful issue, before their respective parts or shares of the said sums of 1100*l.* and 700*l.* shall become due and payable to them under and by virtue of this my will, that the part or share of him, her, or them, so dying without issue as aforesaid, shall go to and be equally divided between and amongst the survivor and survivors of them, share and share alike." And the testator appointed the said Edward Lloyd and Richard North executors.

The testator died, leaving his nephew, John Lloyd, and his nieces, Mary Powell, Jane Greenwood, Ruth Matthews, and Catherine Mitchener, the legatees named in his said will, and the said Catherine Lloyd, his said wife, and Edward Lloyd, his brother, him surviving.

Edward Lloyd died the 18th January 1792.

Catherine Lloyd died the 30th January 1823.

Mary Powell died on the 16th July 1797, leaving one son, John Powell, who died without issue, on the 25th October 1799.

Catherine Mitchener died intestate, on the 5th August 1797, leaving three children, who were all living at the death of the testator's widow.

Jane Greenwood died in May 1802, without leaving issue.

John Lloyd, the nephew, died in August 1805, leaving seven children; some of whom were living at the death of the testator's widow.

Ruth Matthews was living at the death of the testator's widow, and died after the filing of the bill.

The bill was filed by the personal representatives of the testator, in order to have the direction of the Court with respect to the rights of the parties in the two sums of stock.

First—The personal representative of Mary Powell alleged, that, as she left issue her surviving, though there was a failure of that issue before the period fixed for distributing the fund arrived, the share given to her was never divested out of her, and was transmitted to her administrator.

The other parties contended, that, on the death of her only child without issue, Mary Powell's share went over.

Secondly—The personal representative of Jane Greenwood contended, that, though her original share went over upon her death, yet that the part of Mary Powell's share, which had accrued to her, was not affected by the gift over, but was transmitted to him as her personal representative.

Others of the defendants insisted, that her accrued share went over along with her own original share.

Thirdly—The personal representative of Catherine Mitchener insisted, that, though she died before the accrual of any of the shares of the original legatees took place, yet the accrual, when it did take place, was for the benefit of her personal representative, as well as of the surviving nephew, and such of the nieces as were surviving.

On the other hand, the personal representatives of Lloyd and Matthews insisted, that the shares originally given to Mary Powell and Jane Greenwood went only to

the nephew, and such of the nieces as were actually living at the time when Mary Powell and Jane Greenwood respectively died.

Mr. Russell appeared for the plaintiffs, the personal representatives of the testator.

Mr. Horne, Mr. Pepys, Mr. Tinney, Mr. Bickersteth, Mr. Loyd, and Mr. Koe, appeared for the different defendants.

As to the first point, it was said, that "dying without issue," which would otherwise mean an indefinite failure of issue, was restricted to a given period, namely, the death of the survivor of the two tenants for life, the testator's brother and his widow; consequently, if, during that period, there was a failure of issue of any of the legatees, the share of such legatees was to go over; for there was nothing to restrict the operation of the words "dying without issue," to dying without issue living at the time of the decease of the particular nephew or niece: *Hughes v. Sayer* (1), *Forth v. Chapman* (2), *Massey v. Hudson* (3), *Beauclerk v. Dornor* (4).

On the other hand, it was argued, that Mary Powell had not died without issue; for she left issue; and, therefore, that the legacy, which had been once vested in her, was not divested out of her.

On the second point, it was contended, that this was one entire fund, which was to be divided among five legatees at one time, with benefit of survivorship, and that, where the fund is to remain entire, accrued shares survive as well as original shares; and there were cited—*Worlidge v. Churchill* (5), *Pain v. Benson* (6).

On the other hand, it was answered, that, as there were no specific words to extend the clause of survivorship to the accrued, as well as the original shares, when the only child of Mary Powell died without issue, a proportion of her share went over to Jane Greenwood; and did not, on her death, pass under the ultimate gift over, but was transmitted to her administrator; and, in support of this position, *Perkins v. Mic-*

(1) 1 P. Williams, 130.

(2) Id. 663.

(3) 2 Meriv. 130.

(4) 2 Atk. 308.

(5) 3 Bro. C.C. 465.

(6) 3 Atk. 78.

Heathwaite (7), and *Ex parte West* (8), were relied on.

As to the third point, the representatives of Catherine Mitchener cited *Wilmot v. Wilmot* (9), to prove, that survivor and survivors ought to be considered as equivalent to "other and others" of the five persons named; and, therefore, that she was to take her proportion of the accrued share, though she was not actually a survivor when the accrual happened.

It was answered, that "survivor and survivors" could only mean such of the five legatees as were living when any one of them died; and *Milson v. Awdry* (10) was cited.

The Lord Chancellor.—Dying "without lawful issue" denotes an indefinite failure of issue, unless it is limited by a reference to a particular time. Here, a time is specified, to which the failure of issue is referred—I mean the time when the fund is to be divided. Mrs. Powell left a son her surviving; but he died without issue in 1799, before the time of division arrived. Mary Powell, therefore, took nothing under this will.

As to Jane Greenwood, as she survived the son of Mary Powell, she would become entitled to a proportion of Mary Powell's share: and, though her original share was divested out of her, yet, on the authority of *Ex parte West*, the share, which accrued to her, would go to her personal representative.

A third point was raised in this case. It was said, that the words "survivor and survivors of them," were equivalent to "other and others." Such a construction, though the Court has been sometimes forced to adopt it, Lord Eldon, in *Davidson v. Dallas*, calls a forced construction of the term "survivor" (11). In *Wilmot v. Wilmot*, it was scarcely possible to put any other meaning on the words. But, in looking at the language of the will, I am of opinion, that the words "survivor and survivors," are here to be taken in their natural mean-

ing; and the shares, which accrued to the survivor and survivors, will be divisible among those of the five legatees who were living at the time when the original legatee of the accrued share died. The representative of Catherine Mitchener is not entitled to participate in these accrued shares.

1829. }
Jan.—Feb. } FARRER v. GRANT.

By a settlement made before marriage, part of the wife's fortune was settled for the use of the husband and wife, and then the children of the marriage; and it was stipulated "that all other the personal estate to which the wife was, or might be, or become, entitled, should be permitted to vest absolutely in the husband by right of marriage:" the wife survived the husband:—Held, that a contingent reversionary interest, which was in the wife at the date of the settlement, and which continued reversionary and contingent during the whole period of coverture, belonged to the wife, and not to the executors of the husband.

By an indenture, bearing date on the 12th of August 1785, being a settlement made subsequently to, and in consideration of, the marriage which had previously taken place between the Hon. David Anstruther (then resident in the East Indies) and Mary his then wife, he, David Anstruther, for himself, his heirs, executors, and administrators, did covenant, promise, and agree with John Burgh, William Johnson, Alexander Lord Newark, and Robert Grant, that he, his executors, and administrators, would, within six months pay into the hands of, or otherwise assign and transfer to John Burgh and William Johnson, or the survivor of them, his successor or successors, trustees resident in India, the sum of 80,000 sicca rupees, upon trust to pay the interest to David Anstruther during his life, and, after his decease, to his said wife during her life; and, after the death of the survivor of the said David Anstruther, and Mary his wife, upon trust, that the said John Burgh, William Johnson, Alexander Lord Newark, and Robert Grant, and their survivors, in whatsoever of their hands or names the said 80,000 sicca rupees, or any part thereof,

(7) 1 P. Williams, 274.

(8) 1 Bro. C.C. 575; 1 P. Wms. 276, n.

(9) 8 Vesey, 10.

(10) 5 Vesey, 465.

(11) 14 Vesey, 578.

should then be, should divide and apply the same to, and amongst, and equally between all and every the children and issue of the said David Anstruther and Mary his wife, if more than one, share and share alike, to be transferred and paid to such of them as should be a son or sons, at his and their respective ages of twenty-one years, and to such of them as should be a daughter or daughters, at her or their age or ages of twenty-one years, or day or days of marriage respectively, which should first happen after the decease of them, the said David Anstruther and Mary his wife ; and if there should be but one such child living at the time of the decease of the survivor of them, the said David Anstruther and Mary his wife, then upon trust to pay and apply the whole of the said sum of 80,000 sicca rupees to such only child, if a son, at his age of twenty-one years, and if a daughter at her age of twenty-one years or day of marriage, which should first happen.

There was issue of the marriage between David Anstruther and Mary his wife, six children and no more, of whom the present plaintiff was one. She, in June 1803, intermarried with Henry Mitford, esq., and, he having died, she, in April 1809, intermarried with Farrer Grove Spurgeon Farrer.

By a settlement made previously to, and in contemplation of the last-mentioned marriage, bearing date on the 8th of April 1809, and duly made and executed by and between the Rev. John Grove Spurgeon, of the first part ; Farrer Grove Spurgeon Farrer, of the second part ; the plaintiff of the third part ; and certain trustees of the fourth part,—after reciting, amongst other things, that the said Farrer Grove Spurgeon Farrer was seised of the estates therein mentioned for the term of his life, and had an expectation of becoming entitled to other estates, on the death of the persons therein mentioned ; and that the plaintiff, having attained her age of twenty-one years, was, under the will of Alexander Donaldson, absolutely entitled to a legacy of 5000*l.* and to such contingent proportion of a legacy of 30,000*l.* as therein mentioned ; and also reciting, that, upon the treaty for the intended marriage between the said Farrer Grove Spurgeon Farrer and the plaintiff, it was agreed that the said legacy of 5000*l.*, and all the contingent proportionable share of

the plaintiff in the said sum of 30,000*l.* should be assigned to and vested in trustees, upon certain trusts therein mentioned, for the benefit of Farrer Grove Spurgeon Farrer and the plaintiff respectively, and the issue of their marriage, other than an eldest or only son, inheritable under the will of William Farrer, esq. deceased, the grandfather of the said Farrer Grove Spurgeon Farrer, to the estates of which Farrer Grove Spurgeon Farrer was tenant for life ; and further reciting, that it was further agreed, upon the treaty for the said marriage, that all other the personal estate to which the plaintiff was, or might be, or become entitled, should be permitted to vest absolutely in the said Farrer Grove Spurgeon Farrer by right of marriage ;—it was witnessed, that, in consideration of the then intended marriage, and in pursuance of the agreement in respect of the estates to which Farrer Grove Spurgeon Farrer might become entitled ; and also in consideration of the settlement made, or intended to be made, of such the then present and expectant portion of the plaintiff, by the indenture of even date with the now stating indenture hereinafter mentioned, John G. Spurgeon and Farrer Grove Spurgeon Farrer covenanted with the trustees, that, in case the intended marriage should take effect, and John Grove Spurgeon and Farrer Grove Spurgeon Farrer, or either of them, should, in the events therein mentioned, become seised of, or entitled to, any estate or interest in the manors and premises therein mentioned, they would cause the same to be settled, so far as their estates and interests would permit, to the uses thereafter mentioned. Under these uses, the wife took benefits.

By another indenture of settlement, also made between the same parties, previously to, and in contemplation of the same marriage, and bearing date on the same 8th of April 1809, and duly made and executed by and between Farrer Grove Spurgeon Farrer of the first part, the plaintiff of the second part, and certain persons also named therein as trustees, of the third part,—after reciting to the effect stated in the preceding settlement, with respect to the agreement as to the legacy of 5000*l.*, and the sum of 30,000*l.* ; and further reciting, that, upon the treaty for the marriage, it had been agreed, that all other the personal estate to

which the plaintiff was or might be or become entitled, should be permitted to vest absolutely in the said Farrer Grove Spurgeon Farrer by the rights of marriage;—it was witnessed, that, in consideration of the then intended marriage, and in performance of the agreement made upon the treaty for the same, with respect to the fortune of the plaintiff, and also in consideration of the covenants and agreements entered into by and on the part and behalf of the said John Grove Spurgeon and Farrer Grove Spurgeon Farrer respectively, by the settlement of even date, and likewise in consideration of the benefits which the issue of the marriage would derive or be entitled to under the will of the said William Farrer, deceased, the plaintiff assigned unto the trustees therein named, the said legacy of 5000*l.* and her contingent share in the said legacy of 30,000*l.*, upon the several trusts therein-after mentioned, for the benefit of herself and the said Farrer Grove Spurgeon Farrer, and the younger children of the marriage, as therein mentioned.

The marriage, between Farrer Grove Spurgeon Farrer and the plaintiff, was duly solemnized.

David Anstruther died in May 1825; Farrer Grove Spurgeon Farrer, in October 1826; and Mary Anstruther, in July 1827.

The 80,000 sicca rupees had been invested in five per cent. stock, which had been converted into 9427*l.* 1*s.* new four per cent. annuities. Upon the death of Mary Anstruther, the sum of 9427*l.* stock became divisible amongst all the six children of David Anstruther by Mary his wife.

Sir William Grant, the surviving trustee, had transferred five of the shares to the five other children, but he declined to transfer the remaining sixth part or share, being 1571*l.* 3*s.* 6*d.*, without the indemnity of the Court.

The bill was filed by Mary Farrer, the widow, to have this sum of stock transferred to her.

William Domville and George Lucas, the executors of Mr. Farrer, alleged, that, according to the true meaning and construction of the two deeds of settlement made on the marriage of the plaintiff with Farrer Grove Spurgeon Farrer, all the personal

estate and effects to which the plaintiff was or might be entitled after her marriage, including her one-sixth part or share of the Navy five per cent. annuities, afterwards converted into 9427*l.* 1*s.* new four per cent. annuities, together with all interest and dividends which might have accrued due on such one-sixth share, belonged to and became absolutely vested in him, the said Farrer Grove Spurgeon Farrer, by the rights of marriage, and consequently, now belonged to them as his legal personal representatives.

For the plaintiff, it was argued, that the only effect of the settlement on the wife's fortune, was, to secure certain definite portions of it on certain trusts for the benefit of the husband and wife, and their issue, and to leave the residue subject to the marital rights of the husband. The wife's interest in the fund in question was contingent and reversionary during the whole duration of the coverture; and, as the husband died before he either did or could reduce it into possession, it survived to her.

For the executors of the husband, it was argued, that the contract was, that all other the personal estate, to which the wife was, or might at any time become entitled, should vest in the husband absolutely. These words would be entirely defeated, if he was to have only such property of the wife as he should reduce into possession during the coverture. In fact, the settlement would be altogether inoperative for his benefit, if such a construction were put on it. He would take nothing by the settlement; he would take merely what he would have taken without it.

The Master of the Rolls.—The true intention of this settlement is, that, as to all the property of the wife except the legacy of 5000*l.* and her share of the 30,000*l.*, the husband should take absolutely such interest in it as his marital rights would give him; in the events that happened, he took no interest in the sum in question in this suit; for the wife's title to it was contingent and reversionary during the whole of his lifetime; I must therefore declare the plaintiff to be entitled.

1829. } BAILY v. LLOYD.

A will, manifesting on the whole an intention to execute a power, was held to operate as an appointment, notwithstanding that it contained expressions, and made dispositions, which would not have been used or made in a due exercise of the power.

Construction of a covenant, that one child should be entitled to a share of the father's property, equal to the fortunes or advancements of the most favoured child.

What shall be deemed an advancement to a child, with reference to the particular language of an instrument.

Construction of a will as to election.

By articles of agreement, bearing date the 12th of April 1779, and made between Samuel Andrews Lloyd, of the first part, Ann Vokins, of the second part, and Samuel Parks, Edward Harford, Mark Harford, and Joseph Harford, of the third part, Samuel Andrews Lloyd, in consideration of a marriage then intended, and which shortly after was solemnized, between him and Ann Vokins, covenanted with Samuel Parks, Edward Harford, Mark Harford, and Joseph Harford, their executors, and administrators, that, in case he should survive Ann, his intended wife, and at his death should leave issue by her, and any of such issue should survive him by the space of three calendar months, (all which events happened,) the heirs, executors, or administrators of him, Samuel Andrews Lloyd, should, within the space of three calendar months next after his decease, pay, or cause to be paid unto Samuel Parks, Edward Harford, Mark Harford, and Joseph Harford, or the survivors or survivor of them, or the executors or administrators of such survivor, the sum of 3000*l.* upon trust, in the events before mentioned, to pay and divide the said sum of 3000*l.* unto, or unto and between all and every or any and such of the child or children, or issue of the said intended marriage, either entire, or in such parts, shares, and proportions, or disproportions, at such time or times, for such intents and purposes, and in such manner and form, as he, the said Samuel A. Lloyd, should, by any deed or deeds in writing, under his hand and seal, revocable or irrevocable, to

be by him executed in the presence of, and attested by two or more credible witnesses, or by his last will and testament, also in writing, or any writing in the nature of, or purporting so to be, under his hand and seal, or under his hand alone, to be by him executed or signed in the presence of, and attested or witnessed by two or more such witnesses, should order, direct, or appoint, or give, or bequeath the same unto; and, in case no such disposition should be by him, the said Samuel A. Lloyd, made of the sum of 3000*l.*, or if wanting in or with respect to any part or parts thereof only, then upon trust, to divide and pay the same sum of 3000*l.* or such part or parts thereof only, whereof no such disposition should be made, unto, or unto and equally between all and every the children, or child of the intended marriage, in the manner therein mentioned.

By indentures of lease and release, bearing date the 9th and 10th of May 1780, the release being made between Richard Vokins and Margaret his wife, of the first part, Samuel A. Lloyd, and Ann his wife, (who was the only child of Richard and Mary Vokins,) of the second part, and Samuel Parks, Edward Harford, Mark Harford, and Joseph Harford, of the third part, and, by virtue of certain indentures of fine, which were duly levied in pursuance of the covenant for that purpose contained in the said indenture of release, certain lands were conveyed, limited, and assured unto the said Edward Harford, Mark Harford, and Joseph Harford, their heirs and assigns, to the use of Richard Vokins, and Margaret Vokins successively, during their respective natural lives; and from and after the several deceases of Richard Vokins and Margaret Vokins, to the use of the said Samuel Parks, Edward Harford, Mark Harford, and Joseph Harford, their heirs and assigns, during the natural life of Ann Lloyd, upon trust, for her separate use, with remainder to the use of Samuel A. Lloyd and his assigns for his life, with remainder to the use of all and every, or any and such of the child and children and issue of the said Ann Lloyd by Samuel A. Lloyd begotten, or to be begotten, in such manner and form as Samuel A. Lloyd and Ann his wife should, in manner therein mentioned, jointly order, direct, and appoint; and, in case no such joint order, direction, and appointment

should be made by them, the said Samuel Andrews Lloyd, and Ann his wife, of the said hereditaments and premises, or if wanting in or with respect to any part or parts thereof only, then, as to the same or such part or parts thereof only, of which no such joint order, direction, or appointment should be made, to the use and behoof of all and every, or any and such of the children or child, and issue of the body of Ann Lloyd by Samuel A. Lloyd begotten, or to be begotten, as well female as male, and without distinction, either entire, or by such parts, shares, and proportions, or disproportions, at such time or times, for such estate or estates, ends, intents, and purposes, and in such manner and form as the survivor or longest liver of them, Samuel A. Lloyd, and Ann his wife, by any deed or deeds in writing, with or without power of revocation, under his or her hand and seal, by him or her executed in the presence of, and attested by two or more credible witnesses, or by his or her last will and testament in writing, or any writing in the nature thereof, or purporting so to be, under his or her hand and seal, or hand alone, to be by her executed or signed in the presence of, and attested or witnessed by three or more credible witnesses, should limit, direct, or appoint, or give, or devise the same; and, in case no such order, direction, limitation, or appointment, or gift, devise, or disposition of the premises should be made by Samuel A. Lloyd and Ann his wife jointly, or by the survivor, then to the use and behoof of all and every the child and children of the body of Ann Lloyd by Samuel A. Lloyd begotten, in fee, as tenants in common.

By an indenture of assignment, bearing date the 10th day of May 1780, certain leaseholds were assigned to the same trustees upon certain trusts, for the benefit of Richard Vokins and Margaret his wife, and Samuel A. Lloyd and Ann his wife successively, during their respective lives; and after the decease of them all, then in trust for the children and issue of Ann Lloyd by Samuel A. Lloyd, in such manner, and subject to such powers of appointment to the said Samuel A. Lloyd and Ann his wife jointly, and to the survivor of them, as were contained in the indenture of release before set forth

In 1815, there were seven children of the marriage living; and, one of them, Emma, being about to marry, Mr. Lloyd and his wife executed a deed of appointment, dated the 26th of October 1815, by which they appointed one-seventh equal share of the freehold and leasehold premises to her; and by the same instrument, Mr. Lloyd also appointed to the same daughter one-seventh part of the 3000*l*.

In contemplation of a marriage, which was shortly afterwards solemnized, between the plaintiff, Arthur Baily, and the said Emma Lloyd, certain indentures of lease and release, bearing date respectively the 27th and 28th of October 1815, were made and executed by and between A. Baily of the first part; the said Samuel A. Lloyd, and the said Emma Lloyd, his daughter, of the second part, and Francis Baily and Henry Lloyd of the third part; whereby the one-seventh share of the freehold and leasehold tenements, and of the 3000*l*. appointed as above mentioned, was settled to certain uses. The indenture of release also recited, that the said Samuel Andrews Lloyd was, and stood seised of, or well entitled to freehold estates of inheritance of considerable value; and that it was agreed by and on the part of Samuel A. Lloyd, on the treaty for the said marriage, that, by way of additional portion for his said daughter, Emma Lloyd, he should enter into a covenant, that she, the said Emma Lloyd, should have and be entitled to an equal share at least with his present or future children of the estates, real or personal, which he, the said Samuel A. Lloyd should be seised or possessed of, or entitled to at the time of his decease, after due payment of his just debts, and funeral and testamentary expenses; and that, if any or either of his children should, at any time or times thereafter, have or receive any sum or sums of money, or other estate or effects, upon marriage, or otherwise, in the way of advancement, in the lifetime of Samuel A. Lloyd, he, she or they should account for, and accept the same, as and in part of his or her share of the estates, real and personal, of their said father; and also, that any and every sum and sums of money, or other estates or effects, real and personal, which the said children or any of them should become or be entitled to, under or by virtue of any gift or

disposition by her last will and testament, or otherwise made or to be made by Ann Lloyd, the mother, or otherwise howsoever under her, should be deemed and considered an advancement.

And by the indenture, it was, among other things, witnessed,—“that, in further consideration of the said intended marriage, and in further pursuance of the agreement made upon the treaty for the same, the said Samuel A. Lloyd, for himself, his heirs, executors, and administrators, doth covenant, promise, and agree with and to the said Francis Baily and Henry Lloyd, their executors, administrators, and assigns, in manner following: that is to say, that, in case the said intended marriage shall take effect, then, and in such case, the heirs, executors, and administrators of him, the said Samuel A. Lloyd, shall and will, on or before the expiration of three calendar months next after his decease, duly convey, assign, and assure such part of the real and personal estates of or to which he shall be seised, possessed, or entitled, as shall be equal at least to the shares which the other children of him, the said Samuel A. Lloyd, or any or either of them, shall have or be entitled to, or shall have had or been entitled to, of or in such estates or effects, unto, or to the use of them, the said Francis Baily and Henry Lloyd, or the survivors or survivor of them, his heirs, executors, administrators, or assigns, to the end and intent that they and he may stand seised and possessed thereof, and interested therein and of and in every part thereof, upon and for the several trusts, intents, and purposes, and with, under, and subject to the several powers, provisos, declarations, and agreements hereinbefore declared and expressed and contained, of and concerning the same, or such of them as shall be then subsisting, undetermined and capable of taking effect. Provided always, and it is hereby agreed and declared, between and by the said parties to these presents, that all and every sum and sums of money, or other estate or effects whatsoever, which shall or may at any time or times hereafter be conveyed, assigned, advanced, or paid by him, the said Samuel A. Lloyd, unto or for the benefit of his said children, or any of them, exceeding in amount or value the sum of 50*l.* each, shall be deemed and considered as part of

the portion or share, portions or shares, of the child or children, to whom or for whose benefit the same shall have been conveyed, assigned, advanced, and paid as aforesaid, and be brought into hotch-pot and accounted for accordingly; and, for obviating all doubts as to such advancements, it is hereby expressly declared, that as well the seventh parts or shares hereby appointed, of and in the said freehold and leasehold estates, and money comprised in the said indentures and articles, and the other undivided parts or shares thereof, as also certain copyhold lands and hereditaments within the manor of Thornbury in the county of Gloucester, which, in contemplation of the marriage of the said Samuel A. Lloyd and Ann his now wife, were surrendered by Richard Vokins and Margaret his wife, her father and mother, to certain uses, under which, she, the said Ann Lloyd, is now tenant in tail, and which interest is intended to be forthwith barred, shall be deemed advancements within the meaning of this settlement: provided also, and it is hereby further declared and agreed, that all and every sum or sums of money, or other estates or effects, which the said children, or any of them, shall have received or been entitled to, or shall receive or be entitled to, by the gift, devise, bequest or other disposition, either by last will and testament or otherwise, of their said mother Ann Lloyd, or under the statute of distribution, in case of her intestacy, or which they or any of them shall derive, to, by, from, or under her, by any other ways or means, shall also, for the purposes of this settlement, be deemed and considered as an advancement or advancements within the true intent and meaning of the proviso or covenant last hereinbefore contained; and it is hereby further declared and agreed, by and between the said parties to these presents, that, in case any sum or sums of money, estates, or other property, shall be conveyed, assigned, paid, advanced, or settled to or in favour of any such child or children by Samuel A. Lloyd and Ann his wife, or either of them, in their or either of their lifetimes or lifetime, upon the marriage, or in contemplation of the marriage of any such child or children, and to take present and immediate effect, then, and as often as such immediate advancements shall be made, be,

the said Samuel Andrews Lloyd, shall and will immediately thereupon, convey, assign, assure, and pay, or cause and procure to be conveyed, assigned, assured, and paid, unto and to the use of Francis Baily and Henry Lloyd, their heirs, executors, administrators, or assigns, or other the trustee or trustees of this settlement for the time being, such sum or sums of money, or other estate or effects, as shall be equal in amount or value to the largest advancement which shall be made to or in favour of any one such child upon marriage, or in contemplation of marriage, as aforesaid.

Emma, the wife of the plaintiff, died on the 29th of March 1819.

Ann Lloyd (who survived Richard Vokins and Margaret his wife) died on the 30th of March 1818, leaving Samuel A. Lloyd, her husband, her surviving. He made his last will and testament in writing, bearing date the 18th of January 1822, duly executed and signed in the presence of three credible witnesses, in such manner as was required for the execution of the before-mentioned powers of appointment; whereby, after directing the payment of his just debts, funeral and testamentary expenses, he gave and devised as follows:—
“By virtue of all and every power and powers, authority and authorities, enabling me thereto, I give and devise all and singular my messuages, lands, tenements, rents, hereditaments, and real estate whatsoever and wheresoever unto my two sons, Henry Lloyd, and Edmund Lloyd, their heirs, executors, administrators, and assigns, according to the respective tenures thereof, to the uses, and upon the trusts hereinafter declared,” that is to say, upon trust to sell the same as therein directed, and in the mean time, till such sale or sales respectively, to receive the rents and profits thereof, and apply the same in the same manner as the dividends, interest, and proceeds of the monies to arise by sale thereof; if sold, were thereafter directed to be applied. And the said Samuel A. Lloyd gave and bequeathed unto Henry Lloyd and Edmund Lloyd, their executors, administrators, and assigns, all the rest and residue of his monies and securities for money, stocks, funds, goods, chattels, and personal estate and effects whatsoever and wheresoever,

upon trust, that they, and the survivor of them, their executors, administrators, or assigns, should stand possessed of such part thereof as should consist of money or securities for money, and sell and convert into money such part thereof as should not consist of money or securities for money, and should stand possessed of the money to arise from the sale of his real estates, and to be produced from the residue of his personal estate as aforesaid, in trust, after payment of his debts, funeral and testamentary expenses, to invest the same upon government or real securities, with power to vary the same, as therein mentioned, and to stand possessed of such trust monies, stocks, funds, and securities, in trust to pay unto the trustees or trustee for the time being of his late daughter Emma's marriage settlement, (being the indenture of settlement of the 28th of October 1815, which has been set forth above,) such a proportion or such proportions thereof, as in the said settlement was or were covenanted and agreed to be paid upon the trusts therein contained; and then in trust to pay and divide the remainder among themselves, the said testator's sons, Henry Lloyd and Edmund Lloyd, and his daughter, Julia Ann, the wife of Theodore de Tremerrerc, Elizabeth, then the wife of James Ebenezer Bicheno, and Laura Jane Lloyd, equally share and share alike; yet, nevertheless, as to the share of the testator's daughter, Julia Ann, the testator declared his will to be, that Henry Lloyd, and Edmund Lloyd, and the survivor of them, his executors, administrators, and assigns, should stand and be possessed thereof, upon the trusts thereafter declared, for the separate use of the said Julia Ann, exclusive of the said Theodore de Tremerrerc, her husband; and from and after the decease of Julia Ann de Tremerrerc, in case the same should happen in the lifetime of her husband, then upon certain trusts for the benefit of her children, and, in default of issue, of her next of kin as therein particularly mentioned; and the testator declared his will to be, that, in case his daughter Julia Ann should survive her husband, the whole of the shares thereinbefore directed to be retained by his trustees upon the trusts aforesaid, should be

paid, assigned, or transferred to her, to and for her own absolute use, benefit, and disposal; and the testator directed that the provision made by that his will, for or in favour of his children, should be accepted by each of them, in satisfaction of any benefit to which they were already, or might become entitled under the articles or settlement, made on his marriage with his late wife, Ann Lloyd, or any appointment made or to be made in pursuance thereof, by any power created under any such articles or settlement as aforesaid, or any deed or writing which might subsist at the making of that his last will and testament.

It appeared, that the copyholds mentioned in the marriage settlement of Mr. and Mrs. Baily were the property of Richard Vokins, and parcel of the manors of Thornbury, and that, on the 2nd of March 1780, upon and in consideration of the marriage of Samuel Andrews Lloyd with Ann his wife, the same copyhold premises were surrendered by Richard Vokins, and settled by such surrender upon and to the use of him, Richard Vokins, for his life, with remainder to Margaret Vokins for her life; and after her decease, to the use of Ann Lloyd for her life; and after her decease, to the use of Samuel Andrews Lloyd for his life, with remainder to the heirs of the body of Ann Lloyd by Samuel Andrews Lloyd in tail.

No act had been done to bar the estate tail of Ann Lloyd; so that, upon her death, Henry Lloyd, the eldest surviving son of the marriage, and the customary heir, became entitled to the copyholds as tenant in tail in remainder; and, upon his father's death, as tenant in tail in possession.

The bill was filed by Mr. Baily, his daughter, and a trustee of his marriage settlement, to have one-seventh of the said sum of 3000*l.*, and also of the proceeds of the freehold and leasehold estates, comprised in his marriage settlement, paid over on the trusts of that settlement, and also one-sixth of the remaining six-sevenths of the 3000*l.* and of the proceeds of these estates; and further to have paid to them out of the real and personal estate of S. A. Lloyd, such further sum as should be equal to the difference between what they might receive

as aforesaid, and the fortunes and advancements of the most favoured of the children of S. A. Lloyd, including the copyhold estate at Thornbury.

Mr. Pepys and *Mr. West* appeared for the plaintiffs.

Mr. Bickersteth and *Mr. Knight* appeared for Edmund Lloyd.

Mr. Polson appeared for Henry Lloyd, the heir-at-law, and customary heir of Mr. and Mrs. Lloyd.

Mr. Blackburne, and *Sir George Grey*, for the defendants.

The first question argued was, whether the will of Mr. Lloyd operated as an execution of his power of appointment.

The Master had found that the will was a good appointment of the 3000*l.*, and of the freehold and leasehold estates comprised in the settlements: and to this finding, the plaintiffs and Henry Lloyd excepted severally.

For them it was contended, that the will could not be considered as an execution of the power. The testator described the estates and property as *his* estates: and he disposed of them in such a manner as was applicable only to his own property, and not to property over which he had a mere power of appointment. He charged them with the payment of his debts, and with the satisfaction of his personal covenants: and he directed that the provision made for his children by his will, should be in lieu of what they might be entitled unto under the settlement, or any appointment made in pursuance of any power contained in the settlement. Such disposition and directions were quite inconsistent with the notion, that the testator intended that the will should be an exercise of his power. Besides, many of the persons, in whose favour the dispositions by the will were made, were not objects of the power.

On the other hand, it was alleged, that the introductory words shewed that the testator meant the will to be an exercise of his power. It was not the less an exercise of the power, because, as to some persons,

and as to some purposes, it went beyond the objects and scope of the power. As to those purposes and persons, the appointment would not be valid; but it would be a valid appointment as to everything else.

The Master of the Rolls was of opinion, that, though the will furnished some indications the other way, yet on the whole it manifested an intention to execute the power; and he therefore held, that the will was an appointment.

The next questions in the cause were, whether the copyhold which Henry Lloyd took as issue in tail, under the estate tail limited to his mother, was to be considered an advancement within the meaning of the covenant of the father in Mr. Bailly's marriage settlement: and whether Henry Lloyd was not to be put to elect between the copyhold and the benefits given him by the will.

The Master of the Rolls delivered the following judgment:—

A court can act with safety to itself, and security to the public interests, not by conjecturing what a testator might have meant, but only by looking to see what he has substantially expressed by the language he has made use of; and it is upon that it must found its judgment. If, unhappily, in this case, an intention is expressed which was not meant, however one may regret the result, it is much better that the particular parties interested should suffer, than that the Court should indulge itself in vague speculations. Now, I would observe, that, where the operative part of an instrument is doubtful, there the recital is of extreme importance, in order to collect the intention of the party, so as to resolve that doubt; but where the operative part of an instrument is perfectly clear, no court has ever had recourse to the recital, in order to give effect to the operative part, contrary to the expressions used. In the early part of the covenant, the father expresses his intention and engagement, that his daughter Emma should have as much as any favoured child should receive, either by advancement in the father's lifetime, or by gift at his death. Then he proceeds

to explain what he means by advancement in his lifetime; and the language which he uses is in these words: "Provided always, and it is hereby agreed and declared between and by the said parties to these presents, that all and every sum and sums of money, or other estate or effects whatsoever, which shall or may at any time or times hereafter be conveyed, assigned, advanced or paid by him, the said Samuel Andrews Lloyd, unto, or for the benefit of his said children, or any of them, exceeding in amount or value the sum of 50*l.* each, shall be deemed and considered as part of the portion or share, portions or shares, of the child or children, to whom or for whose benefit the same shall have been conveyed, assigned, advanced and paid as aforesaid, and be brought into hotch-pot and accounted for accordingly;—and for obviating all doubts as to such advancements, it is hereby expressly declared, that as well the seventh parts or shares hereby appointed, of and in the said freehold and leasehold estates, and money comprised in the said indentures and articles, and the other undivided parts or shares thereof, as also certain copyhold lands and hereditaments within the manor of Thornbury, in the county of Gloucester, which, in contemplation of the marriage of the said Samuel Andrews Lloyd and Ann his now wife, were surrendered by Richard Vokins and Margaret his wife, her father and mother, to certain uses, under which she, the said Ann Lloyd, is now tenant in tail, and which interest is intended to be forthwith barred, shall be deemed advancements within the meaning of this settlement." Now let us stop here—and is it possible to say, that this testator has not expressly declared, that whatever interest any child should receive from his copyholds, should be considered as an advancement within the meaning of that covenant? It is said, he was mistaken in supposing that the surrender was in contemplation of the marriage of the father and mother of the wife of Samuel Andrews Lloyd; and undoubtedly the surrender was not made in contemplation of the marriage, according to the strict sense of those words here; but to change the effect of a covenant by so loose a conjecture, would undoubtedly not be warranted by any principle upon which this

court acts. Of what importance was it, whether the copyholds were surrendered in contemplation of the marriage, or whether they were surrendered after the marriage, in consideration of the marriage previously had? It is of no importance, and can in no manner affect the question.

Then it is said, that, upon this covenant, it must be inferred that the father meant that the copyholds should be considered as an advancement, only in case he, by a recovery suffered, should acquire over them a power of disposition. Now, I can find no words in this covenant, which would at all warrant the Court in coming to such a conclusion; all he has said with respect to the copyholds is—"which interest is intended to be forthwith barred." Supposing that intention had been complied with, if nothing more was done than to bar the estate tail in the mother, what would have been the consequence? Why, the estate would have descended to the eldest son, who appears to be the customary heir. Here is no intimation that the covenant was not to have effect, and that the copyholds were not to be considered as advancements, unless they came within the power of disposition by the father.

After that part of the covenant which I have just read, there follows a proviso in these words "Provided also, and it is hereby further declared and agreed, that all and every sum or sums of money or other estate or effects which the said children, or any of them, shall have received or been entitled to, or shall receive or be entitled to, by the gift, devise, bequest, or other disposition, either by last will and testament, or otherwise, of their said mother Ann Lloyd, or under the statute of distribution, in case of her intestacy, or which they or any of them shall derive, by, from, or under her, by any other ways or means, shall also, for the purposes of this settlement, be deemed and considered as an advancement or advancements within the true intent and meaning of the proviso or covenant last hereinbefore contained." Now, I agree that these copyholds were not derived, to, by, from, or under the mother by any ways and means; but I am clearly of opinion that this proviso was not meant to

affect the previous part of the covenant; but was introduced for the purpose of affecting other property than the copyholds. The prior part of the covenant had made a special provision as to them; and this was meant to apply to any other property which might be acquired, to, by, from, or under the mother; and no court can ever adopt the principle, that the first part of a covenant, where a gift is made, is to be entirely annihilated by the subsequent part, if, upon a careful examination of both parts, they may be satisfactorily reconciled. I am therefore bound to declare, that the persons interested under the settlement made on Emma Baily's marriage, are entitled to be considered as having a claim under this covenant, to as much of the father's property as shall make her share equal to that of the eldest son, considering that he intends to retain the copyholds.

The other question is a question of election, and is too clear to admit of argument. An heir (and, for this purpose, a customary heir is as much an heir as any other,) is not to be disinherited, but by a clear and express intention. Now, from whence is this clear and express intention to be collected here? The language of the testator is this: he directs that the provisions made by his will in favour of his children, &c. should be accepted by each of them, in lieu of what they were or might become entitled to, under his articles of settlement made on his marriage, or any appointment made or to be made in pursuance thereof, or any deed then subsisting. What can this refer to, but to some subsequent deed, which might affect the property of the testator, and which was to be considered as if it were a deed existing at that time? So far from there being a clear intention manifested here to disinherit the heir, there is no one word which gives to the Court the least opening to say, that any such intention is to be collected. The customary heir, therefore, has a right to retain the copyholds, and take all benefit which he derives under the will of his father.

1829. }
Feb. 28. } LONG v. HUGHES.

Construction of wills as to a claim of priority by legatees over annuitants.

Rule to be followed, where legatees and annuitants are to abate proportionally, in making the abatement.

The testatrix, Sarah Evans, by her will, bearing date the 3rd of April 1822, gave and bequeathed to the directors or trustees of the Salisbury Infirmary, for the use of the infirmary, 100*l.*; to the directors or trustees of the Bath Infirmary, 100*l.*; to the directors or trustees of the Bristol Infirmary, 100*l.*; and she directed these three legacies to be paid by her trustees out of her monies in the funds, at the expiration of one year next after her decease.

She then proceeded to give a great number of legacies, and, afterwards, a great number of annuities: and, "for the purpose of paying the said legacies, and for other the purposes of her will, the testatrix directed, that her trustees therein named should call in all such parts of her personal estate as should consist of money out upon security at interest, and also the rents and profits of her houses or tenements, and other premises, and that they should be possessed of the monies to arise by the means aforesaid, or otherwise, by virtue of her will, in trust for the purposes thereinbefore and therein-after mentioned; and she directed and empowered the trustees to sell all and every or any part of her messuages or tenements, goods, chattels, and other her personal estate, as they should think fit, and directed that they should stand possessed of the monies to arise by such sale or sales, and of the residue of her personal estate, after payment of her debts, funeral, and testamentary expenses, and the legacies thereby bequeathed, in trust to invest the same in the purchase of parliamentary stocks or funds of Great Britain, or on other good and approved securities or security at interest, in the names of the trustees for the time being, with power to vary the same, as and when they should think fit, and to stand possessed of the said stocks, funds, and securities, and the annual dividends, interest, and proceeds thereof, upon trust to pay the said several annuities thereinbe-

VOL. VII. CHANC.

fore bequeathed," and for other the purposes in her will mentioned.

The assets of the testatrix were not sufficient to pay the legacies, and provide for the annuities in full: and the question was, whether the legatees were not entitled to priority over the annuitants.

Mr. Bickersteth, for the legatees, contended, that, as the trustees were to stand possessed of the proceeds of the real and personal estate, after payment of debts, funeral and testamentary expenses, and legacies, upon trust to pay the annuities, it was clear that the legacies were meant to be first satisfied; and that, till they were paid, the annuitants were to have nothing.

Mr. Pepys, contra.

The Master of the Rolls was of opinion, that the legatees were not entitled to any priority over the annuitants; and that both legatees and annuitants ought to abate proportionally.

The legacies to the infirmaries were deemed specific, and were directed to be paid in full out of the testator's stock in the funds.

There was considerable difficulty and doubt as to the rule which ought to be followed in making the abatement proportionally among the legacies and annuities.

The rule, as finally settled by the Master of the Rolls, appears in the minutes of the decree, which, after directing payment of the legacies to the three infirmaries, proceeded as follows:—

"Declare, that the other legacies bequeathed by the said testatrix are not entitled to any preference over the annuities bequeathed by her; and that the other legacies, and the annuities ought to abate proportionally; and, for the purpose of such proportional abatement, refer it to the Master to ascertain the value of the annuities respectively, as at the death of the testatrix; and, in so doing, he is to have regard to the circumstance, that the annuities are given free from legacy duty; and he is to compute interest at the rate of 4*l.* per cent. per annum, on such estimated value of the annuities respectively, from the death of the testatrix down to the time to which interest shall be computed on the legacies."

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The interest on the legacies had been computed from the end of a year after the testatrix's death.

1829. }
February. } WHARTON v. CHILD.

In a suit for tithes, an admission by the defendant of the plaintiff's right to a specified modus in lieu of tithes, which modus cannot be sustained in consequence of its being defectively pleaded, is an admission of his title to the tithes.

Mode of pleading a farm modus.

The bill was filed for an account of tithes. It stated a lease of the tithes of the parsonage of Skelton, and chapelry of Brotton, granted to the plaintiffs by the Archbishop of York, who, it was alleged, was, at the date of the lease, seised of those tithes.

The defendant admitted, that the alleged lease had been executed, and that, at the date of it, "the archbishop was seised of, or entitled to such parts of the tithes of grain, hay, wool, and lamb, and oblations, alterations of the parsonage of Skelton, and the chapelry of Brotton, in the said bill mentioned, except the tithes arising on such of the lands within the parish as are therein-after mentioned, and such other titheable matters within the parish, the tithes whereof are or may be shewn to be covered by moduses or a modus."

The defendant further stated, by his answer, that, "during the years 1823 and 1824, he held and occupied, and has continued to hold and occupy, about one hundred and thirty-eight acres of land, situated, lying, and being within the parish and chapelry, and which lands, together with about sixty-three acres and three roods, late in the occupation of Lawrence Mills, and about twenty-five acres, late in the occupation of George Adamson, amounting together to about two hundred and twenty-six acres and three roods, are, as defendant has understood and believes, an ancient farm, or parcel of land, and that no tithe in kind of any titheable matters arising in the said farm and lands, has ever, within the memory of man, been received or paid to

any person, or any composition or satisfaction for the same, save only the modus or ancient customary payment hereinafter mentioned; and this defendant says, that from time whereof the memory of man is not to the contrary, there hath been due and payable, and of right ought to be paid by the owner or occupier of the said ancient farm or parcel of land to the rector of the parsonage or chapelry, or those who claim to be entitled, and are entitled to the tithes of the parsonage and chapelry, a modus or ancient customary payment of 5*l.* 1*s.* 8*d.* at Michaelmas in each year, for and in lieu and satisfaction of the tithes of all titheable matters and things respectively arising, growing, and renewing on the farm and lands, and for all agistment of barren cattle, fed and agisted thereon, and that he has had and taken on and from the farm and lands, divers quantities of corn, grain, hay, and other titheable matters and things, and that he has taken and carried away the same without setting out the tithe thereof, or of any of them, for the archbishop or his lessee, or made any compensation for the same, save that he was always willing, and he now is, and offers to pay modus or ancient customary payment in lieu and satisfaction of the tithes.

Mr. Bickersteth and Mr. Beames appeared for the plaintiff.

Mr. Roupell appeared for the defendant.

The plaintiffs not having made out their title by evidence, to the satisfaction of the Court, they relied on the above passages of the answer as an admission of it. The defendant, it was said, admitted the right of the plaintiffs and of their lessor to the tithes, except as to lands protected by a modus, and he admitted their right to such modus: here, the modus could not be sustained, because neither were the metes and bounds of the alleged ancient farm set out, nor was any sufficiently definite description of it given: therefore, the title of the plaintiff was in effect admitted absolutely.

On the other hand, it was argued, that, if the plaintiffs read the above passages, they were bound by the statement that the lands in question were part of an ancient farm which was protected against the payment of tithes by the specified modus.

The Master of the Rolls.—This answer must be considered an admission of the title of the plaintiffs, except so far as the defence can be rested on the alleged modus. The submission to pay the modus is an admission of the title of the plaintiffs, and of his lessor, as impropiators. The modus cannot be sustained, because the alleged ancient farm is not sufficiently described. I consider the answer, therefore, as an admission of the title of the plaintiffs to the tithes in question.

Decree for the plaintiffs, with costs.

1829. }
Feb. 25. } BUTLER v. BURT.

A married woman had a power of disposing of property by deed "to be by her sealed and delivered in the presence of and attested by two or more credible witnesses thereto," or by her last will: she signed and sealed a deed of appointment, the only attestation to which was in the following words, "Witnesses A. B. & C. D.:"—Held,

That there was no attestation of the delivery, and, therefore, that the power was not well executed.

Under an indenture, dated 19th of June 1800, certain property was conveyed and assigned, upon trust to convey, assign, employ, and dispose of the same to such person or persons for such estates and interests, upon such trusts, and for such intents and purposes, and in such parts, shares, and proportions, and in such manner and form as Louise Smith, notwithstanding her coverture, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be by her sealed and delivered in the presence of, and attested by two or more credible witnesses thereto, or any writing purporting to be or in the nature of her last will and testament or codicil, to be by her signed and published in the presence of, and attested by the like number of credible witnesses, should direct, limit or appoint.

The defendant claimed to be entitled to this property, under an instrument dated the 20th of September 1813, purporting and appearing to have been signed and sealed by

Louise Smith. The only attestation was in the following words:—

(Witnesses) John Heyliger Burt,
Hannah Bowles.

The bill alleged, that the instrument had never been delivered; and insisted, that the attestation was not according to the requisites prescribed for the exercise of the power, because it did not attest the delivery, as well as the sealing.

The plaintiffs also stated a case of fraud, but there was no evidence in support of it.

The defendant swore, that he believed that the instrument had been delivered to, and, from the date of it, had been in possession of his father, John Heyliger Burt, among whose papers it had been found.

Mr. Rose and Mr. Lynch appeared for the plaintiffs.

Mr. Treslove and Mr. Flather appeared for the defendant.

The following cases were cited:—

Wright v. Wakeford, 4 Taunt. 213.

Doe v. Peach, 2 Mau. & Sel. 576.

Wright v. Barlow, 3 Mau. & Sel. 512.

Moodie v. Reid, 1 Mad. 517.

Stanhope v. Keir, 2 Sim. & Stu. 37.

The Master of the Rolls.—The question arose on an instrument, purporting to be executed by a married woman, in favour of the defendant. The power given to this lady was to be exercised by any deed sealed and delivered in the presence of, and attested by two or more credible witnesses. In the instrument itself, the lady, after declaring her intention as to the disposition of the property, proceeds thus—"Signed and sealed at, &c., this 20th of September 1813, witnesses, John Heyliger Burt, Hannah Bowles:" and it appears to have been signed and sealed by her.

It has been long settled, that the attestation is to be considered as part of the deed. Of course, where the attestation is general, it affirms all that the deed states to have been done. This attestation, therefore, affirms, that this instrument was signed and sealed, but it does not affirm that it was delivered: and it is essential to the validity of a deed, that it be delivered. Now, can it be presumed that this deed was delivered in the presence of the witnesses?

The attestation must affirm all the requisites essential to the due execution of the power. This attestation affirms only that the instrument was signed and sealed. The case therefore comes within the principle of *Moody v. King*: and I am bound to declare that it was not a due execution of the power.

The bill contains allegations of fraud: and that part of the case is abandoned. I therefore, cannot give costs to the plaintiffs.

1829. } RUFFORD v. BISHOP—AND
March 9 & 11. } BISHOP v. RUFFORD.

Where a mortgage is given to secure the balance due from a customer to his banker, the land is charged with such compound interest, as, according to their course of dealing, enters into the composition of that balance.

In accounts between a customer and a banker, quarterly or half-yearly receipts may be made.

The owner of certain iron-works mortgages them, and continues in possession till he becomes bankrupt:—Held, that nearly the whole of the machinery belonged to the mortgagee, and not to the assignees of the bankrupt, and was not to be considered as within the order and disposition of the bankrupt.

Messrs. Rufford and Biggs were bankers, who were in the habit of discounting bills for, and affording other pecuniary accommodation to S. Hornblower, W. Hornblower, and Abel Josiah Smith, who were co-partners in the business of iron-masters.

By indentures of lease and release, bearing date respectively the 6th and 7th of October 1815, the release being made between S. Hornblower, W. Hornblower, and Abel Josiah Smith, of the one part, and Messrs. Rufford and Biggs, of the other part;—reciting, that the said Serjeant Hornblower and William Hornblower were seised of, or entitled in fee-simple to, the several pieces or parcels of land, messuages, works, and hereditaments thereafter mentioned, subject to a mortgage, and to an agreement, made by the said Serjeant Hornblower, and William Hornblower, with the said Abel Josiah Smith, for the joint use and occupation by them, as iron-masters and co-partners, of

the said hereditaments and premises; and that Rufford and Biggs had, at the request of the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, for some time past been their bankers, and in that capacity had, from time to time, discounted for the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, divers bills of exchange, drafts, and promissory notes; and had also advanced, to and for the use of the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, divers drafts, bills of exchange, sums of money, and cash-notes; and that the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, as co-partners as aforesaid, then stood justly indebted to the said Francis Rufford and Thomas Biggs, as bankers and co-partners, in the sum of 10,000*l.* and upwards; and, for securing the repayment thereof with interest, and also all such other sum and sums of money, which they, the said Francis Rufford and Thomas Biggs, or either of them, their or either of their future partners or partner, were or might be liable to pay, by reason, or on account of their indorsements or acceptances of any bill or bills of exchange, promissory or other note or notes, drawn or indorsed by the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, any or either of them, as co-partners as aforesaid, or which they, the said Francis Rufford and Thomas Biggs, or either of them, their or either of their future partners or partner, should thereafter advance, lend, and pay, or become liable to answer or pay for or on account of the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, as co-partners as aforesaid, not exceeding in the whole the sum of 20,000*l.*, including the said sum of 10,000*l.*, together with all interest, discount, commission, costs, charges, and expenses for and in respect thereof, or attending the same, they, the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, had consented and agreed to appoint, grant, and release the said several pieces or parcels of land, messuages, works, and hereditaments, unto the said Francis Rufford and Thomas Biggs, their heirs and assigns, in manner thereafter expressed;—it was witnessed, that, in performance of the said recited agreement, and for the considerations therein

mentioned, they, the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, did direct, limit, and appoint, grant, release, and confirm unto the said Francis Rufford and Thomas Biggs, and to their heirs and assigns, the several pieces of land, messuages, works, and hereditaments therein described, all which said messuages, works, lands, and hereditaments were then in the possession of the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith,—to hold the same, with their appurtenances, unto and to the use of the said Francis Rufford and Thomas Biggs, their heirs and assigns, for ever, subject to the following proviso and agreement for redemption of the same respective premises, that is to say, “if the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, or any or either of them, their or any or either of their heirs, executors, or administrators, should pay or cause to be paid unto the said Francis Rufford and Thomas Biggs, their executors, administrators, or assigns, upon demand, the said sum of 10,000*l.*, with interest for the same, at and after the rate of 5*l.* per cent. *per annum*; and also should, from time to time, regularly provide cash for and pay all such bill or bills of exchange, or promissory or other note or notes, draft or drafts, which the said Francis Rufford and Thomas Biggs, or either of them, had received from, accepted, indorsed, or drawn, or which they or either of them, their or either of their future partners or partner, should thereafter receive from, accept, indorse, or draw for or in favour of, or at the request, by the order, or on the account of, the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, or any or either of them, as, when, and where they should severally become due and payable; and also should, from time to time, pay or cause to be paid unto the said Francis Rufford and Thomas Biggs, their executors, administrators, or assigns, future partners or partner, all and every such sum and sums of money as they or either of them, their or either of their future partners or partner, should at any time or times thereafter advance, pay, lay out, or expend for or on account, by the order, or at the request of the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, or any or either of them, or

as they, the said Francis Rufford and Thomas Biggs, their or either of their heirs, executors, administrators or assigns, or future partners or partner, should be called upon, or liable or compellable to pay, for, or by reason, or on account of the acceptance or indorsement of any bill or bills of exchange, or other bill, or promissory or other note or notes, draft or drafts, already drawn or made, or to be drawn or made, by the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, any or either of them, upon, or made payable by, or at the house of them, the said Francis Rufford and Thomas Biggs, or at or upon any other person or persons, house, or place or places whatsoever, or which they, the said Serjeant Hornblower, William Hornblower, and Abel Josiah Smith, or any or either of them, whether upon their or his own proper account, or jointly with any other person or persons, should, by any means howsoever, become indebted unto them, the said Francis Rufford and Thomas Biggs, or either of them, their or either of their executors, administrators or assigns, or future partners or partner, for the time being, or which they or either of them should pay, expend, suffer, sustain, or be put unto, for or on account of any such negotiations, advances, loans, acceptances or indorsements as aforesaid, or in anywise howsoever, together with interest for all and every such respective sum and sums of money, at and after the rate of 5*l.* per cent. *per annum*, from the time or respective times when such payments or advances should severally be made.”

Upon the execution of these indentures of lease and release, an account was opened in the books of the bankers, upon the security of the said mortgaged estates, works, and premises, and was carried on and kept as an open current account, until the 15th of February 1822.

In 1816, Smith retired from the partnership; in 1819, S. Hornblower died; in 1822, Wm. Hornblower became bankrupt.

After the bankruptcy, Messrs. Rufford & Biggs filed a bill to enforce their security; and a decree was made, referring it to the Master, to take an account of what was due to them on their mortgage.

The plaintiffs carried in certain accounts,

according to which, they submitted, that there was due to them on the 24th of June 1816, when Abel Josiah Smith retired from the partnership, 14,068*l.* 16*s.* 1*d.*; on the 21st of November 1819, the day of the death of Serjeant Hornblower, 11,896*l.* 14*s.* 8*d.*; and at the bankruptcy of William Hornblower, when the account was closed, the sum of 9,108*l.* 4*s.* 1*d.*, which resulted from the former balances, and was the sum total claimed by them.

It appeared from the inspection of these accounts, that, at the date of the mortgage, the balance, which was carried over to the subsequent account, was not 10,000*l.* (as stated in the deed), but was upwards of 13,000*l.* In the preceding accounts, on which this sum was ascertained to be due, rests had been made, and interest computed, generally half-yearly, and sometimes quarterly; and, in the subsequent accounts, down to 1822, the same mode of stating the account had been followed.

The Master adopted the accounts as stated by the plaintiffs, and reported the ultimate balance claimed by them to be actually due to them on their security.

To this report the assignees of Hornblower took exceptions.

The first exception was, for that the Master, in finding 15,381*l.* 17*s.* 9*d.* to have been due to the plaintiffs, on their security, on the 24th of June 1816, had treated, as a final and settled account, a certain rest made in the month of October 1815, by the plaintiffs in their books, and in their pass-books with the firm of Hornblowers & Smith; and in taking the account subsequent to such rest, the Master had adopted, as final and settled accounts, subsequent rests made in the said books and pass-books, all which charged the firm of Hornblowers & Smith with interest upon interest, or compound interest: whereas, the Master ought, in taking such account, to have rejected all such rests, and all prior rests, and to have ascertained what was the true balance on the 7th of October 1815, due to the plaintiffs, by virtue of the indenture of the 7th of October 1815, or intended to be thereby secured, exclusive of all interest; or, at any rate, he ought to have allowed only simple interest in computing such balance; and, in computing such balance,

ought, if he had allowed interest, to have distinguished the amount of principal from the amount of interest, and should then have taken the account between the 7th of October 1815, and the 24th of June, 1816; and, in taking such account, he ought to have taken the same, exclusive of all interest, or ought to have computed or allowed simple interest on the amount of principal money due on the 7th of October 1815, and ought, if he had allowed any interest, to have distinguished the amount of principal from the amount of interest. The exception also insisted, that, if the Master was right in considering such rests, or any of them, as final or settled accounts, still he ought to have permitted the assignees of William Hornblower to have surcharged and falsified all such accounts, in respect of such interest upon interest, or compound interest, the same being error on the face of such accounts.

The other exceptions proceeded on the same principle, and were applied to the different balances as ascertained at the subsequent dates.

Upon these exceptions, the question was, whether interest, thus calculated upon interest, could be charged on the land.

Mr. Bickersteth and *Mr. Wakefield* were in support of the exceptions.

In *Ossulston v. Yarmouth* (1), it was decided, that a mortgagee could not stipulate beforehand, in his mortgage-deed, that the interest, if in arrear, should carry interest. The distinction is, that, though it is not unlawful to contract for compound interest, interest upon interest cannot, by any previous contract, be made a charge upon the land; but, after the interest has accrued due, the parties may then agree that it shall bear interest. Such a subsequent agreement, however, would require to be signed: otherwise, the Statute of Frauds would prevent it from being of any avail. Here, even if a contract to have compound interest were implied from the course of dealing, that would be a contract previous to, or, at least, contemporary with, the mortgage-deed, and it would not be a contract in writing. In *Brown v. Bookham* (2), and

(1) 2 Salk. 449.

(2) 1 P. Wms. 653.

Ex parte Bevan (3), there are *dicta* of Lord Macclesfield, and Lord Eldon, confessing these doctrines.

Mr. Pepys and Mr. Roupell were in support of the report.

The doctrine referred to is applicable only to a mortgage given to secure a specific sum with interest. This is a security given expressly for the balance of an account; and the only question is, whether, in ascertaining the balance of that account, interest may be calculated upon interest. That depends on the contract of the parties: and what the contract was here, is evident from the whole course of dealing. That such a mode of settling the account is perfectly legal, the cases of *Ex parte Bevan*, and *Calcot v. Walker* (4), put beyond all doubt.

Mr. Bickersteth, in reply, admitted,—in answer to a question from the Court,—that the bankers could have recovered the balance claimed by them in an action against their debtor for money had and received, if he had not become bankrupt.

The Master of the Rolls.—There are only two or three cases, in which the question has arisen, which has been discussed here. In *Ex parte Bevan*, Lord Eldon has determined, that such rests as are made here, are to be allowed, if such be the usage of the particular trade, or the course of dealing that has taken place between the parties; and he adds, that his observations do not apply to the case of a real security. When he so expresses himself, I understand him to speak, not of a real security like this, but of an ordinary mortgage. If Lord Eldon had there given an opinion on the question now raised, still it would have been only a *dictum* on a point which had not been argued before him: but I am persuaded that he never meant to give any opinion on the question.

A case was cited from *Salkeld* to shew, that you cannot covenant *à priori* that interest at the end of the year, if not paid, shall become principal, and that an agreement to convert interest into principal must be in writing. The latter opinion is not

expressed decidedly; and I have not made up my mind, whether, in such a case, a parol agreement would not bind the mortgagor. The former opinion is not applicable to the present question.

Putting aside these two cases, as not touching on the question here raised, there is no other authority for the proposition, that the security is not, in this case, to be considered in a very different light from the common case of a security for the loan of money. I asked, in the course of the argument, if it was disputed, whether, if bankruptcy had not intervened, and Messrs. Rufford & Biggs had brought an action for the balance, they could have recovered the sum reported by the Master to be due. Mr. Bickersteth admitted, that they could have recovered it; and unquestionably they might: for, that interest may be charged as it is here charged, has been decided in three cases—*Ex parte Bevan*, *Morgan v. Mather* (5), and *Calcot v. Walker*. If, then, the mortgagees, supposing there had been no bankruptcy, could have recovered the whole amount of their demand from the mortgagors, it seems extraordinary that there should be a principle to prevent the mortgagor from giving to the mortgagee a security for the balance, which the latter might so recover. Why should not the debtor, to gain credit, give a security for what should be due from him on an account of this nature?

I have found a case, which is expressly in point—*Lord Clancarty v. Latouche* (6). An opinion, indeed, is there expressed, as to quarterly rests, which could not now be maintained: but rests were there permitted to be made at the end of every year; and Lord Manners says, "Neither do I consider the defendants as mortgagees; for the mortgages were executed as securities collateral for any balance that might eventually be in their favour" (7). Let it be supposed, that the sum of 10,000*l.* had not been mentioned in the deed, the lands would here have been merely a collateral security for such balance as might be ultimately due from the customer to the banker; and the only difficulty that occurred to me was, that the deed stated, that it was a security for

(3) 9 Vesey, 223.

(4) 2 Annother, 496.

(5) 2 Vesey, jun. 15.

(6) 1 Ball & Beattie, 420.

(7) 1 id. 429.

10,000*l.* or thereabouts (8). But it is admitted, that that sum of 10,000*l.* became due to the bankers in a course of dealing similar to the subsequent dealings; and the effect of the whole deed is simply, that the land shall be a security for the sum which shall be ultimately found due on the balance of accounts.

If the 10,000*l.* had been in the nature of a common loan from the bankers to the iron-masters, that might have made a considerable difficulty; because it might then have been argued, that the transaction was to be regulated by the relation between mortgagor and mortgagee. Here, the transaction was not of that kind.

I must, therefore, overrule the exceptions.

The property comprised in the mortgage consisted of premises, on part of which large iron-works, with machinery of considerable value, were erected. These works had continued in the possession of William Hornblower till the time of his bankruptcy. A bill, which was, to a certain extent, a cross-bill, had been filed by the assignees of William Hornblower; and, in the progress of the causes, the property comprised in the mortgage had been sold under an interlocutory order of the Court.

By a decree made in both causes, it was amongst other things referred to the Master to inquire, what part of the estate and premises in question consisted of real, and what of personal estate,—and what part thereof was in the order and disposition of William Hornblower at the time of his bankruptcy,—and what sum of money the said estate and premises produced at the sale thereof, under an order, dated the 13th of July 1824; and he was to ascertain what part of such sum of money arose from the sale of the real, and what part thereof from the personal estate, distinguishing, in what he should find to have arisen from the sale of the personal estate, such part thereof as was in the order and disposition of the bankrupt, William Hornblower, at the time of his bankruptcy.

The Master found, that parts of the estate and premises in the decree mentioned, consisted of real estate, the particulars

(8) The language of the deed was "10,000*l.* and upwards."

whereof were set forth in the first schedule to his report; that other parts of the said estate and premises consisted of personal estate, the particulars whereof were set forth in the second schedule to his report; that such parts of the said personal estate as were mentioned in the first part of the said second schedule, were not in the order and disposition of the bankrupt, William Hornblower, at the time of his bankruptcy; and that such parts of the said personal estate as were mentioned in the second part of the second schedule, were in the order and disposition of the bankrupt, at the time of his bankruptcy; that such parts of the estate and premises as had been sold, produced, at the sale thereof, the sum of 14,350*l.*, of which 5,565*l.* arose from the sale of the real estate,—8,775*l.* 3*s.*, from the sale of the personal estate, which was not in the order and disposition of the bankrupt at the time of his bankruptcy,—and 9*l.* 17*s.*, from the sale of such personal estate as was in the order and disposition of the bankrupt.

The first part of the second schedule included nearly the whole of the machinery connected with or subservient to the iron-works, many parts of which could not be considered as affixed to the freehold.

The Master, in coming to his conclusion, had relied mainly on the affidavits of a great number of iron-masters, who were well acquainted with the usage of the county of Stafford as to iron-works. They deposed, that "it is the constant custom of the iron trade to let iron-works of the same description as those mentioned in the pleadings; and the tenant, by the custom of letting, has always delivered to him two inventories, one of which includes all machinery that is fixed and in a working state, which the tenant undertakes to repair, when any breakage or other casualty occurs; and, at the end of the term for which the tenant may agree to take it, he binds himself to deliver it up in good working repair and condition; and the other inventory includes all loose stock, such as tolls, holsters, pinions, &c. not fixed in the machinery, but lying on the premises for the purpose of being ready to replace and repair those which are fixed, and which loose stock is always paid for by the tenant on entry;—that the whole of the engines, furnaces, ma-

chinery, and buildings, as set forth in a schedule," (corresponding with the first part of the second schedule to the report,) "would be considered, according to the custom of iron-masters, and the iron trade, as belonging to the first inventory;—that the engines, furnaces, machinery, and floor-plates, comprised in the said schedule, are all necessary for a working iron-work, and the work would not be considered complete, if any part of it were to be removed; and the landlord would at his own expense have to supply any part thereof that might be deficient;—that they had looked over the said schedule, and that it appeared to the deponents that there is nothing mentioned therein but the race of wheels, the trains of rolls, laves, shears, &c. &c., the engines, brick-work, furnaces, &c., which form the first groundwork of an establishment of this nature, and the whole of such machinery is always fixed in the most permanent manner, being bound down to, by iron bolts, or imbedded in, brick, mortar, and timber, and forms no part of the stock which is considered as belonging to the tenant;—that the greater part of the machinery, buildings, and works comprised in the schedule, require constant repairs, and which repairs the tenant always engages to make, in order to leave the work entire and in a working condition."

On the other hand, there were affidavits on the part of the assignees, in which engineers, who were well acquainted with the premises in question, and who were employed by iron-masters and others in valuing iron-works when the same were let or sold, and also in erecting iron-works and machinery for the making of iron, deposed "that they are not aware that there is any custom or usage in the iron trade for letting the machinery of an iron-work to a tenant, but that the most usual practice in letting an iron-work, where the same is a going work, is, that the tenant, or party about to take a lease of the same, takes to, and purchases the machinery, at a valuation, from that point of the engine-machinery, which is termed the "fast crab," which is the place where the motion is given to the rolls or machinery from the engine; and that, at the end of the term, the landlord either takes to the machinery again at a valuation, or the tenant removes and sells, and disposes

VOL. VII. CHANC.

of the same;—that deponents knew of several instances where they have been called in and consulted, in which an iron-work has been let to a tenant, with the engine and all the machinery complete, and, in those instances, a valuation has been made of the engines and machinery at the time the tenant took to them, and a special agreement has been made between the parties, letting and taking the same, that the same engines and machinery should be delivered up by the tenant at the end of his tenancy, in the same state of repair and condition, or pay to his landlord the difference, in case of any deterioration;—that it is the custom and usage of the iron trade, that, in cases where a lease for a term has been granted of land and premises for the purpose of erecting an iron-work where no iron-work stood at the time of granting such lease; and where no special covenant or agreement is contained in such lease to the contrary, the tenant in possession at the end of the term has invariably a right to remove the steam-engines, machinery, and every other species of property used for the purpose of making iron, except the walls and buildings which have been erected and built in and upon the said land and premises, and affixed to the soil or freehold of the same premises, and which are commonly termed the shell of the work."

The assignees excepted to the report, on the ground, that the Master ought to have found that the whole or nearly the whole of the personal estate and effects mentioned in the first part of the second schedule, were in the order and disposition of William Hornblower at the time of his bankruptcy.

Mr. Bickersteth and *Mr. Wakefield* appeared in support of the exceptions.

The greater number of the articles of machinery, included by the Master in the first part of the schedule, are clearly such as a tenant, who had erected them, might have removed, and as might have been taken in execution. If some of them are fixed to the freehold, many of them are not so affixed in any manner, and others of them are connected with it only by being connected with portions of machinery so affixed. The greater part of these articles are mere personal chattels, which were

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never out of the possession of the bankrupt, and of which, up to the time of his bankruptcy, he appeared to be the owner.

Mr. Pepys and Mr. Roupell were in support of the report.

It is proved, that, according to the custom of the trade among iron-masters, machinery of this kind is not necessarily or usually the property of those in whose possession it is. William Hornblower, therefore, never could have gained a false credit by his remaining in possession of these articles of machinery.

Mr. Rose appeared for other parties in the same interest.

The following cases were cited on the one side and the other :

Poole's Case, 1 Salkeld, 368.

Ryall v. Rolle, 1 Atkyns, 166.

Horne v. Baker, 9 East, 215.

Elwes v. Maw, 3 East, 88.

Storer v. Hunter, 2 Barn. & Cress. 369.

Ex parte Smith, Buck. 150.

Sinclair v. Stevenson, 2 Bing. 514.

The Master of the Rolls.—This is a case in which the mortgagor is the landlord, and also the occupier of certain premises, and of the iron-works erected on them. If the question were between landlord and tenant, or between heir and executor, it would be difficult to adopt the conclusion of the Master. As between mortgagor and mortgagee, the mortgagee takes whatever the mortgage deed professes to give him. Here the mortgagor has professed to give the mortgagee a title to the articles in question ; and, *primâ facie*, whatever is attached to the freehold passes to the mortgagee with the freehold. To this rule there is an exception in the case of the bankruptcy of the mortgagor,—an exception introduced by the statute of James, and adopted by the present Bankrupt Act ; and the principle on which the exception proceeds is obvious—namely, that, if the true owner suffers another party to acquire a credit by means of certain property, as if he were the true owner of it, he gives him the means of imposing on the world, and shall therefore not be allowed, as against creditors, to retain that property as his own.

The real question, therefore, in all such

cases is, whether the possession of the property does necessarily infer that the party in possession is the owner of the property, so as to give him a false credit.

It is impossible that the world can know, what the real title of the bankrupt to the possession is ; and it is for that reason that judges have referred to the custom of trade. If the custom of the trade be, that articles of this kind are supplied by the tenant, the possession of them by the occupier, gives him an apparent ownership : but if the usage be, that they belong to the landlord, that usage shews that no false credit could be obtained by the tenant, in consequence of his being in possession of them.

So far as the articles are affixed to the freehold, the mortgagee is not deprived of the benefit which his deed professes to give him : and as to the question on the particular articles, which are said not to have been fixed to the freehold, I assume that the Master had a better opportunity of coming to a right conclusion than I have. If those articles had been more numerous, further inquiry might have been necessary. As it is, my inclination is to confirm the report generally.

Some of the articles, which the exceptants claim as not affixed to the freehold, must be regarded as having been affixed to it,—for instance, an iron chest, and a set of book-shelves near it. The wall was cut away to admit the chest and the shelves : and if a wall is cut away to admit a thing, that thing must be considered as fixed to the freehold.

The exceptions were overruled.

1829. { ATTORNEY-GENERAL v. WARD
AND OTHERS.

A man, out of favour and kindness towards the son of A, demised certain premises, including the advowson of a vicarage, to A. and B. for a term of 99 years, at a rent of 40l. a year : shortly afterwards, he conveyed the same premises to trustees, upon trust to pay, out of the profits thereof, 20l. a year to his sister during her life ; and, after her death, to her children ; and, after the death of the survivor of the children, to pay the said 20l. a year

to one charitable purpose; and, out of the residue of the rents and profits, to pay 15l. a year to a second charitable purpose; and, out of the residue of the rents and profits, to pay 5l. a year to a third charitable purpose:—Held, that the whole profits of the property were devoted to charity; and that a lease of the premises for 500 years was void, as being an improvident act in the management of a charity estate.

An advowson may be given to a charitable use.

Quære—Whether the trustees of a charity will be permitted to present to a vicarage, the advowson to which has been given to the charity, without making profit of the presentation by selling it for the benefit of the charity.

Thomas Triplett, Doctor in Divinity, by indenture, dated the 10th of November, in the twentieth year of the reign of His Majesty King Charles the Second, demised certain hereditaments to Elizabeth Nedham and Richard Oakeley, for the term of 99 years, at the rent of 40l. per annum. This lease contained a declaration, that it was mutually agreed between the parties therein named, that, the said indenture of lease being granted to the said Elizabeth Nedham and Richard Oakeley, from the said Thomas Triplett, in favour and kindness to John Nedham, son of the said Elizabeth Nedham, if it should, at any time thereafter, appear to the said Elizabeth Nedham and Richard Oakeley, or the survivor of them, or the executors or administrators of such survivor, that no competent benefit could be made thereby, either by reason of the continuance of taxes, or the badness of the times, then and in such case, it should and might be lawful to and for the said Elizabeth Nedham and Richard Oakeley, or the survivor of them, or the executors or administrators of such survivor, at any time or times during the continuance of the said lease, at his or their wills or pleasures, to depart with, surrender, and deliver up all and singular the said demised premises, and estate and lease thereby granted unto the said Thomas Triplett, his heirs and assigns, in manner therein mentioned, or to that effect.

Shortly afterwards, by indenture, bearing date the 21st of December 1668, Thomas Triplett conveyed the said pre-

mises to John Nedham, and seven other persons therein named, their heirs and assigns, by the description of the rectory and church of Haughley, *alias* Halley, in the county of Suffolk, and the advowson, donation, free disposition, and right of patronage, of the vicarage of the said church, and all the manor, grange, or rectory, called Fishpond, with their appurtenances, in the county of Suffolk, which had belonged to the dissolved monastery of Heyles, in the county of Gloucester, together with all tithes, and other hereditaments thereto belonging, situate, arising, and increasing in Haughley, Harleston, Wetherden, and Stow Market, or elsewhere, in the said county of Suffolk; and also, a messuage or tenement, called Dowis, and ten acres of land, meadow or pasture, in Haughley, next or near the ground belonging to Fishpond aforesaid, and the reversion and remainders of all and singular the premises, and of every part thereof, and all rent or rents reserved or payable upon any lease or leases of the premises, or any part thereof,—to hold the same to them, their heirs and assigns, upon trust, and to the intent and purpose, that they, the said trustees, their heirs, &c. should, from time to time, and at all times thereafter, during the natural life of Katherine Warne, sister of him, the said Thomas Triplett, pay unto her, out of the rents and profits of the said rectory and premises, the full yearly sum of 20l. per annum: and, after the death of the said Katherine Warne, that they, the said trustees, &c. should pay the yearly sum of 20l., so limited to the said Katherine for her life as aforesaid, unto such child or children of the said Katherine Warne as should be living at the time of the decease of the said Katherine Warne, or his, her, or their assigns, by equal portions, at the respective days of payment before mentioned: and, from and after the death of such child or children of the said Katherine Warne, and the survivor of them, that they, the said trustees, and the survivors of them, and the heirs and assigns of such survivors, should pay, or cause to be paid, unto the then dean and sub-dean of the collegiate church of St. Peter at Westminster, and the two senior prebends of the said church, and their successors for ever, the said yearly sum of 20l. per annum, to the use, for, and in trust for, four of the most worthy acho-

lars of the free-school at Westminster, that want means to subsist at the University; and, upon this further trust, and to this further intent and purpose, that they, the said trustees, and the survivor of them, should, out of the residue of the rents and profits of the premises, over and above the said yearly sum of 20*l.*, pay or cause to be paid unto such poor children, both male and female, born or to be born, for ever, in the parish of Hayes, in the county of Middlesex, as they, the said trustees, by the advice and assistance of the churchwardens and overseers of the poor of the said parish for the time being, should think fit, and by such proportions as they should also think fit, the yearly sum of 15*l.* *per annum* for ever, at the respective days of payment therein mentioned: and also upon this further trust, and to this further intent and purpose, that they, the said trustees, and the survivors of them, &c. should, out of the residue of the rents and profits of the said premises, over and above the said yearly sum of 20*l.* *per annum*, and 15*l.* *per annum*, pay or cause to be paid unto such poor children, both male and female, born or to be born, for ever, in the parishes of Petersham and Richmond, in the county of Surrey, as they, the said trustees, and the survivor of them, and the heirs and assigns of such survivor, by the advice and assistance of the churchwardens and overseers of the poor of the said parishes of Petersham and Richmond for the time being should think fit, and by such proportions as they should also think fit, the yearly sum of 5*l.* *per annum* for ever, at the respective days of payment therein mentioned.

The deed contained also a power of appointing new trustees.

Katherine Warne and her children had been long dead.

An information was filed by the Attorney General, upon the certificate of the commissioners for inquiring into charities, which, after setting forth the indenture of 1668, stated, that, in 1696, John Nedham was the only surviving trustee under that indenture;—that, by indenture, bearing date the 20th of November 1696, he demised to Charles Knipe, his executors, administrators, and assigns, the premises aforesaid, to hold the same from the expiration of the term of 99 years, for the term of 500 years,

at the old rent of 40*l.* *per annum*;—that that rent was greatly below the value of the said premises;—that Charles Knipe was the son-in-law of the said John Nedham;—that the said lease was granted by John Nedham, in order to benefit his own family at the expense of the charity;—and that, the term of 99 years having expired, the reversionary term of 500 years had fallen into possession, and had become vested in the defendants, the Wards, who had paid unto the trustees of the charity for the time being the annual rent of 40*l.*

The information charged, that the reversionary lease for 500 years was an improper and improvident lease, granted at a very inadequate rent, and without any consideration being paid for the same; that the grant of such lease was a breach of trust; and that the income arising from the rectory alone exceeded 400*l.* a year.

The prayer was, that the demise for the term of 500 years might be declared void, and that the whole of the rents might be paid over to the trustees of the charities, to be applied according to the trusts of the indenture of the 21st of December 1668.

The defendants, the Wards, in their answer, set forth the lease of the 20th of November 1696. It recited, among other things, that Elizabeth Nedham, in her lifetime, laid out and bestowed, in repairing of the messuages and houses then standing in and upon the said rectory and premises, at least the sum of 60*l.*, which messuages and houses had since, by casualty, been totally burned down and demolished; and that Charles Knipe had since laid out and expended in the repairs of the chancel belonging to the parish church of Haughley therein mentioned, the further sum of 20*l.*: so that the said Elizabeth Nedham and Charles Knipe had, in truth, thitherto been considerable losers by the lease so made to them, contrary to the intendment of the said Dr. Thomas Triplett; the whole estate having never been let by them, when the houses were standing, at more than 50*l.* a year, and many years at the rate of 45*l.* The defendants further stated, that the property had been purchased for valuable consideration by their father and grandfather, and who had respectively charged it with legacies and annuities; that they had paid those legacies and annuities; and that they them-

selves were thereby purchasers for valuable consideration. They also submitted, that, in case the lease was not binding against the charity as to the lands, yet, at least, it was good as to the advowson of the vicarage, which cannot be applied to charitable purposes; and that the gift to charities was only a gift of certain sums to the amount of 40*l.* *per annum*.

The Attorney General and Mr. Pembrton appeared in support of the information.

The doctrine of the Court is, that, if the whole profits of the land, at the time of the charitable gift, are devoted to charity, the whole increased profits, at any subsequent time, must go to charity also. Here the whole profits of the premises comprised in the deed of 1668, were at that time 40*l.* a year, and the whole of that 40*l.* was apportioned among the charities. The whole rents of the lands, therefore, are now applicable to those charitable purposes.

Then the only question is, whether a lease of a charity estate for five hundred years, granted by trustees half a century before the expiration of a subsisting lease, can be sustained. All the authorities shew that the granting of such a lease is a gross breach of trust, and a most improvident administration of the charity property.

Mr. Sugden, Mr. Simpkinson, and Mr. Rolfe, appeared for the defendants, the Wards.

The 40*l.* a year has been regularly paid to the charities; and if that is the whole which the charities are entitled to claim, the Attorney General can have no right to question the validity of this lease. Now, unless the land itself is given to charity, or all the profits are so given, the Court will not intend that the donor meant to give more than the specific sums mentioned by him. Here there is no pretence for saying that the property itself is given expressly to charity; and unquestionably the whole profits are not so given in express words. It is true that the rent reserved on the ninety-nine years lease, was only 40*l.*, and that that sum is apportioned among the three charities; but the circumstances afford the strongest reason for believing, that, even in 1668, the property was worth more

than 40*l.* a year, and that the excess beyond the 40*l.* was never intended for charitable purposes. The lease of ninety-nine years was granted in favour and kindness to John Nedham, the son of Elizabeth Nedham, one of the lessees; so that the lessor must have thought that the lease was a beneficial one, and that the property had some surplus value beyond the 40*l.* a year. Each of the charges of 20*l.*, 15*l.* and 5*l.*, is expressly said to be for ever; and the donor expressly confines the trust to no other use, intent or purpose. The first charge of 20*l.* is directed to be paid out of the rents, and each of the other sums of 15*l.* and 5*l.* are directed to be paid "out of the residue of the rents," contemplating a residue after payment of the last sum of 5*l.*, as well as after payment of the foregoing sum of 15*l.* The founder of the charity must have been aware that there would be charges attending the execution of the trust. Whence were those charges to be defrayed, if 40*l.* a year was considered to absorb the whole profits of the lands?

Besides, an advowson yields no profit, and is therefore not the subject of a gift to charity. "An advowson in gross," says *Duke* (1), "a way or passage, &c. cannot be granted to a charitable use." The information, therefore, must fail, as to the advowson, at least; and failing as to it, the consequence is, that the whole of the property is not devoted to charity; and the charities, therefore, cannot claim more than the specific sums bequeathed to them; for the right of the charities must either be limited to the 40*l.* specifically charged, or must extend to the whole property upon which that 40*l.* was declared to be charged. Now, suppose the lease of 99 years had expired in the lifetime of a child of Dr. Triplett's sister, Katherine Warne; and that, after the expiration of the lease, and during the life of such child, the advowson of the vicarage had become vacant, and the houses, lands, and rectorial tithes had been let for a much higher rent than 40*l.* a year,—could it have been contended, that such child's limited annuity of 20*l.* was to be increased according to the increased value of the property upon which it was charged?—or would not both the increased surplus income, and the bene-

(1) *Duke's Charitable Uses*—Bridgman's *it.* p. 138.

ficial interest of nominating to the vacant vicarage, have been deemed resulting trusts, for the benefit of Dr. Triplett's heir? And if such would have been the operation during the life of a child of Katherine Warne, what should make the difference after the death of such child, since it is the *said sum* of 20*l.* which is given to the dean and sub-dean of Westminster? The dean and sub-dean of Westminster can claim nothing which Katherine Warne could not have claimed.

The following authorities were cited :—

Attorney General v. Tonner, 2 Ves. jun. 1; and 4 Bro. Ch. Ca. 103.

Attorney General v. the Mayor of Bristol, 2 Jac. & Walk. 294.

Attorney General v. the Mayor of Exeter, Jac. 448.

Attorney General v. Skinners' Company, 5 Mad. 174.

The Master of the Rolls.—The last case, in which the authorities applicable to this subject were critically examined, was on an appeal from my decision in *The Attorney General v. the Mayor and Corporation of Bristol*. Lord Eldon there went through the cases with great care; and pronounced what he considered to be the rule of a court of equity on subjects of this nature; and I cannot better express his opinion on these matters than by reading the words he has used :—

“As far as I have read these ancient cases, they state it to depend upon the intention of the donor; and that one way of finding out that intention is, to inquire whether the whole of the annual value of the property was, at the time of the foundation of the charity, distributed amongst the objects of the charity. If it was, they say, that that circumstance is evidence of the donor's intention to give the whole of the increased value to the same objects. Whether that be a rule of evidence, which good and sound reasoning would have led one to adopt originally, I do not trouble myself with inquiring; but I cannot help feeling the force of what Lord Hardwicke says, in *The Attorney General v. Johnson* (2), that, when the *Thetford* case was decided, the doctrine

of resulting trusts was but little understood; and, if the object of the gift had not been charity, I feel considerable difficulty in believing, that this doctrine of the Court would have prevailed. Settled rules of construction, however, must not be disturbed; and this principle is of so much importance in administering the justice of the country, that, according to my notion, if there has been, not merely a variety of cases, but even only one ancient case, and there has been practice and experience in favour of it, it ought to be adhered to. Another rule to be found in these ancient cases is, that, as the charity would lose, if the fund decreased in value, it ought to gain, in case it increased. I should have doubted, whether that was a sound rule of construction; but I take it to be one as settled as the other; and that, therefore, it would not be right to disturb it.”

The principles here stated by Lord Eldon must be considered as the settled rule of the court: because no Judge, after this elaborate judgment of Lord Eldon, will ever venture to apply a rule different from that which he has so laid down. Let us apply these principles to the present case. Doctor Triplett was seised of property, which he had demised for a term of 99 years, at the clear annual rent of 40*l.* a year; and he disposes of the whole of this 40*l.* a year to objects of charity, in certain proportions. By the deed of foundation, he gives 20*l.* to his sister and her children; and, after their decease, to the dean and chapter of Westminster, for certain charitable purposes; 15*l.* to a second charity; and 5*l.* to a third charity. Here, therefore, to use Lord Eldon's words, at the time of the foundation of the charity, the then present actual amount of the property was entirely devoted to charity, after the death of the sister and her children; and the intervening life-interest in the 20*l.* a year, can make no difference in the application of the principle.

It is said, there are special circumstances here, which take the case out of the general rule. The age of the sister, it is said, is not known; she might have been a very young woman; her surviving child might outlive the term of 99 years; in that event, the annual sum of 20*l.* payable to that child, could not have been increased; and, therefore, it is inferred, that the other annual sums of 15*l.* and 5*l.* could not have been increased.

Now, in the first place, if I were to admit that Dr. Triplett had in his contemplation the notion, that a child of his sister might outlive the term of 99 years, it would not be a necessary conclusion, that, because the 20*l.* payable to the sister and her children would not be increased, however the income of the property might be augmented, therefore the two sums of 15*l.* and 5*l.* would not be increased. My opinion is otherwise. In such a case, these two annual sums would be increased, so as to exhaust the whole of the rents and profits. But I do not admit, that Dr. Triplett had any such event in his contemplation; so that the possible circumstance, which has been relied on, is no ground for inferring any intention on his part. Dr. Triplett appears to have had considerable church preferment; and the foundation of a charity is not the act of a man in early life: the probability, therefore, is, that he was a man considerably advanced in years; and the sister, in all likelihood, was not very young. Upon reading the deed, it appears to me that Dr. Triplett never contemplated the possibility, that the payment of the 20*l.* a year to his sister and her children would endure beyond the term of 99 years.

Another circumstance relied on is, that the language of the deed is, that the trustees shall, "*out of the residue*" of the rents and profits, pay the 15*l.* a year; and then, that "*out of the residue of the rents and profits,*" they shall pay the 5*l.* a year. This phraseology, it is said, shews that there was an intention, that there should be a residue after the annual payments of 20*l.*, 15*l.*, and 5*l.*, and that the founder did not consider that he had exhausted the whole of the property by these three payments; and, therefore, that the case is taken out of the general rule. Now, it is plain, that the words thus relied on are merely an inaccuracy of expression. Dr. Triplett is here disposing of a rent, which, during 99 years, could not be increased beyond 40*l.* a year. After the 20*l.* and the 15*l.* were paid, the 5*l.* would exhaust the whole; there would be no residue out of which it could be taken. His mention of the residue is merely an inaccuracy of language introduced by the framer of the deed, who uses, *currente calamo*, the same expression, with respect to the 5*l.*, as he had used with respect to the 15*l.*

It is next said, that a part of the property devoted to charity consists of the advowson to a vicarage; that the presentation to a vicarage could not be sold by the trustees; nor in any manner turned to profit; and, consequently, that Dr. Triplett has not applied the whole profits of these premises to charitable uses. It is not necessary for me to say, whether the next presentation to a vicarage can or cannot be sold by the trustees of a charity; but I am very far from taking it to be clear, that the trustees of a charity would be permitted to present to a benefice, without converting to the benefit of the charity, that which might be lawfully sold. Here, however, the advowson was comprehended in the lease for ninety-nine years. Dr. Triplett, therefore, exhausted the whole profit of the property, including the profits of the advowson, such as it existed at the time of the foundation.

It was further argued that, because the advowson could not be turned to profit, it could not be made the subject of a charitable gift; and a passage to that effect was cited from *Duke*. It happens, that, in a late case of *Bennett v. Bennett* in the House of Lords, the subject of the charity was in part an advowson, and it did not occur to any person that such an objection could be maintained. That amounts to a declaration of the law, that an advowson may be the subject of a charitable gift; and the inclination of my opinion is, that, an advowson being the subject of a charitable gift, this Court would hesitate long, before it permitted trustees to present, without making that profit, out of the presentation, which the law permits to be made.

My opinion therefore is, that this is a case within the rule, and that the charities are entitled to the increased rents.

As to the lease for five hundred years, the case stands thus:—The original lease, granted in 1668, would expire in 1767; and in 1696, John Nedham, the surviving trustee, executed the reversionary lease for a term of five hundred years. Now, without entering into the corrupt motive which must have affected the mind of Nedham, when he executed this lease, the authorities are clear, that a lease for five hundred years, being in effect an alienation of the trust-property, could not be granted in the pro-

vident management of the charity estate. On that ground alone, the lease must be avoided.

The costs of the Attorney General, as between party and party, were ordered to be paid by the defendants, the Wards. The extra costs of the Attorney General, and the costs of the trustees of the charity, (who were also defendants) were to be borne by the estate.

1829. }
February. } DYMCK V. ASHTON.

The examination of a party may be read on further directions, for the purpose of having inquiries directed, though no foundation for those inquiries appears on the report itself.

The accounts had been taken against an executor in the Master's office, and the result was, that a balance was found due to him.

On the part of the plaintiffs, it was stated, that it appeared from the examination of the defendant, that he had frequently retained considerable balances in his hands, and they prayed inquiry with respect to those balances.

Mr. Bickersteth, for the defendant, objected, that it did not appear from the report, that the executor had had balances in his hands; and the plaintiffs could not go out of the report. They had not given notice of any intention to read the examination.

The Master of the Rolls.—The plaintiffs have a right to refer to the regular proceedings in the Master's office, to shew that the executor has had balances in his hands; and what appears on this examination is a sufficient foundation for the inquiry which is asked. I shall, therefore, refer it to the Master to inquire, what annual balances the executor has had in his hands, and whether the same were properly retained in the due execution of his trust.

1829. }
March 23. } LIVESSEY V. LIVESSEY.

*A testator devises and bequeaths his property after his wife's death, to trustees, who are to invest it in securities, and to pay the interest to his daughters, Jane and Eliza, in equal shares, and also to pay to, or apply for the benefit of, his grandson Edmund (Eliza's eldest son), 200*l.* annually, when he attains twenty-one; and before that period, such part of the 200*l.* bequeathed to him, as they may judge proper: in a subsequent part of his will he gives his daughter power to dispose of the moieties of his property, of which they respectively took the interest, in favour of their respective children or grandchildren, except that 4000*l.*, part of Eliza's share, out of which the interest to the grandson is to arise, and which is to be that grandson's property; and he directs that, in case either of his daughters shall die without leaving issue, the fortune of the one so dying shall go over for the benefit of the other and her children, and she shall have the power of limiting an annuity of 100*l.* per annum out of her moiety to a surviving husband: the grandson Edmund attained twenty-one, and died in the lifetime of his mother:—Held,*

*That the annuity of 200*l.* a year ceased upon his death;*

*That the 4000*l.* did not become a vested interest in him.*

The testator, James Worthington, devised his property (1), after the death of his wife, to trustees, upon trust to pay the annual interest or profits to his two daughters, Jane and Eliza, to their separate use, in equal shares.

"And my will and mind (continued the testator,) is, that my trustees shall pay to, and apply for the benefit of, my grandson, Edmund Worthington Livesey, the sum of 200*l.* annually, when he attains the age of twenty-one years; and before that period, such part as may be judged proper out of the 200*l.* bequeathed to him, so as to give him a good education,—being desirous that he may be brought up in a judicious manner, to give him a degree of respectability in society equal to his family and fortune, which have always supported honourable

(1) The will is set forth more at length in the *Law Journal*, vol. 6, p. 13, 14.

and useful characters in life. As to the principal, my mind is, that my said daughters, Jane and Eliza, shall have full power to dispose of it, in such proportions as they by will shall direct, to their children or grandchildren respectively,—(except that proportion of principal given to Eliza, and from which the interest is to arise to my grandson, viz. 4000*l.*, which sum shall be my grandson's property); but in case either of them shall die without leaving lawful issue, then my will is, that the fortune of her so dying shall revert to and become the property of the surviving one, her children or grandchildren, to be disposed of to them in such proportions as the one departing this life shall will and direct: and she shall also have the power of bequeathing unto her husband, provided she leaves one, 100*l.* per annum, as an annuity, to be issuing from and out of the moiety so disposed of, which moiety is to be subject to the restriction, limitation, and distribution aforesaid.

The grandson, Edmund, (he was the eldest son of Eliza,) attained twenty-one in 1817; and it was decided by the Lord Chancellor (2), affirming the decision of Sir Thomas Plumer, that he was not entitled to the 200*l.* a year till he attained twenty-one.

Edmund Worthington Livesey, by his will, dated the 15th of May 1827, bequeathed all his personal estate and property to his sister, Mary Carter Livesey, and appointed her his executrix. He died on the 21st of the same month.

Mary Carter Livesey now presented her petition, praying that Martin Livesey, and Jane his wife (who was the surviving executrix of the original testator), might be ordered to pay to her the arrears of the annuity of 200*l.* and also the growing payments of the same, until the sum of 4000*l.* should become due and payable; and that in the meantime, the said sum of 4000*l.* might be duly secured under the direction of the Court.

There was no dispute that the petitioner was entitled to the arrears of the annuity which had accrued in the lifetime of Edmund: but two questions were raised:—

First, whether the annuity of 200*l.* until

the 4000*l.* became payable, vested absolutely in Edmund, or was given for his personal benefit and ended with his life.

Secondly, whether Edmund took a vested interest in the 4000*l.*

Mr. Agar, Mr. Preston, and Mr. Duckworth appeared to support the claims of the petitioner.

The will contains no limitation of the time, during which the annuity is to be paid: but that annuity is referred to as being the interest of a sum of 4000*l.*; and it must continue till that sum becomes payable, namely, at the death of Eliza Livesey.

The 4000*l.* was a vested interest in Edmund. The will speaks of it as his property; and the interest of it, in the form of an annuity, was in the meantime given to him for maintenance. Besides, the decree on further directions expressly declares, that it is to be payable on the decease of Eliza Livesey.

Mr. Pepys, Mr. Wood, Mr. Treslove, and Mr. Russell, *contra*.

The devise declares only that the 4000*l.* would be payable on the death of Eliza, on the terms of the will; that is to say—if the person, in whom it was then for the first time to vest, should be then alive. The decree has ascertained, that the 4000*l.* did not vest in Edmund before he attained twenty-one; where, then, are there any words in the will to make it vest before the time of payment? The testator has given each of his daughters a power of appointment among their children and grandchildren, over their respective moieties of his property: but he provides that Edmund shall not be left in the power of his mother, like the other children; he fixes his share at 4000*l.*, and in the meantime he gives him an annual income. *Prima facie*, when a testator gives an annuity to A. B., he means an annuity only during the life of A. B.; and in the present case, the words shew that the testator had in view only the personal advantage of Edmund. Besides, it is clear from the ultimate gift over, that, if Eliza were to die, not leaving any issue, the whole of her moiety (including the 4000*l.*) would go over to her sister or her sister's children.

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The Master of the Rolls.—This is certainly a very embarrassing case; but, looking at the decree, and at the language of the will, I am of opinion, that the testator intended only a personal benefit to this gentleman, Mr. Edmund Worthington Livesey. The words are particularly strong: the money is to be "paid to him or applied for his benefit;" which are words that would have no application whatever, if the testator had intended that he should have an absolute interest during the life of his mother in the interest of the 4000*l.* When he comes to except this 4000*l.* from the power of appointment, what he means is this only—Eliza shall have a power of appointment over her moiety, except that, if Edmund Worthington Livesey should be an object of that power of appointment, (which he might or might not be, because he might not have attained twenty-one, and if he had not attained twenty-one, it never could have been argued that he would have taken this 4000*l.* absolutely,)—if he should live to be an object of that appointment,—he should have the 4000*l.*, and his mother should have no power to diminish that sum. Then comes the clause in the will, giving over the whole property; he gives it to his two daughters, and if either of them should die, without leaving issue, her share is to go to the surviving daughter. Unless the Court, on the hearing of the cause, had held this to be the construction, I think, it would be extremely difficult to reconcile the judgment with the language of the will.

The order directed, that it should be referred to the Master to take an account of the arrears of the annuity of 200*l.*, which became due in the lifetime of Edmund Worthington Livesey, in case the parties differed about the same; and his Honour declared, that the sum of 4000*l.* given by the will of the testator, James Worthington, to answer the growing payments of the said annuity, did not vest in Edmund Worthington Livesey (3).

(3) Against the above order an appeal to the Lord Chancellor is now pending.

1829. } KING v. TULLOCK.
Feb. 4. }

The consent of the creditors of a bankrupt, or of the commissioners, to the prosecution of a suit, in which the bankrupt's estate is interested, and which was commenced by the assignees without such consent, will not enable the assignees to sustain the suit.

Demurrer allowed to a supplemental bill by assignees, stating that the commissioners, after the institution of the suit, had given their consent to its prosecution.

This purported to be a supplemental bill, and was filed by King and Harris, as the assignees of the estate and effects of a bankrupt of the name of Baskett.

Their original bill, filed Trinity term 1827, and amended in June 1828, after stating the transactions, in respect of which relief was prayed against Tullock, alleged—that a commission of bankrupt, bearing date the 18th of October 1826, was awarded and issued against Baskett, under which he had been duly found and declared a bankrupt; that the plaintiffs had been duly chosen assignees of his estate and effects; that the usual assignment and bargain and sale had been executed to them of the real and personal estate of the bankrupt; and that the plaintiffs, as such assignees, had been duly authorized by a meeting of creditors to commence and prosecute the said suit.

The supplemental bill, after reciting the above-mentioned allegations of the original bill, stated that the defendant put in his answer, whereby he said—that he believed and contended that the plaintiffs, as such assignees, had not been duly or legally authorized or empowered to commence or prosecute the suit, and he, the defendant, craved permission to prove the same; that, in consequence of the pretence so set up by the answer, and to obviate any doubt as to whether the authority given to the plaintiffs to commence and prosecute the suit was in all respects sufficient, according to the statute, the plaintiffs caused an advertisement to be inserted in the London Gazette of the 29th of September 1828, calling a meeting of the creditors who had proved their debts under the commission, in order to assent to or dissent from the assignees continuing and prosecuting, and commencing

such supplemental proceedings as might be necessary or advisable for the purpose of effectually proceeding with, and adopting, or for obtaining the relief sought by a certain suit in equity, commenced in Trinity term 1827, in the names of the assignees, against a certain person to be named at the meeting, for the purpose of obtaining a statement of, and investigating the accounts then or lately subsisting between, such certain person and the bankrupt; that one third in value of the creditors did not attend at the appointed time and place; whereupon the major part of the commissioners, at a meeting of the commissioners, in due manner convened on the 27th of October 1828, upon being in due manner informed of the suit and proceedings, and of the other matters mentioned in the advertisement, and having duly weighed and considered the same, did, by their consent testified in writing, under their hands, upon and dated on the 27th of October 1828, after reciting the advertisement and the non-attendance of creditors in pursuance thereof, signified their consent to the plaintiffs continuing and prosecuting the said suit against James Tullock, and also to the plaintiffs commencing and prosecuting such supplemental proceedings as might be necessary or advisable for the purpose of effectually proceeding with, and adopting, or for obtaining the relief sought by, the same suit in equity.

The prayer was, that it might be declared that the plaintiffs were duly authorized to carry on and prosecute the said suit and proceedings; and, that they, as such assignees, might be at liberty to carry on and prosecute the said suit against James Tullock; and that they might have the benefit of the proceedings already had therein.

To this bill a general demurrer was filed.

Mr. Sugden appeared in support of the demurrer.

The 6 Geo. 4. c. 16. s. 88. provides (1), "that no suit in equity shall be commenced by the assignees without such consent"

(1) The 88th section of 6 Geo. 4. c. 16. enacts, "That the assignees, with the consent of the major part in value of creditors who shall have proved, present at any meeting, whereof and of the purport whereof twenty-one days notice shall have been given in the London Gazette, may compound debts," &c.: it then proceeds—"and no suit in equity shall be commenced by the assignees without such consent as

as therein mentioned. This supplemental bill is filed for the purpose of stating that a consent, according to the requisitions of the act, has been given since the filing of the original bill: and that consent was obtained, it is said, in consequence of a pretence (as it is called) in the answer, that the plaintiffs had no authority to institute the suit. Now, the authority to sue in equity must be obtained before the institution of the suit; and neither the creditors nor the commissioners can, by any subsequent act, cure the defect, if the proper consent be not given before the suit is commenced. The subsequent consent of the creditors or the commissioners is a mere nullity. Therefore, the only supplemental matter stated in this bill is utterly immaterial, and cannot in any way give the plaintiffs a title to relief, or affect their capacity to sustain the suit.

That a bill in equity cannot be sustained without the previous consent of the creditors, was decided by the present Master of the Rolls in *Ockleston v. Benson* (2), upon the construction of the old bankrupt act. The same principle applies to the present case.

Mr. Rose and *Mr. Wray*, contra.

The original bill alleges that the assignees were duly authorized to prosecute the suit: but, in order to avoid frivolous objections and difficulties as to evidence, it may be useful to have this subsequent consent. Even if the suit was instituted without authority, the executors would be the only parties to complain of the irregularity; and their adoption of the proceeding, binds them as effectually as if they had consented previously. Would any creditor be permitted now to complain of the conduct of the assigness in instituting the suit? The provision in the bankrupt laws was introduced, in order to protect the creditors, and not for the benefit of debtors to the bankrupt's estate. There are many instances in which it is sufficient, if a plaintiff perfects his title before the hearing; for instance, in the case of executors and administrators.

aforesaid; provided that if one-third in value or upwards of such creditors shall not attend at any such meeting (whereof such notice shall have been so given), the assignees shall have power, with the consent of the Commissioners testified in writing under their hands, to do any of the matters aforesaid."

(2) 2 Sim. & Stu. 265; s. c. 3 Law J. Chanc. 142.

The Vice Chancellor.—The words of the statute are very plain—"No suit in equity shall be commenced by the assignees without such consent as aforesaid:" and Sir John Leach, in *Ocklestone v. Benson*, has decided expressly, that, without the prescribed consent, the assignees have no right to maintain the suit.

Then the only question will be, whether the consent of the commissioners, given after the suit was actually commenced, can be considered as having authorized this suit, commenced without consent. The statute provides that the assignees shall have power, with the consent of the commissioners, "to do any of the matters aforesaid." Now, the "*matters aforesaid*" are to commence a suit.

Upon this record, I must take the statement of the plaintiff as a representation, that, when the suit commenced, there was not such a consent as the statute requires; and, consequently, the bill cannot be sustained.

The demurrer was allowed.

1829. }
Jan. 17. } LEWIS v. MALLETT.

If a defendant does not plead or demur to a bill of revivor, but answers, the plaintiff has a right immediately to obtain an order of revivor, notwithstanding that his right to revive is contested by the answer.

The original bill was filed against Sir Samuel Young, and prayed an account of tithes of certain lands for 1820 and subsequent years. Sir Samuel Young died, having appointed Mallett & Bridgman his executors. A common bill of revivor was filed against them. On the 20th of November, Mallett, by his answer, stated, that the original cause had been before his Honour the Vice Chancellor, on the 26th day of April 1827, and was on that day called on to be heard: whereupon his Honour did order the said cause to stand over, until a certain appeal then pending in the House of Lords should have been heard and determined, which was an appeal by the said complainants from a decree

of the Court of Exchequer, made and pronounced in a certain suit, which had been instituted there by the said complainants against the said Sir Samuel Young, for the purpose of compelling him to account for and pay to the said complainants the single value of the tithes of the same matters whereof the tithes are claimed by the said original bill, arising from the same farm and lands as in the said original bill mentioned, during certain years preceding the year 1820; and which appeal has never yet been heard, and has become abated by the death of the said Sir Samuel Young, and has not been revived by the said complainants; and he submitted to the judgment of the Court, under the circumstances aforesaid, whether the complainants were entitled to revive the said original suit until they had revived the said appeal in the House of Lords.

On the 24th of November, the plaintiff obtained the common order of revivor, which recited, "that the defendant, John L. Mallett, hath put in his answer to the bill of revivor, and thereby submitted that the said suit and proceedings should stand revived against him.

A motion was now made to discharge the order of revivor as irregular.

Mr. Kindersley appeared to support the motion.

A plaintiff may revive, if the defendant's time for answering is expired, or if the answer admits his title to revive; but if his title to revive is contested, he cannot revive till the objection is removed, or his right to revive established. The order here recites a falsehood. It states, that Mallett has submitted to have the suit revived, which is directly contrary to the fact.

Mr. Spence, contra.

As soon as the answer is in, the plaintiff has a right to revive; and he cannot be prevented from doing so by any objections taken by the answer to his right to revive. These objections may be material at the hearing; but the established practice is, that the order of revivor is obtained upon the answer, without the least regard to what the answer may contain.

Vice Chancellor.—A defendant may plead or demur to a bill of revivor, and thereby prevent a plaintiff from reviving; but, by putting in an answer, he gives the plaintiff a right to revive without regard to what the contents of that answer may be. Facts or reasons stated in the answer, as objections to the reviving of the suit by the plaintiff, will not prevent him from obtaining the order of revivor.

Motion refused, with costs.

1829. }
Feb. 4. } M'MAHON v. UPTON.

An act of parliament enabling a joint stock company to sue and be sued in the name of their chairman, does not enable them to sue a shareholder in that manner.

The bill was filed by John M'Mahon, chairman of the directors of the Royal Irish Mining Company, for and on behalf of that company, against George Upton:—

It set out with stating an act of parliament made in the 5th Geo. 4, entitled "An act to encourage the working of mines in Ireland, and to regulate a joint stock company for that purpose, to be called the Royal Irish Mining Company," whereby it was, among other things, enacted, that the several persons therein particularly mentioned, and their several executors, administrators, and assigns, and all and every other person and persons who should, according to the conditions and restrictions thereafter set forth, be possessed of any part of the joint stock, their several and respective executors, administrators, and assigns, so long as they should hold the same, should have full power and authority from time to time to search for and work all such mines &c., and other bearings of mines, ore, coal, and other minerals and metals and metallic substances, and all other matters and products in Ireland, as they should contract for, take on lease, or hold, or possess, &c., and should for those purposes be a joint stock company by the name and description of the Royal Irish Mining Company; and that, from and after the passing of that act, all actions and suits to be com-

menced, instituted, or carried on by or on behalf of the said company, against any person or persons, body or bodies politic or corporate, should and lawfully might be commenced, instituted, and prosecuted, or carried on in the name of the person who should be the chairman of the directors of the said company at the time such action, suit, or proceeding should be instituted, or in the name of any one of the directors for the time being of the said company, as the nominal plaintiff for and on behalf of the said company; and in all other allegations, and indictments, informations, or other proceedings, in which, before the passing of that act, it would be necessary to state the names of the persons comprising such company, it should be lawful and sufficient, from and after the passing of that act, to state the name of such chairman or director, and the death, resignation, or removal, or other act of such chairman or director, should not abate any such action, suit, or prosecution.

The bill then alleged, that the plaintiff was the chairman of the board of directors of the said company, duly elected and qualified pursuant to the provisions of the said act;—that, there being 241 shares of the joint stock of the company, which remained on hand and undisposed of, and, the board of directors of the company being desirous that such shares should be sold and disposed of for the benefit of the company, the board caused to be transmitted the certificates of those two hundred and forty-one shares to the defendant, who was and is a member or proprietor of the shares of the said company, with directions to him to sell and dispose of the said shares on account of the board of directors and for the benefit of the said company,—the said board being willing to pay or allow the customary rate of commission in respect of his agency; and the said defendant having received the certificates of the said shares, did accordingly sell and dispose of the whole of these two hundred and forty-one shares for a considerable premium or profit, which was received by him on account of the board of directors and for the use and behoof of the said company; and that the defendant had refused to account for the monies so received by him. The prayer was—that an account

might be taken of all sums of money which had been received by the defendant in respect of the said two hundred and forty-one shares of the joint stock of the company so sold and disposed of by him on account of the board of directors of the company; and that he might be compelled to pay to the plaintiff, for and on behalf of the company, what should be found due and owing from him on taking the said account, after deducting such commission as he might be entitled to in respect of the sales.

The bill mentioned two persons of the names of Whiting and Roney as being the owners of shares in the company.

The defendant filed a general demurrer for want of equity—alleging, also, as a further ground of demurrer, that James Whiting and ——— Roney, both in the said bill named, and the members of the company therein mentioned, other than the said plaintiff and this defendant, were not parties thereto.

Mr. Rose and *Mr. Knight* appeared in support of the demurrer.

The company was merely a partnership, and was not a corporation; and therefore, to a suit for an account, in which the company was interested, all the partners must be parties. If, indeed, the proceeding had been against a third person, not being a shareholder, the chairman might, by virtue of the act, have sued on behalf of the company; but such a clause, as that which occurs in this act of parliament, related only to suits by or against the company, against or by third parties, and not to disputes between the shareholders themselves. That was clearly laid down by Lord Eldon in *Van Sandau v. Moore* (1). In giving the history of joint stock companies, Lord Eldon there says—"If a man had occasion to bring an action against one of the bodies so constituted, he did not know how to proceed, or against whom to bring his suit; and if he brought it, naming the defendants who were known to him, he was treated with a plea in abatement, which was a check-mate to his action. To meet this inconvenience, it became necessary to introduce into those bills a clause, that the

company should sue and be sued by their clerk or secretary."

Then, after detailing some other improvements in the constitution of such companies, he adds, "One thing was still wanting. If the members of these bodies happened to quarrel among themselves (which, though they came harmoniously together, was very likely to happen, how were they to sue one another? And it was not till the latest stage of improvement that that difficulty was provided for. I believe it was in the acts regulating the new banking establishments in Ireland (2) that provisions were for the first time made to meet all those difficulties: and similar provisions now form part of the regulations, which are likely to take place in the banking establishments in England now in contemplation."

Mr. Campbell appeared in support of the bill.

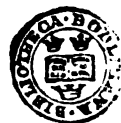
The words of the section empowering the chairman to sue on behalf of the company are general; and there is no reason why they should not be construed generally. Though Upton be a partner, he is not sued as a partner: he is sued merely as the agent of the company; and if such a bill as this cannot be maintained, they are entirely without remedy.

Vice Chancellor.—There is clearly a defect of parties in this bill. The act of parliament does not enable the plaintiff to sue a shareholder without having the other partners before the court. The objection taken by this demurrer is one which Lord Eldon always patronized.

Demurrer allowed.

1829. }
Feb. 7. }

LEAR V. LEGGETT.



The interest of a sum of stock was given to A. for life, remainder to his children, with proviso that it should not be subject to alienation or disposition by mortgage or otherwise, or by anticipation of the receipt; and in case he should charge or attempt to encumber the same, such charge, mortgage,

(1) 1 Russ. 458; s. c. 4 Law Journ. Chanc. 177.

(2) 5 Geo. 4. c. 73, s. 5, 6; 6 Geo. 4. c. 42. s. 10, 18.

sale, or disposition, or incumbrance, was to operate as a forfeiture of his life-interest, and the fund was to go to the persons next in remainder, as if he were actually dead; A. became bankrupt:—Held, that his life-interest did not cease, but passed to his assignees.

Alexander Goudge, by his will, dated the 21st of January 1804, gave and bequeathed unto his wife Sarah Goudge, and to Jacob Cope, and to the complainant Jeremiah Lear, the sum of 23,333*l.* 6*s.* 8*d.* three per cent. consolidated bank annuities, upon trust to pay his said wife the dividends thereof for her life, and after her decease, upon trust to pay the dividends thereof unto and amongst his son and daughters, the plaintiff Alexander Goudge, Elizabeth the wife of Joseph Batho, and Sarah the wife of James Ebenezer Saunders, in equal shares for their respective lives; and from and immediately after the decease of his son and daughters respectively, he directed that one full third part or share of the bank annuities should be in trust for, and should be paid and transferred unto and amongst all and every the child or children *per stirpes* and not *per capita*, of each and every his son and daughters who should live to attain the age of twenty-one years, to be divided among such children; and in the meantime, and until the share or respective shares of such child or children should become payable, he directed that his trustees, or the survivor of them, should, from and after the several deceases of his wife, and the parents of such child or children, receive the dividends of such child's share and apply the same for his or her maintenance and education until his, her, or their share thereof should become vested and payable. And the said will contained a clause in the words following:—
"Provided always, nevertheless, and my mind and will is, that the several provisions hereinbefore and hereinafter given for my son and daughters during their respective lives, shall not nor shall any part thereof respectively be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever, or by anticipation of the receipt; and in case they, or either or any of them, shall charge, or attempt to charge, affect, or

incumber the same, or any part or parts thereof respectively, then I do declare it to be my express will and meaning that any such mortgage, sale, or other disposition or incumbrance so to be made by them, or either or any of them, on his, her, or their life-annuity, interest or provision, shall operate as a complete forfeiture thereof, and of all benefit therein during the remainder of their respective natural lives, and the same shall devolve upon the next successor, or person or persons in expectancy, as if she or they were then actually dead."

The widow, Sarah Goudge, died in 1821.

On the 5th of March 1828, a commission of bankrupt issued against Alexander Goudge the son, under which he was declared a bankrupt; assignees were duly chosen, and to them his estate and effects were conveyed.

Alexander Goudge, the son, who was subsequently appointed one of the trustees, had at that time eight children, who were defendants to that suit; and the question was, whether the third part of the dividends of the stock during his life passed to the assignees, or whether his children became entitled in the same manner as if he had been dead.

The bill was filed by the trustees of the fund.

Mr. Sugden and *Mr. Koe*, for the assignees, contended, that Alexander Goudge, the son, took a life-interest, which was to cease only on certain events—that his bankruptcy was not one of those events—that the proviso of forfeiture contemplated only voluntary acts of the legatee, and not the involuntary legal operation of a commission of bankrupt—that his life-interest, therefore, still subsisted, and passed to his assignees.

Mr. Horne and *Mr. Knight*, for the children of Alexander Goudge, argued, that his interest must have ceased, if he had taken the benefit of the Insolvent Debtors Act, and that the same effect must follow the commission of bankrupt. The event which the testator had provided against, was the alienation of the interest, so as to be no longer applicable to the personal benefit of his son or the maintenance of his family.

The following cases were cited:—

Dommett v. Bedford, 6 T. R. 684, s. c.

3 Vesey, 149.

Brandon v. Robinson, 18 Vesey, 499.

Graves v. Dolphin, 1 Sim. 66.

The Vice Chancellor stated, that here there was an express trust declared for Alexander Goudge during his life; and the proviso which declared that his interest should be forfeited, had relation only to voluntary acts—such as mortgage, sale, or disposition, by the voluntary act of the party; his bankruptcy was not a case contemplated by it; his interest, therefore, did not cease upon his bankruptcy, but passed to his assignees;—and declared the assignees entitled to the life-interest of Alexander Goudge in the one-third part of the sum of 23,333*l.* 6*s.* 8*d.*, and ordered the costs of all persons to be paid out of the dividends thereof.

[See note in 1 Swanst. 481.]

1829. } HOLMES v. GOODWORTH AND
Feb. 25. } OTHERS.

A testator devises Black Acre to A., and White Acre (which is of equal value) to B.; afterwards, a commission of lunacy having issued against him, White Acre is sold by the order of the Lord Chancellor, for the payment of the lunatic's debts: A. is not entitled to have any compensation out of the lands devised to B., for the loss of the lands devised to him, A.

Richard Addy, by his will, dated the 11th of August 1811, directed that his funeral and testamentary expenses, and all his debts, and the legacies thereafter bequeathed, should be fully paid and satisfied by his executors out of his personal estate and effects, except his goods, furniture, and other effects in the house at Tudworth; and if the same should be insufficient for that purpose, he charged his real estates, thereafter devised to and for the benefit of his two daughters, with the payment in equal shares of such deficiency.

He then devised certain lands to trustees, upon trust for his daughter Elizabeth Holmes, and, after her death, of her husband

and children: and he devised certain other lands in like manner, for the benefit of her daughter Sarah (afterwards the wife of the defendant Birch), her husband and children.

Richard Addy having, in the year 1814, become of unsound mind, and incapable of the conduct of himself and his affairs, a commission of lunacy was, on the 10th of January 1815, awarded and issued against him, under which he was duly found and declared a lunatic.

When the commission issued, Richard Addy was indebted, on bond, and by simple contract, in sums amounting in the whole to about 4000*l.* or thereabouts, and some of his creditors commenced actions against him, to enforce the payment of their respective debts; while others threatened to take legal measures for that purpose. Accordingly, by an order made in the lunacy, and dated the 29th of July 1815, it was referred to the Master, to inquire and certify whether it would be fit and proper, and for the benefit of the lunatic and his estate, that any, and what part of his freehold and copyhold estates should be sold for the payment of his debts.

The Master, by his report, dated the 5th of March 1817, certified, that the debts of the lunatic, with certain costs, amounted in the whole to the sum of 3,842*l.* 5*s.* 4*d.*; that the personal estate of the lunatic consisted of 302*l.* 11*s.* due to him from sundry persons, but that such debts were doubtful, and that it would be fit and proper, and for the benefit of the lunatic and his estate, that certain premises therein particularly mentioned should be sold for that purpose.

This report was confirmed; and a sale was ordered. The sale produced 4,298*l.*, which was applied in the payment of the debts of the lunatic and of the costs of the lunacy.

Richard Addy died on the 1st of August 1826; and it was then found, that the lands sold comprised, exclusively, lands which had been devised to the daughter Elizabeth and her family, so that only a very small part of the property devised to her remained; while, on the other hand, the daughter Sarah and her family had the full benefit of the devise to them, no part of the property comprised in that devise having been sold.

The bill was filed by Mr. and Mrs.

Holmes, against the other persons taking interests under the will in the testator's real estates. The bill stated, that the premises devised for the benefit of the plaintiff and her children, and the premises devised for the benefit of Sarah and her children, were equal, or nearly equal, in value; that it was the intention of Richard Addy to put his two daughters, who were his only children, upon an equality in respect of his real estates; and that, by the orders in the lunacy, part of the estates devised to the plaintiff, Elizabeth, and her issue, to the value or extent of 4,298*l*. had been sold, for payment of Richard Addy's debts; the effect of which was, to deprive her and her children of the benefits of the devise, to the extent of the estate so sold. The plaintiffs, therefore, insisted, that they and the children ought to be compensated out of the testator's estate devised to Sarah, one moiety or fair proportion of the sum of 4,298*l*.; that such amount and compensation ought to be estimated according to the value which the entirety of the estates devised for the benefit of the plaintiff and her children, at the date of the will, bore to the estate devised for the benefit of Sarah and her children; and that it ought to be declared, that the plaintiff, Elizabeth Holmes, and her children were entitled to so much of the estate and premises devised to Sarah and her family, as would make them such compensation as aforesaid.

The prayer was to that effect.

Mr. Barber appeared for the plaintiff.

It is true that, in *Oxenden v. Lord Compton* (1), it was holden, that there was no equity between real and personal representatives of a lunatic, to have property, which had been altered by the act of the Court, restored, after the lunatic's death, to its former character. But there is a distinction between such a case and the present: there, the question lay between the heir and the next of kin, persons who had no community of title; here, the question is between devisees claiming under the same will. If the equity sought by this bill be not administered, the effect of the proceedings in the lunacy will, in truth, be, to have revoked the testator's will.

(1) 2 Ves. jun. 69.

The counsel for the defendant were not heard.

The Master of the Rolls held, that there was no equity in the case stated by the bill, and that the plaintiffs were not entitled to compensation. The act of the Court must be considered, as if it had been the act of the testator himself.

1829. } WILLIAMS AND OTHERS V.
March 17. } SMITH.

Releases set aside as fraudulent; and that, too, though there was no express prayer that they might be set aside.

Some individuals of a class may file a bill on behalf of themselves and the others of that class, praying an account, though the plaintiffs have executed separate releases which would bar their right, the bill charging that those releases were obtained fraudulently.

Where a bill is filed on behalf of a class, a person belonging to that class, and who would have the benefit of the decree, if the plaintiffs succeeded, is not a competent witness for the plaintiffs.

The bill was filed against William Smith by Thomas Williams, Joseph Antoni, Andrew Burton, and John Brown, on behalf of themselves and all other the unsatisfied officers, seamen, and crew, if any, of a certain ship or vessel called *The Granger*, engaged or employed on board that ship on or during the voyage after mentioned, who should come in and contribute to the expenses of the suit.

It stated, that, in 1820, Smith, the defendant, who was then the owner of a vessel called *The Granger*, being desirous to send out the ship on a voyage to the South Seas, engaged with the plaintiffs and divers other persons to go out with the ship as the officers, seamen, and crew thereof for the voyage; and it was thereupon agreed between the defendant and the plaintiffs, and such other officers, seamen, and crew, that each of the officers, seamen, and crew, engaged for the voyage should, in lieu of wages, be entitled unto,

and have and receive certain specified, shares of the clear produce of the cargo, which should be obtained on or by means of the voyage, after deducting therefrom all customary and proper charges and expenses;—that thereupon certain articles of agreement were made and entered into, called the ship's articles, bearing date the 20th of September 1820, and made between Smith, as owner, of the one part, and the master, officers, seamen, and crew of the ship, of the other part; and thereby, amongst other things, it was declared, that, in consideration of the proportion against each person's name thereunder written of the nett proceeds of the cargo which should be procured and brought in the vessel to London, to be paid by the defendant upon the completion of the voyage—they, the master, officers, seamen, and crew, did promise and agree to and with the defendant to perform the above-mentioned voyage, and to do the other things therein mentioned; and it was thereby provided, that, in ascertaining the nett proceeds of the cargo, there should be charged 4*l.* 10*s.* per ton for casks, and 2*l.* 10*s.* per cent. commission or agency for the owner upon the gross amount of the cargo, and all other usual customary and incidental charges and expenses; and that the owner should sell and dispose of the cargo at any time or times he should think fit, and either upon credit or otherwise, and either before or after the arrival of the ship or vessel at the port of London, as he should think proper; and that the defendant should and might deduct from each person's share of the nett proceeds of the cargo such sum or sums of money as he might owe or be indebted, either to the owner or to the captain, for advance money, clothes, and other necessities, or on any other account; and that none of the persons who should execute the articles should have any claim or demand to any monthly or other wages, pay, or recompense, for performing the voyage, save his share of the nett proceeds.

The plaintiff and the rest of the crew signed these articles; the voyage was performed; and on the 13th of October 1823, the ship returned to the port of London with a valuable cargo, consisting of 180 tons of fine sperm oil, and 449 pounds of amber-

gris, contained in three casks. Shortly after the arrival of the ship at the port of London, the plaintiffs, being greatly distressed for money, respectively requested the defendant to make them advances on account of their several shares of the cargo; whereupon the defendant, being aware that they were very illiterate men and almost destitute of provisions and clothes, formed a scheme to defraud them of a considerable part of the monies fairly due to them on account of the clear produce of the cargo of oil, and to obtain to himself the whole of the cargo of ambergris at a price far below the fair value; and, accordingly, he represented to the plaintiffs, that, although the cargo of ambergris was of the value of 800*l.* only, he would give 900*l.* for it; and he further represented to the plaintiffs, that, upon the result of his accounts respecting the oil and ambergris, the respective shares of the plaintiffs, Williams and Antoni, of and in the clear produce of the cargo of oil and ambergris, estimating the ambergris at such sum of 900*l.*, and deducting all the customary, proper, and incidental charges and expenses on account of the cargo, amounted to 52*l.* each, and the clear shares of the plaintiffs, Burton and Brown, to 42*l.* each; and he accordingly offered to pay them such respective sums, together with a further sum of 5*l.* each, by way of remuneration, for their great exertions in bringing home the ship; but he did not produce any accounts by which it could appear that such respective sums were the sums fairly due to them. The plaintiffs, at first, refused to accept such offers without the production of accounts; but, he having again assured them that he had fairly ascertained that the respective shares of the plaintiffs amounted to such respective sums, the plaintiffs, confiding in such representations, and being greatly distressed for money, at length acceded to such proposal of the defendant, and thereupon signed certain papers or writings which had been previously prepared by the direction of the defendant, and which plaintiffs were, by the defendant or his solicitor, peremptorily required to sign, before any money was paid to them, but which were not read over to the plaintiffs, nor approved of by any person on their behalf, and

which plaintiffs then understood and believed to be receipts in writing for the respective sums of 52*l.* each, and 42*l.*, but which they had since discovered to have been deeds of absolute release from all claims in respect of the cargo.

The bill charged, that the execution of the releases had been obtained by fraud; that the value of the cargo of oil had been represented by the defendant at less than it actually was; that he had made improper deductions in respect of charges, which ought to have been borne, not by the cargo, but by himself as owner; and that the ambergris was worth a much larger sum than 900*l.*

The prayer was, than an account might be taken of the proceeds of the cargo; that the respective shares of the plaintiffs and other the unsatisfied officers, seamen, and crew of the ship, and others the parties interested in the cargo and in the nett produce of the cargo, might be ascertained and secured for their benefit under the direction of the Court.

The defendant, by his answer, insisted that the whole transaction was fair; and with respect to the ambergris, he denied that he represented 800*l.* or 900*l.* to be the value of it; but he admitted that he offered to the plaintiffs to take to it at that price, if they did not wish to wait for the result of the gradual sale.

It appeared that the ambergris had been sold by auction on the 1st of March 1824, in three casks: the two first of which, containing about 4811 ounces, were knocked down at 5*s.* 6*d.* per ounce to the defendant as the best bidder, and the third cask, containing about 400 ounces, was knocked down to him at 13*s.* per ounce. The price thus paid by him amounted to 1583*l.* 0*s.* 6*d.* He afterwards disposed of it in successive parcels at a much higher price; and in a suit by some others of the crew, who had made no settlement with him as to their shares of the ambergris (and which cause was heard immediately before the present), the sale to him had been set aside.

The plaintiffs had examined a witness of the name of Matheson, as to what passed

on the occasion of the alleged settlement between them and the defendant. He had been one of the crew, and acted as cooper on board of the ship during the voyage.

On the part of the defendant, it was objected, that he was an interested witness, because, if the plaintiff succeeded in setting aside the releases, and obtaining a general account, the decree would be for the benefit of all the crew; and the witness, as one of the crew, would have the advantage of it.

The Master of the Rolls held, that the objection was valid, and rejected his evidence.

On behalf of the defendant various points were raised, both as to the merits of the case, and as to the form of the pleadings. These are all adverted to in the judgment of the Master of the Rolls.

Mr. Bickersteth and *Mr. Girdlestone* appeared for the plaintiffs:

Mr. Horne and *Mr. Knight* appeared for the defendant.

The Master of the Rolls.—This is a suit instituted by four seamen, who formed part of the crew of a certain ship employed in the South Sea Whale Fishery. The terms of their engagement were, not to be paid weekly or monthly wages; but they were to be paid by having a certain proportion of the produce of the voyage. The ship returned from her voyage on the 13th of October 1823, and brought with her a quantity of sperm oil, and also an extraordinary quantity of ambergris, which had been procured by the accidental circumstance of finding a dead whale. The bill is filed by these four seamen, on the part of themselves and all other the crew who have not been satisfied in respect of this voyage, for the purpose of having an account of the produce of the sperm oil, and also of the produce of the ambergris, in order to determine what should be their respective proportions of the nett profits of the voyage.

It has been observed in the first place, that these four persons ought not to have

joined in one suit; that they executed separate deeds of release, and consequently that they ought to have filed four different bills for the amount of their demands. It appears, upon the evidence, that the proposition made to them on the part of the defendant, to accept a certain sum in satisfaction of their claims, was a proposition made to them jointly; that they afterwards accepted this proposition jointly; and that, although there are four different deeds of release, yet those deeds of release are verbatim the same. It appears, therefore, to have been one single transaction, and not four different transactions; and it does, therefore, appear to me, that, instead of complaining that one suit alone was instituted, the defendant has reason to be satisfied with this union of the suits, which has saved him much litigation and much expense. It is admitted, that if there had been one deed of release only, in that case the suit would have been properly framed; and I am of opinion, that the circumstance of there being four different deeds of release (considering the transaction as one), can make no difference.

This suit I have already stated to be instituted on behalf of the plaintiffs themselves, and all other the crew of this ship, who have not been satisfied their demands in respect of the voyage. It is said that is improper, because the parties can only file a bill on behalf of themselves, and such other persons as stand precisely in the same relation to the defendant; and that these persons, therefore, stood only in the same relation with such of the crew as have executed, like themselves, releases, and do not stand in the same relation with the other part of the crew, who have not executed such releases. If the Court pronounces its judgment, as it presently will do, that these four persons are entitled to an account notwithstanding the releases, then it will be manifest that the suit is properly instituted on behalf of themselves and all other the unsatisfied part of the crew; for the effect of having the accounts which this bill prays, (which must depend upon the question, whether the releases are or are not to stand,) will be, that all the unsatisfied part of the crew have a common interest with the plaintiffs in the accounts

prayed by this bill; and it would have been an objection to this suit, that, the accounts being to be taken, they were to be taken in the absence of all other the crew, except these four persons.

Another objection made is, that this bill contains no prayer to avoid the releases. That is very true; there is no prayer in this bill directly to avoid the releases; but the prayer of the bill desires those accounts which could only be given to the plaintiffs, provided the Court was of opinion that those releases were void. It is in effect a bill to avoid the releases, because it prays accounts wholly inconsistent with the effect of the releases. I find in the bill an allegation, that the releases had been obtained by fraud and misrepresentation; consistently therefore with the rule, that the Court, under the prayer for general relief, is to give such relief as the statement of the proceedings makes fit and necessary—the mere allegation, that the releases were obtained by fraud and misrepresentation, would, under the head of general relief, entitle the plaintiffs to that which they claim.

These, I think, are all the objections that were taken in point of form.

I requested that the parties would inform me, (seeing that the passage of the answer on this point was extremely equivocal,) whether it was to be considered, that the sum given to these plaintiffs as the price of the release was to be considered as an entire sum, or whether it was to be considered, that the price was divided into two parts—namely, a price in respect of the sperm oil, and a price in respect of the ambergris. It was taken for granted, by the counsel on both sides, that it was in truth a contract consisting of two prices; that the produce of the sperm oil was taken at a certain sum stated, and that the ambergris was purchased by the defendant at the price of 900*l*. The answer given to my inquiry was consistent with the argument of counsel, that it was substantially considered as being in effect two contracts—one for the sperm oil, and the other for the ambergris; and it is upon this principle that I shall now proceed. The bill complains of misrepresentation with respect to the amount of the produce of the sperm

oil, and of misrepresentation with respect to the statement of what the defendant calls the customary charges, which he has a right, in the first place, to deduct from the gross produce. Now, with respect to the fact of misrepresentation as to the gross produce, that is perfectly manifest; for the defendant, by his answer, admits that he represented the gross produce to be the sum of about 7500*l.* and a fraction; he is afterwards required, by an amendment of the bill, to set out the particulars of that produce, and he there admits that the gross produce was the sum of 8280*l.* These plaintiffs, therefore, contracted with him upon the faith of a representation, that the gross produce amounted only to about 7500*l.*, whereas, in truth, it amounted to a considerably larger sum. There is, therefore, on the part of the defendant, admitted misrepresentation with respect to the gross produce.

With respect to the customary charges, (taking the answer to the amended bill into consideration, and the schedule annexed to his answer,) there is also misrepresentation. The bill alleges, that there were charged as against the plaintiffs by the defendant, 360 tons of casks at the rate of 4*l.* 10*s.* per ton, which was, in truth, the rate stipulated for in the articles under which the voyage was undertaken. Upon turning to the first answer of the defendant, he says he admits, not that there were 360 tons charged, but that there were 200 tons charged at the rate of 4*l.* 10*s.* per ton, giving no answer with respect to the charge for 360 tons. He admits that he charged for 2200 tons—which is, in truth, when the bill is considered, stating that he charged for 200 tons only. Upon reference to the schedule, it will appear that he charged not only for the 360 tons as the bill alleged, but there is added to the schedule a further charge of 60 tons at the rate of 4*l.* 10*s.* per ton. I cannot, in that respect, understand the schedule, because I should rather have thought the defendant had meant those 60 tons had been allowed for to the plaintiffs, it never being pretended there were more than 360 tons in the whole. I apprehend, therefore, the defendant has made some mistake in that respect: he has added the 60 tons, and the

price of them at 4*l.* 10*s.* per ton, instead of deducting that sum, so as to increase the proportion due to the defendant. But, however that may be, here is a plain admission of misrepresentation, the effect of the answer being, that he had charged the plaintiffs with 200 tons only, and it now turning out by the admissions in the schedule, that he actually charged them with 360 tons at the rate of 4*l.* 10*s.* per ton.

It is hardly necessary to enter into the consideration of any other charge, because, there being this plain misrepresentation with respect to one charge, it would let the plaintiffs into the whole account, upon the principle of surcharging and falsifying. But there is one very remarkable case of misrepresentation with respect to the expenses of pilotage. The bill charges, that he had in his accounts deducted certain considerable sums in respect of pilotage, that those were sums which he ought personally to have paid as the owner of the ship, and that they formed no ground of deduction. Upon looking at the schedule to his answer, we find that he deducted no less than three sums for pilotage, amounting to nearly 200*l.* So that here is a second admitted case of plain misrepresentation. Upon these grounds, I am of opinion that the plaintiffs are entitled to an account of the produce of the sperm oil; and the Master must be directed, in taking that account, to allow the defendant all usual and customary charges.

Considering this as a double contract—as embracing two distinct subjects, it would not follow, because an account was directed with respect to the sperm oil, that therefore an account should be directed with respect to the ambergris. If it had been one entire contract for a gross sum, then the effect of directing the account must have been extended to the whole subject, as well to the ambergris as the sperm oil; but, considering the contract to be divided, it remains to be considered whether the plaintiffs are or are not entitled to the account which they pray with respect to the ambergris. The ambergris I have already stated to be of a very extraordinary amount, owing to the accidental circumstance I before referred to. The ship returned on the 13th of October; and in

that same month of October the defendant has a meeting with these four persons—the plaintiffs—and he then proposes to them, as he states it, to give them at the rate of 900*l.* as an equivalent for the crew's proportion of the ambergris.

The bill charges that the defendant represented the ambergris to be of the value only of 800*l.*; but meaning to deal with liberality towards the plaintiffs, he had voluntarily proposed to give more than the actual value; he, therefore, proposed to them to take 900*l.*; 900*l.* they agreed to take, and they accordingly executed the releases, upon the supposition that the gross produce of the sperm oil was 7500*l.* and a fraction, and that the produce of the ambergris was to be taken at the sum of about 900*l.* This ambergris was, in the month of March following, sold by public auction, at which the defendant became the sole purchaser for 1,583*l.* That sum, however, cannot be taken as any criterion of the actual value of the property; for that sale has been set aside in another suit. The 900*l.* amounts to about the rate of 3*s.* 6*d.* per ounce for the ambergris. I think the first resale by the defendant after he had thus become the apparent owner of the property, was at the rate of 45*s.* per ounce; he having given to these plaintiffs the sum of 3*s.* 6*d.* per ounce only. There was afterwards a sale at 40*s.* an ounce, and afterwards a sale at 35*s.* an ounce; but the great bulk of the ambergris seems to have been sold for exportation at the price of 22*s.* an ounce. Now, computing the ambergris, upon the whole, as of the value of 22*s.*, or of 23*s.* or 24*s.* an ounce, then the inadequacy of price would be the difference between 3*s.* 6*d.* and about 23*s.* or 24*s.* an ounce, which is, perhaps, the fair average of what the actual value was. Upon the ground of mere inadequacy of price, no contract has in equity been yet avoided. There was a case before Lord Eldon, which I have looked for, but without finding it—a case within my own experience, in which Lord Eldon was at first disposed to send an inquiry to the Master for the purpose of determining, whether, upon a mere inadequacy of price, a contract could be avoided. In that case, the alleged difference in value was only as four to one; but

Lord Eldon considered an inadequacy so great, as in itself affording an inference, that there had not been fair dealing between the parties, but that advantage had been taken, on the part of the defendant, of the situation of the plaintiff. Lord Eldon did not ultimately send that reference to the Master, being of opinion, from the other circumstances of the case, that a plain advantage had been taken of the ignorance, distress, and unprotected state of the defendant.

I should be justified upon the principle upon which my Lord Eldon was proposing to proceed in that case, to say, that, the proved price being more than six times the sum actually given to the plaintiffs, was in itself such an inadequacy of value, as to induce the Court to avoid the contract; it being scarcely possible, with fair dealing between the parties, that persons would have been induced to part with their property, at less than a sixth of the actual value. I do not rely upon that ground alone. If the inadequacy of price, be not such as in itself to avoid the contract, it is at least strong evidence against the fair dealing between these parties; and there are many circumstances in this case, which come in aid of that circumstance, in order to establish an opinion in my mind, that this contract cannot be maintained.

In the first place, the alleged contract, or the proposition on the part of the defendant, was made in that same month of October, in which the ship arrived in the port of London; that is some evidence of surprise. In the next place, it appears that these four seamen, who are thus induced to enter into these releases, were in such distress of circumstances, that, between the arrival of the ship on the 13th of October, and the end of that month, they had been actually obliged to apply to the owner of the ship for small pecuniary advances for their subsistence. This appears by the book handed to me, in which these sums are stated. One has 6*l.* and another 7*l.*; so that it is plain evidence they were in circumstances of pecuniary difficulty. In the next place, they were wholly unprotected—there was no person whatever with whom it was alleged that they consulted upon the subject. The defendant, in

his answer, has made a statement, which undoubtedly was intended to mislead the Court in this respect; for he states in his answer, that no person was present, except a clerk of Messrs. Howard & Co.; meaning, therefore, that the Court should infer that the clerk of Howard & Co. (being attorneys) was present as the adviser and for the protection of these plaintiffs: but the clerk has been examined, and he states, that he had no connexion with them in the matter; that he attended on the part of other persons who had demands upon some of the plaintiffs, for the purpose of obtaining payment of those demands, in case the parties should be able to agree to the terms proposed. In the next place, the situation in life of these parties shews that they were not very competent to business. In truth, they were totally ignorant of all the forms and habits of business. The defendant tells us in the course of his answer repeatedly, that he never produced the accounts, and vouchers to verify the statements he made to the plaintiffs, but that he did not produce them, because they did not ask for them. We find persons, in this low condition of life, so ignorant of business, that they come to a settlement in respect of claims upon a subject of this nature, without even demanding those accounts, by which the extent of their claims were to be ascertained. There is another circumstance of considerable importance, which is, that the defendant, from the nature of his commercial engagements, must have known what was the market price of ambergris at this period, and what was the quantity of ambergris then in the market. For it appears by the evidence, that the quantity of ambergris used in this whole kingdom is very small: the price therefore will always be in proportion to the quantity of the article found in the market. Now, it appears, by the evidence of two witnesses, that the last price of ambergris, prior to this transaction in the month of October 1823, was from 45s. to 50s. an ounce; and that there was very little ambergris left in the market. These were circumstances, which could not but be known to the defendant; they could not be known to the plaintiffs; and whether it was the absolute duty of him to tell them those circumstances, I do not

decide; it would, however, undoubtedly have been more fair, to have disclosed to them what was the state of the market with respect to this subject. But combining altogether the ignorance and unprotected state of these plaintiffs, their pecuniary distress, and their total want of all knowledge or information as to the method or habits of business,—adding these circumstances to the great inadequacy of price, I am of opinion, that this is a contract which no court of equity can permit to stand: and that an account must be taken as well of the produce of the ambergris, as of the produce of the sperm oil.

1829. } HANSON V. WALKER.

A testator dies in England, domiciled here, and dies seised of lands in a foreign country, which, by the law of that country, and also by the will, are charged with his debts; the assets being insufficient for the payment of his simple contract debts, the produce of those lands must be applied among the simple contract creditors according to the priorities recognized by the law of the country where the lands are situate.

This was a creditor's suit for the administration of the assets of John Nutt. He was domiciled in England, and died there. He had no real estate in England, but he had real estates in Georgia and South Carolina.

A great part of the personalty had been exhausted by the specialty creditors; the real estates in Georgia and South Carolina had been sold; but the whole produce of the sale, and the remainder of the personalty were not sufficient to pay the simple contract debts of the testator.

The will would have charged lands in England with his debts.

By the decree, on further directions, dated the 16th February 1827, it was, among other things, declared, that the real or landed estate of the said testator, situate in the states of Georgia and South Carolina in the United States of America, are by the laws of those

states subject to the payment of simple contract debts; and it was referred to the Master to inquire, whether the will of the testator Nutt would be operative by the laws of those states, or either of them, to charge the lands of the testator situate in those states, or either of them, with the payment of his debts, and in what way; and whether, by the laws of the state of Georgia and South Carolina, or either of them, any and what order, preferences, or priorities are observed, in the payment of debts due by a deceased person, where the assets of such deceased person are insufficient for the payment of the whole of such debts in full.

The Master found, that the will of the testator would be operative, by the laws of the states of Georgia and South Carolina in the United States of America, to charge the lands of the testator, situate in those states, with the payment of his debts according to the priorities thereafter mentioned; and he also found, that, by the laws of the state of Georgia, the order, preference, or priority observed in the payment of debts due by a deceased person, where the assets of such deceased person are insufficient for the payment of the whole of such debts in full, is as follows:—1st, Funeral expenses, and other expenses of the last sickness; 2dly, charges of probate and will, or of letters of administration; 3dly, claims substantiated by estates or orphans, where the intestate is a defaulting guardian, executor, or administrator, as provided by the 5th section of the act of 18th Feb. 1799; 4thly, debts due to the public; 5thly, judgments, mortgages, executions, and liens; 6thly, rent; 7thly, bonds and other specialties, bills of exchange, and promissory notes, and other liquidated demands, bearing date since 9th June 1791; and lastly, debts due upon open accounts.

In South Carolina there was no such distinction between the different species of simple contract creditors.

The question was, whether the produce of the Georgian estate should be applied exclusively in satisfaction of creditors having liquidated demands on bills of exchange, promissory notes, &c., or whether it was to go among creditors on open unliquidated

accounts rateably with simple contract creditors of the other class.

Mr. Pepys, for the creditors on open unliquidated accounts.

The testator having been domiciled in England, and dying here; and having made a will, which would have charged lands here with the payment of his debts, the produce of the lands in Georgia, which is now in court, ought to be applied in the same manner as if the money had arisen from lands in England. The priority, allowed by the local law of Georgia to one class of creditors over another, ought not to have any influence here. Besides, the personalty should unquestionably have been applied according to the law of England—all the simple contract creditors would have come upon it equally. But a great part of it (to the amount of more than 2,000*l.*) has been exhausted by specialty creditors. To this extent the assets ought to be marshalled; and so much of the produce of the real estate, as will replace the personalty which has gone in payment of the specialty creditors, ought to be applied exactly as the personalty would have been applicable.

Mr. Fonblanque and *Mr. Simpinkson* for the plaintiffs, *contra*.

Mr. Barber, for the executors.

The Master of the Rolls held, that the produce of the Georgian estate was to be applied in satisfaction of the simple contract creditors according to the order of priority recognized by the law of Georgia, and that the doctrine of marshalling of assets did not apply to a case like the present.

1829. }
March 5. } GUILLEBAUD v. MEARES.

*A testatrix, having 30,000*l.* of three per cent. stock, transferred 25,000*l.* of it to trustees, upon trust for herself for her life, and after her death for such persons as she should by deed or will appoint: she appointed 25,000*l.* of the stock among her children: shortly afterwards she made a will, by which*

*she gave legacies of stock to the amount of 30,000*l.* to persons, who also took under the appointment, though, in fact, exclusive of the 25,000*l.*, she had only 5,000*l.* stock, and the rest of her property was of inconsiderable value:—Held,*

*That her declarations to her solicitor, at the time of giving instructions to him for her will, that she then had 30,000*l.* stock, were admissible in evidence.*

And, those declarations being received,—Held, that the parties were bound to elect between the will and the deed of appointment.

In the month of April 1821, Mary Ann Meares, then a widow, and the mother of George Hammond Meares, Peter Guillebaud Meares, Henry Meares, Amelia Jane Meares, Robert Meares, John Meares, and Mary Ann Watt, requested her brother Peter Guillebaud, together with Peter Dobree, and George Hammond, to accept a transfer of the sum of 25,000*l.* stock in the three per cent. reduced bank annuities, then belonging to her, Mary Ann Meares, and standing in her name, and to become trustees thereof, upon such trusts as she should declare.

These three gentlemen accepted the trust. the transfer of the stock was made; and, by a deed dated the 14th of April 1821, it was declared that they should stand possessed of it, upon trust to pay Mary Ann Meares the dividends or annual produce thereof for her separate use during her life, and, after her decease, upon trust to assign and transfer the capital stock, and the dividends, interest, and annual proceeds unto such person or persons, at such time or times, in such parts, shares, and proportions, and to and for such ends, intents, and purposes, and upon such trusts, and subject to such powers, provisos, declarations, restrictions, and agreements as Mary Ann Meares, whether covert or sole, should, at any time or times during her life, by any deed or deeds, writing or writings, with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be or in the nature of her last will and testament, or any codicil thereto to be by her signed and

published in the presence of and attested by the like number of witnesses, direct or appoint, and, in default of such direction or appointment, or in case any such should be, then and as to such part or parts of the stocks, funds, or securities as should not be appointed or disposed of by such direction or appointment, and in the meantime subject thereto, upon trust, to pay, assign, and transfer the same unto the executors or administrators of her, Mary Ann Meares.

Mary Ann Meares, by deed dated the 3rd of May 1821, and executed as required by the power, appointed the sum of 25,000*l.* amongst her children as follows, viz. to Mary Ann Watt, 5,000*l.*; to John Meares, 6,000*l.*; to Robert Meares, 1,000*l.*; to G. H. Meares, 4,000*l.*; to P. G. Meares, 4,000*l.*; to Henry Meares, 3,000*l.*; and to Amelia Jane Meares, 2,000*l.*

Mary Ann Meares afterwards made her last will and testament in writing, bearing date the 26th of May 1823, which was signed and published by her in the presence of, and also attested by, two witnesses; and thereby, after reciting that there was then standing, in the name of Peter Guillebaud, in the books of the Governor and Company of the Bank of England, the sum of 2,000*l.* three per cent. reduced bank annuities of the year 1726, upon trust, after her decease, to pay and transfer the same, and the dividends and interest thereof, unto such persons, in such manner, and upon such trusts, intents, and purposes, as she should by her last will and testament in writing direct or appoint,—she, in exercise of the power, appointed the 2,000*l.* three per cent. bank annuities unto her executors as part of the residue of her estate; she then bequeathed certain sums to her children as follows:—to Mary Ann Watt, 5,000*l.* three per cent. reduced annuities; to John Meares, 5,000*l.* like annuities; to G. H. Meares, 5,000*l.* like annuities; to Peter Guillebaud Meares, 5,000*l.* like annuities; to Henry Meares, 5,000*l.* like annuities; to Amelia Jane Meares, 3,000*l.* like annuities; and to Robert Meares, 2,000*l.* like annuities; and she declared that her reason for making a distinction in her bequests to him (Robert Meares) and her other children was, that she considered him to be already handsomely provided for.

There was not, at the time of making the will or at any other time, standing in the name of Peter Guillebaud, the sum of 2,000*l.* three per cent. reduced bank annuities of the year 1726, or any other stock of any description, except the 25,000*l.* three per cent. reduced bank annuities transferred upon the aforesaid trusts into the names of Peter Guillebaud, Peter Dobree, and Geo. Hammond; but there was standing in the name of P. Guillebaud, as surviving trustee, 2,000*l.* three per cent. reduced bank annuities of 1726, of which the testatrix was possessed before her marriage with her late husband, John Meares the elder, and the trusts of which were declared by her marriage settlement, bearing date the 21st of May 1796, for the separate use of the testatrix during her life, and, after her decease, for her husband for his life, and, after the decease of the survivor of them, for all the children of the marriage in equal shares at their respective ages of twenty-one years. The testatrix, some time before her death, was possessed, exclusively of the 25,000*l.* stock, of the sum of 4,000*l.* like annuities standing in her own name; and some small purchases of stock were afterwards made by her; so that, at the time of her death, the stock to which she was entitled, including the 25,000*l.* which she had appointed, amounted to about 30,000*l.* three per cent. reduced bank annuities. She had also other personal estate sufficient for the payment of her debts, funeral and testamentary expenses, but not of such an amount as to leave any considerable surplus.

Thus, the whole of her property, including the 25,000*l.* stock, did not much exceed 30,000*l.* three per cent. reduced bank annuities; and the legacies given by her will amounted alone to 30,000*l.* stock.

The question was, whether the parties were to elect between the benefits given them by the deed of appointment, and the benefits given them by the will: or, whether the appointment was to prevail, and the legatees were to abate proportionally.

In order to raise a case of election, the bill alleged, that, after the execution of the deed of appointment, the testatrix always, and particularly at the time of making her

will, treated and considered the 25,000*l.* three per cent. bank annuities as her own property, and as property which she had the right to dispose of amongst her children, in such manner as she should think proper; and that, in the instructions which were given by her to her solicitor, for preparing her will, and in the statement of her property contained in the instructions, the 25,000*l.* three per cent. bank annuities was mentioned by her as part of her property, and subject to her disposition by will amongst her children.

The solicitor who prepared the will was examined as a witness.—He deposed, that a certain paper writing, to which he referred as an exhibit, was of his own handwriting, and was written by him on the 19th of May 1823, on the occasion of Mary Ann Meares, the testatrix, attending at his office, to make her will; that the same was written in the presence of M. A. Meares, for the purpose of being instructions for her last will and testament; and that the purpose, for which the paper writing was written, was carried into effect by a will being prepared afterwards on or about the 26th of May 1823. This paper writing mentioned 30,000*l.* stock, as standing in the name of the testatrix.

He further deposed, that, at the time when she gave the aforesaid instructions, she, the testatrix, stated to the witness, that she had then standing in her name the sum of 30,000*l.* three per cent. reduced bank annuities, and that she, the testatrix, had then at her disposal the further sum of 2000*l.* in the same reduced bank annuities, which was then standing in the name of Peter Guillebaud.

Mr. Horne appeared for the plaintiffs, and contended, that the parties must be put to elect.

Mr. Bickersteth and *Mr. Treslove*, for the defendants, insisted, that no case of election was raised by the will.

The first question was, whether the paper of instructions, and the evidence of the solicitor of the testatrix was admissible.

On this point the following cases were cited :—

Selwood v. Mildmay, 3 Ves. 306.

Hinchcliffe v. Hinchcliffe, 3 Ves. 316, 521.

Druce v. Denison, 6 Ves. 385.

The Master of the Rolls held, that the case came within the principle of *Hinchcliffe v. Hinchcliffe*, and that the evidence was admissible.

The evidence being admitted, there was little argument on the remaining point.

The Master of the Rolls.—This lady had originally 30,000*l.* stock. By her will she disposed of legacies of stock to the amount of 30,000*l.*; and, at the time when she gave instructions to the solicitor who prepared her will, she told him that she had 30,000*l.* stock standing in her name. In fact, she had parted with 25,000*l.* of this stock, by a deed of appointment. The evidence (which I have held to be admissible) shews, that she meant, by her will, to dispose of a sum of stock which included the 25,000*l.* I must conclude, that she had forgotten the appointment, and the transfer of the 25,000*l.* to trustees. She did not mean to give the legacies in addition to the provisions made by the deed of appointment. The parties must, therefore, elect between the will and the appointment.

With respect also to the 2,000*l.* the subject of her marriage settlement, which she has affected to dispose of, there is a clear intention to make it part of her general assets. The parties must, therefore, confirm that disposition, unless they elect against the will.

1829. } *Ex parte* CUNNINGHAM, in the
March. } matter of CAVENAGH.

A petition may be referred for impertinence, although the respondent, on a former occasion, succeeded in a formal objection to it.

This petition had been in the paper on a former day: the respondent took a for-

mal objection; and it was ordered to stand over.

Mr. Montague now applied, that the petition might be referred for impertinence.

Mr. Knight, *contra*.

Though a proceeding may be referred for scandal at any time, it cannot be referred for impertinence, if the objection be not taken in the first instance. For instance, an affidavit cannot be referred for impertinence, if an affidavit in reply has been filed. Here, an objection, distinct from that of impertinence, was taken on a former occasion: and the respondent cannot now have a reference for impertinence.

The Vice Chancellor was of opinion, that the respondent had not lost his right to complain of any impertinent matter which the petition might contain, by reason of his having previously urged a technical objection against it with success.

Reference to the Master ordered.

1829. } *Ex parte* PAUL, in the matter
March. } of RICH.

After assignees have acted for some time under a commission, which ultimately proves to be invalid, the assignees are liable for the costs which have been incurred, and not the petitioning creditor.

A commission had issued against Sir Charles Rich; and the assignees had acted under the commission, disposed of property belonging to the bankrupt, and brought an action against the sheriff to recover property taken under an execution, which they alleged to be invalid. In that action they failed, in consequence of not being able to shew that there had been such a trading as would support the commission.

They now petitioned that the commission might be superseded, and that the petitioning creditor might be ordered to pay the costs and expenses which they had

incurred, and the costs of superseding the commission.

Mr. Sugden and *Mr. Montague* appeared for the petition :

Mr. Horne and *Mr. Collinson* appeared in opposition to it.

The following cases were cited: —

In re Bryant, 2 Rose, 18.

Ex parte Johnson, 1 Glyn & Jam. 231.

The Vice Chancellor was of opinion, that, as the assignees had not made their application to the Court immediately after their appointment, but had allowed a considerable time to elapse, and had interfered with the estate of the bankrupt, and had brought an action in their character of assignees, they could not now throw the responsibility on the petitioning creditor, but must bear it themselves.

Petition dismissed, with costs.

END OF HILARY TERM, 1829.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

IN

EASTER TERM, 10 GEO. IV.

1829. }
April 28. } FURRIER v. RANKEN.

Account—Principal and Agent—Length of Time.

A large demand established after a lapse of more than twenty years, against the estate of an accounting party, though no evidence could be given as to the particulars of the demand.

The bill was filed on the 8th of June 1823, by the executors of E. A. Cuthbert, against the executors of Wm. Hollings, praying a declaration that the plaintiffs were entitled to have a sum of 10,928*l.* 10*s.* 8*d.* three per cent. consolidated bank annuities, which was standing in the names of the defendants, and the dividends and interest which had accrued due since the transfer thereof into their names, applied, as far as the same would extend, in paying the sum of 18,629*l.* 6*s.*, and interest, alleged to be due to the estate of E. A. Cuthbert, from the estate of Wm. Hollings, in respect of a sum of 50,000*l.*, alleged to have been received by Wm. Hollings from or for the use of E. A. Cuthbert, and to be paid the remainder of such sum of 18,629*l.* 6*s.*, and interest, out of the personal assets

of Wm. Hollings; but if it should appear that Wm. Hollings and E. A. Cuthbert came to an agreement, that E. A. Cuthbert should accept and take the proceeds of certain indigo and cotton in the bill mentioned, consigned by Wm. Hollings for sale to Messrs. Porcher & Co., in full payment and satisfaction of the sum of 50,000*l.*, then, that an account might be decreed of the quantities of indigo and cotton which were consigned by Hollings to Messrs. Porcher & Co. for sale for that purpose, and of the sums of money at or for which such indigo and cotton were sold; and that it might be decreed that the plaintiffs were entitled to be paid, out of the sum of 10,928*l.* 10*s.* 8*d.* three per cent. consolidated bank annuities, and the dividends accrued thereon, so much of the monies produced by the sale of the said indigo and cotton, as the monies which were appropriated and paid by Messrs. Porcher & Co. for the use of E. A. Cuthbert, would not extend to pay, together with interest, upon the amount of what would be then so coming to the estate of E. A. Cuthbert, in respect of the proceeds of the indigo and cotton.

The defendants resisted the claim.

The grounds on which the demand of

the plaintiffs was supported, and the grounds on which it was resisted, are stated at length in the judgment of the Lord Chancellor.

The cause was originally heard before Sir John Leach, as Vice Chancellor, who, on the 6th of May 1826, pronounced a decree, by which he ordered that it be referred to the Master to take an account of the several sums of money, which, in pursuance of instructions from the testator Wm. Hollings, were laid out and expended by Messrs. Porcher, Redhead & Co., or their successors in the same house of business, in the purchase of stock in the name of the testator Edw. Alex. Cuthbert, or which were otherwise paid or accounted for by Messrs. Porcher, Redhead & Co., or their successors, to the plaintiff John Purrier, on the account or as the executor of Edw. Alex. Cuthbert; and his Honour declared, that the plaintiff, John Purrier, as such executor, was a creditor on the estate of Wm. Hollings, for the difference between the amount of several sums which the Master should find to have been so laid out and expended, or otherwise paid and accounted for; and the sum of 50,000*l.*, which, according to the instructions given by the said testator Wm. Hollings to Messrs. Porcher, Redhead & Co., was to have been invested by them in the purchase of stock in the name of the testator Edw. Alex. Cuthbert; and his Honour declared, that the Master, in taking such accounts of the sums laid out and expended, or otherwise paid or accounted for, was not to include therein the several sums of money received by Messrs. Porcher, Redhead & Co., or their successors, for dividends of stock purchased by them in the name of the testator Edw. Alex. Cuthbert, pursuant to the instructions of the testator Wm. Hollings; and the Master was to compute interest at the rate of 4*l.* per cent. on the sum which he should find to have been the difference between the sum of 50,000*l.*, and the amount of the several sums which had been so laid out and expended, or otherwise paid and accounted for as aforesaid, from the 26th day of Nov. 1808, being the day on which the last sum of money was paid or accounted for by Messrs. Porcher, Redhead & Co., or their successors to John Purrier; and

his Honour declared, that the sum of 10,928*l.* 10*s.* 8*d.* per cent. consolidated bank annuities, standing in the name of the accountant-general, together with the dividends which had arisen thereon since the transfer thereof into this court, was specifically applicable in or towards payment of the balance, which, upon the taking of the accounts aforesaid, should be found to be due to the plaintiff John Purrier, as such executor as aforesaid; and his Honour directed the usual accounts to be taken of the estate of Wm. Hollings, and the estate to be applied in a due course of administration in payment of the balance (if any) which should remain due to the plaintiffs, after the application of the said sum of 10,928*l.* 10*s.* 8*d.* stock, and of the other creditors of the testator Wm. Hollings; and his Honour reserved the consideration of further directions and costs.

Against this decree the defendants appealed.

Mr. Sugden and *Mr. Barber* were for the plaintiffs.

Mr. Horne, *Mr. Knight*, and *Mr. Saunders*, for the defendants, contended, on the grounds adverted to in the judgment, that either the bill ought to be dismissed, or an inquiry ought to be directed before the Master or a jury, as to whether the testator Hollings was indebted to Cuthbert at the time of the latter's death.

The Lord Chancellor.—*Mr. Purrier* was one of the executors of a gentleman of the name of Cuthbert, who resided for a considerable time in a military capacity in the East Indies. The defendants, *Mr. Ranken* and *Mr. Gall*, are the executors of a gentleman of the name of Hollings, who also resided in the East Indies, carrying on the business of a merchant at Calcutta, and who acted as agent for *Mr. Cuthbert*. It appears that considerable accounts and transactions had taken place between these parties. In the year 1806, *Mr. Cuthbert* began to think of returning to England; and, with a view to his return, was desirous of transferring to England the funds which he appears to have had in the East Indies; he employed for that purpose *Mr. Hollings* as his agent. *Mr. Hollings*, in certain let-

ters which he wrote to his agents in this country, Messrs. Porcher, Redhead & Co., directed them, out of the proceeds of certain consignments, and out of other property of him Mr. Hollings in their hands, to make an investment in the three per cent. annuities to the extent of 50,000*l.* in the name of Mr. Cuthbert. That investment was to be made in the name of Mr. Cuthbert, and to be solely under the control of Mr. Cuthbert; because the order was accompanied by a power of attorney to Messrs. Porcher, Redhead & Co., authorizing them merely to receive the dividends. It turned out in the result that Porcher, Redhead & Co. were not in funds on account of Hollings to an extent sufficient to make an investment to the amount of 50,000*l.*; there was in that respect a very large deficiency. Mr. Cuthbert set sail from Calcutta in the beginning of the year 1809; the vessel was lost, and every person on board perished. Mr. Hollings intended to have come to this country in the year 1814: he, however, did not execute his purpose, but died in the East Indies in the year 1815, and this bill was filed by Mr. Purrier and the other parties, who are plaintiffs, against the executors of Mr. Hollings for an account of those particular transactions with respect to the 50,000*l.*

The case on the part of the plaintiff, in point of evidence, turns almost entirely on the letters of Mr. Hollings; and it is necessary, in order that the grounds of the opinion, which I have formed, should be understood, that I should refer to parts of those letters. The first letter is dated the 3rd of September 1806. It is a letter addressed to Messrs. Porcher, Redhead & Co., then his agents in England. The part I refer to is this—"Your letter of the 13th of March last leads me to expect you have drawn upon me for a considerable sum, in which case the balance that will be forthcoming from the sales of my present consignments, after payment of the above bills and the former credits I have given in favour of Mr. Purrier and Miss Fitch, will, I expect, considerably exceed 25,000*l.* I therefore request that you will invest that sum in the three per cents. in the name of Edward Alexander Cuthbert, reserving to yourselves the power of receiving the dividends as they become due."

There was a direction, therefore, out of the funds which either were or would be in the hands of Porcher, Redhead & Co., to make this investment to the extent of 25,000*l.* in the three per cents. on account of Mr. Cuthbert. This money, therefore, would be completely under the control, and the exclusive control, of Mr. Cuthbert, when so invested: for the instructions were, that they, Porcher, Redhead & Co. were to receive only the dividends. The next letter is dated the 22nd of March 1807, from Mr. Hollings to Porcher, Redhead & Co.—"I wish to invest a further sum of 20,000*l.* sterling in the three per cents. in the name of Edward Alexander Cuthbert; but as it is impossible for me to estimate accurately what funds I shall have in your hands, I can give no other but general instructions on the point. I request you will retain a sufficient sum in your hands to face the credits I have given upon you for the six months that will immediately follow the receipt of these instructions; the amount that will then remain, provided it does not exceed the sum of 20,000*l.* sterling, is to be invested in the three per cents. as above stated." The third letter is to this effect—it is dated the 7th of Feb. 1808. He says—"As I can form no accurate estimate of the funds I shall have in your hands from the sales of my different consignments and after the bills I have remitted and drawn have been realized and paid, I beg your attention to the following general instructions:—I wish 50,000*l.* sterling to be invested in the three per cents. for account of Edward Alexander Cuthbert, or as much less than that sum as the state of my account with you will permit. I request you will, if my funds fall short of that sum, retain in your hands no more than is sufficient to answer my credits for six months after the receipt of this letter. Observe, that I mean that no more than 50,000*l.* shall be invested on account of Mr. Cuthbert, which sum includes all former sums I have directed to be so appropriated."

Those are the three letters, by which this sum is directed to be invested in the name and for the account and for the benefit of Mr. Cuthbert, and the sum, that is named, is 50,000*l.* to be invested in three per cent. stock, which is to be applied to the exclusive use of Mr. Cuthbert.

The reply, which is suggested in the answer of the defendant, is, that this might have been a loan. It is quite unnecessary for me to repeat the observations, which were made with respect to that point by the Master of the Rolls, for the purpose of shewing the improbability of such a transaction between parties circumstanced as these were. It is impossible to suppose it could have been a loan. In addition to the arguments and observations made by the Master of the Rolls, I may observe, that Mr. Hollings, being a merchant and acting as an agent for Mr. Cuthbert in India, and Mr. Cuthbert being about to set sail from that country to England, if it had been a loan to the extent of 50,000*l.*, it is quite impossible to suppose that Mr. Hollings, as a person in business, should not have taken a bond or some security for the purpose of evidencing the transaction. It is perfectly clear on that account, that it could not be a loan. In addition to the observations made by Sir John Leach, there is another circumstance—an admission out of the mouth of Hollings himself, which shews that it never was a loan. What I refer to is the letter of December 1811: it is an answer to a letter written by Purrier to Hollings, in which he had called for some account of this transaction from Hollings; and in it Hollings writes thus—"As you appear to require further information respecting his account (that is Mr. Cuthbert's account) with me, I have to inform you that it was arranged, on the 13th of January 1819, that all the remittances made to Messrs. Porcher & Co. in indigo and cotton by me, should be considered on his account solely, and that I should pay him an additional sum of 6,000*l.* by my bills on Messrs. David Scott & Co., of London, in full of all demands. This agreement I fulfilled, and all accounts between me and Cuthbert were closed and signed up to that date." This letter is a letter of great importance, as far as relates to this transaction and the evidence of it. Mr. Hollings does not state this transaction to have been a loan, but he admits there was a most extensive claim on the part of Cuthbert against him, Mr. Hollings, and he points out that that claim was settled in a particular mode, namely, that all those consignments of indigo and cotton, together with the sum of 6,000*l.*, were to be taken for

the purpose of liquidating that claim. It is remarkable that this letter refers to the date of January 1809, and it says that this agreement was come to at that period (superseding the former arrangement), and that Mr. Cuthbert was willing to take upon himself the risk of these consignments. That puts an end entirely to the question as to this having been a loan, for it is an admission that there was a large sum of money to be accounted for by Hollings to Cuthbert; and it brings the question to a new issue,—not whether there was any sum due from Hollings to Cuthbert, but, in what way was that sum to be liquidated? Was it to be 50,000*l.* invested in the three per cents? or, was it that this agreement afterwards took place, by which the produce of those consignments was to be taken in liquidation of the account by Cuthbert? The question is, not whether any sum of money was due, or any large sum of money, but in what manner the admitted debt was to be liquidated.

Now, in the first place, this letter was written in the year 1811, after Hollings knew of the death of Cuthbert—after Hollings was apprised that the cotton and indigo had come to a very bad market, and after he was satisfied that the transaction had been a very losing one. Therefore, such a statement, made at such a time, is open to great suspicion, and liable to great observation. But if such were the arrangement that had clearly taken place between the parties—if all these consignments were to be on account of Cuthbert, it is absolutely impossible to suppose that Hollings, who was a merchant, should not have conducted his correspondence with Messrs. Porcher, Redhead & Co., so as to inform them of the circumstance, and to direct them, that they were to account to Cuthbert for the produce of those consignments. No communication of that description, or any intimation whatever, that this gentleman, Mr. Cuthbert, had any interest in these consignments was ever addressed or communicated to Messrs. Porcher, Redhead & Co. Mr. Hollings knew that Mr. Purrier in England had a power of attorney authorizing him to act for Cuthbert. No communication whatever was made to Purrier to inform Purrier that this arrangement had been entered into, by which the produce of these consignments was to become the

property of Cuthbert. It is impossible, therefore, to give credit to that representation made in the year 1811, after it was known by Hollings that Cuthbert was dead, and also known by Mr. Hollings that the transaction altogether had been one of a most ruinous and losing nature.

But the case does not rest there: for there is a letter of Hollings directly opposed to the letter of 1811, a letter written in 1809, and addressed to Mr. Hollings, he, the writer, supposing Mr. Cuthbert to be alive. The letter of the year 1811 was not written until he knew that Mr. Cuthbert was dead; and the contents of the letter of 1809 are directly opposed to the supposition that any person except this gentleman, Mr. Hollings, was interested in those consignments. The letter to which I refer is dated the 13th of March 1809, Mr. Cuthbert having sailed on the 18th or 20th of January 1809, and the material passages are in these terms—"My dear Cuthbert,—I have heard of the arrival of the fleet at Ceylon, but am greatly disappointed at not receiving any letters from you from that place, or upon your quitting the pilot. I have received accounts from England of the sales of the indigo I sent home last for account of your remittances, and I am concerned to say my disappointment in the proceeds is greater than on the former occasion. How fatally has this business turned out, and how much have we to regret that the house of Porcher, Redhead & Co. were employed!" Now, great reliance was placed—and, in fact, that is the only expression on which any reliance could be placed—on the word *we*—"how much have *we* to regret that the house of Porcher, Redhead & Co. were employed." It was suggested by one of the learned counsel, that, from the use of the word *we*, it was quite obvious that these consignments were on the joint account; but that is directly at variance with the letter of Mr. Hollings, dated December 1811, in which he does not represent that they were on the joint account; but he says—"that all the remittances made to Messrs. Porcher, Redhead & Co. in indigo and cotton by me should be considered on his account solely." But that expression is not at all inconsistent with the supposition that these consignments, as far as the profit

and loss on the consignments were concerned, were on the account of Hollings alone; both parties were interested on that supposition in the amount of the consignments. One gentleman, Mr. Cuthbert, expected that they would be sufficient to give him remittances in England to the extent of 50,000*l.* stock. The other gentleman was anxious to have as large a profit in those remittances as possible. They, therefore, had a joint interest in the proceeds and the extension of the proceeds of these consignments, which is quite sufficient to explain the passage to which I have referred, and which has been relied on, namely—"How fatally has this business turned out, and how much have we to regret that the house of Porcher, Redhead & Co. were employed." I have to regret that they were employed, because the consignments have been sold most disadvantageously, and you have to regret they were employed on the same account, yet not that you were interested directly in the amount of the consignments, but because there was not sufficient to make good your expected remittances. There is nothing in the word *we*, which was relied upon, at all inconsistent with the view the Master of the Rolls took of the case. The letter then goes on, after stating the grounds on which he supposes the consignments ought to have been sold more advantageously—"The difference quoted would have given an addition of 5,000*l.* to your remittances, and which I have now to lament the loss of. You know very well they were not drawn upon; they had no pressing payments to make from the proceeds of these consignments. How, then, is their conduct to be reconciled?"—"This infernal transaction will reduce your funds in England to 41,000*l.* or 42,000*l.* I include in this sum the balance of my consignments of this year to Messrs. Porcher, Redhead & Co." So that he was giving him, Cuthbert, credit, in order to supply the deficiency on the consignments of that year, which, according to his representation, he had made. But to these consignments of indigo and cotton, if the former had been made in liquidation and discharge of the debt, Cuthbert, it is quite obvious, would have had no claim. Then he goes on and says, "and which I shall

authorize you to receive by the first fleet of the ensuing season. From this day forward I shall hold no communication with them, and, except the letter ordering them to make over all my accounts to you, I shall not again write to them—this cruel addition to my other losses and disappointments has almost overwhelmed me." What losses and disappointments, if the consignments were all on the account of Cuthbert? "I feel most forcibly the necessity of bearing up against its pressure, and in a short time I trust my mind will recover its vigour and power of exertion; but to be thus basely plundered of the fruits of my industry for upwards of twenty years is cruel, and may surely justify the keen sensibility with which I feel the disappointment." No person reading that letter can for a moment doubt, that Hollings at that time considered the loss, arising from the low sale and low produce of these consignments, as a loss which was to fall exclusively on himself. Therefore, that letter of 1809, independent of the other remarks to which I have referred, is a complete answer to the suggestion for the first time made in the letter of 1811, that these consignments were to be taken by Mr. Cuthbert, in liquidation of all the claims he had on Hollings.

If Mr. Hollings, then, has made this the issue between the parties, it appears to me that the issue is decided in a manner free from all doubt. He does not put the issue as a question, whether there was any claim on the part of Cuthbert against himself—he admits there was a claim to a very large amount; and he says, that that claim was to be liquidated by the consignments which were made, and which consignments, by virtue of the agreement entered into early in January 1809, were to be taken by Cuthbert in discharge of his demand. If that is negatived—if it is shewn by the evidence (which it is, to demonstration) that such was not really the case, he has made that the issue; and, that issue being decided against him, it appears to me, there is at once an end of the case.

It was stated, that there was no trace of this transaction in Hollings's books; it is so sworn in the answer; but that argument proves too much: that there was a

transaction of a most extensive nature, is admitted by Mr. Hollings in his letter of 1811; and there is no trace of that transaction in the books. There was an extensive transaction, and the question is, what was the nature of the transaction? It is admitted that there had been an extensive transaction; and the circumstance of there being no trace in the books of any transaction, does not shew which of the two representations was the correct one. Then it is said, how is the sum to be fixed? The sum is obviously to be fixed by the letters authorizing and directing the investment of the 50,000*l.*, which sum of 50,000*l.*, when invested, it is stated in terms, is to be the property of Mr. Cuthbert, and to be entirely at his disposal. It is fixed, therefore, by Mr. Hollings himself, in his letters, at that amount; and that that is the correct amount, is strongly confirmed by another passage in the letter, in which Mr. Hollings complains, and laments that the amount, which is to be invested, is reduced in consequence of the bad sale and bad market to which his consignments had come; for he there states, that this will reduce your remittances—to what sum?—to the amount of 41,000*l.* or 42,000*l.*; thereby admitting that the sum Mr. Cuthbert was entitled to receive was considerably more than that amount.

Another objection that has been made is, that there has been great delay in the institution of this suit. Now, undoubtedly, there has been very considerable delay in the institution of these proceedings; but I think it is reasonably accounted for in the correspondence. This letter of 1811 could not have been received, till the middle of 1812 by Mr. Purrier. Mr. Purrier, in consequence of the doubts entertained, applied to Mr. Hollings for an explanation. Mr. Hollings was in the East Indies, and the letter was written in December 1811, which must have been received in the middle of 1812, giving an explanation of the transaction; and it is quite clear, from the conduct of Mr. Purrier, that he, in the first instance, believed the explanation that was given by Mr. Hollings, and he states, that he expected that Mr. Hollings would have returned to England, and, that on his return to England all the details and particulars of

the transaction would be fully explained. It turned out, however, that Mr. Hollings did not return to England at the time he expected, and he died in Calcutta in 1815. Then it was that an application was made to his executors, and these proceedings afterwards took place. It does not appear to me, therefore, that there has been such a delay as to deprive Mr. Purrier or those parties whom Mr. Purrier represents, who are the persons interested in this estate of Mr. Cuthbert, of the benefit, or the opportunity of unravelling this transaction, and putting it on its proper foundation.

It is stated, that the Master of the Rolls has committed an error with respect to the calculation of interest. Now, it does not appear to me he has committed any error in that respect, and for this reason:—this is a suit with respect to one particular and individual transaction. The money was to be invested in the funds, and it was Mr. Hollings's duty to take care that the money was invested at the time; and if it had been invested, Mr. Cuthbert would have been entitled to receive the dividends. It is not unreasonable to say that Mr. Hollings's estate ought to be charged with interest from the time the last payment was made, with respect to this transaction—that was in November 1808; for there was, first of all, an investment in the funds by Porcher, Redhead & Co.; then there was an application made by Purrier to Messrs. Porcher, Redhead & Co. to invest more, or to pay him the money which they had belonging to Hollings in their hands; and they did, in November 1808, pay him the amount of 12,000*l.* and upwards in exchequer bills, on account of this particular transaction; and those were the only two sums of money that were ever paid with respect to that 50,000*l.* It is therefore clear on that account, that interest should be given, (always considering that this suit is confined to this one particular transaction, and has no relation to the general account,) as the Master of the Rolls has obviously given it, from the date of the last payment.

1829. }
May 13. } HOWELL v. EDMUNDS.

A man cannot be made liable for the costs of another by a parol undertaking.

The plaintiff, Howell, had obtained an order for the taxation of the bills of costs of his solicitors. The Master certified, that he had proceeded to tax the several bills mentioned in the order, and such bills, amounting together to the sum of 188*l.* 10*s.* 6*d.*, he had taxed at the sum of 171*l.* 0*s.* 10*d.*; and it having been admitted before him by the solicitor, that they had received the sum of 194*l.* 12*s.* on account of their bills, the Master found they had been overpaid the said sum of 171*l.* 0*s.* 10*d.* by the sum of 23*l.* 11*s.* 2*d.* which, accordingly, they were to refund and repay to the plaintiff.

The solicitors presented a petition, stating, that the plaintiff, Thomas Howell, retained and employed them as solicitors, to commence and prosecute the suit, and also to defend and act in the same, for and on the part and behalf of seven of the defendants; that they acted in the suit accordingly; that, in the year 1826, they delivered to the plaintiff the bill of costs against him, amounting to 197*l.* 9*s.* 9*d.*, which comprised, and appeared on the face of it to comprise, the amount due to them, as well for the plaintiff's, as for seven of the defendants' costs of such suit; they, the solicitors, having acted in the suit for those defendants upon the retainer, employment, and responsibility of the plaintiff.

The petition further stated, that they had procured a sum of money for the plaintiff on mortgage, out of which they had, by arrangement with him, retained 188*l.* 12*s.* in discharge of the whole bill of costs.

The prayer was, that the Master might be directed to review his report, and that a competent portion of the sum, which had been received by the petitioner, might be set off against the costs of the seven defendants.

There was contradictory evidence as to the allegation, that the plaintiff had undertaken to pay the costs of the seven defendants.

Mr. Knight, in support of the petition, contended that the balance of evidence was

in favour of the case stated by the petition; that the question of fact was decided by the circumstance of the plaintiff having submitted to pay the bill; and that, as the plaintiff had paid the costs of those seven defendants, the Master could only tax the quantum of charge, and could not disallow that part of the costs *in toto*,—which was what he had done.

Mr. Russell, contra.

The payment of the bill took place under such circumstances, that the Master of the Rolls thought it ought to be taxed, without requiring the plaintiff to establish any *prima facie* case of exorbitancy of charge (1). The case, therefore, must be looked at exactly as if no payment had taken place. Then, even if the facts alleged by the petitioner were true, still his case would be, that the plaintiff had undertaken to be answerable for the costs of other persons: and such an undertaking, to be valid in law, must be in writing.

The Vice Chancellor.—Upon reading over all the affidavits, I find that the case made by the petitioner is put on the fact, that there was an agreement on the part of the plaintiff to be responsible for the costs of these seven defendants, that is, that he undertook to be responsible for that which, primarily, and in itself, was the debt of others. That cannot be, there being no writing, containing any such undertaking. The Master's report, therefore, is right; and the petition must be dismissed with costs.

1829. } *Ex parte KIRBY, in the matter*
May 23. } *of KIRBY AND THOMAS.*

A bankrupt, under examination before the commissioners, is not bound to answer questions which would criminate himself.

If a question is put in so general a form, as that an answer to part of it would criminate the bankrupt, while he might answer other parts of it without criminating himself, he may decline to answer any part of it.

In the course of the proceedings under this commission, an exhibit, marked B,

(1) See 6 Law Journ. Chanc. 29.

had been produced, which was as follows: "K. was insolvent when T. joined him, and C. knew it; he was insolvent about 300*l.* or 400*l.* C. had the stock-book, so shewing the affair; he stated to the citizens, that K. and T. had a capital of about 18. or 14,00*l.* between them, though he well knew that K. was insolvent, as above, and T. had only 470*l.*

"We took stock in August; at that time our stock and book debts and other effects were about 15 or 16,000*l.* and we owed at least 19,000*l.* S. and C. were both informed of this, and C., who was in bed at the time, said, 'Well, it's not so much short either, but I know nothing;' at this time we must have owed them at least 15 or 16 hundred for cash and goods; it was generally about twice the amount, but had then been largely reduced by the sale of Dudley's stock, by which sale we lost 550*l.* about. When Phillip's bad debt occurred, K. told C., who said, 'I have every confidence in your making us all right.' On the following morning he came to Knightsbridge. K. accompanied him home, and saw him with Mr. S——. Mr. C—— said, 'Sewell, these fellows must not fail for twelve months, for we must supply them with all the cash they want, to keep up their credit; and at the same time they advised us to go to K—— & Co. to buy three or four boxes of Ogilby's cloth; and we did accordingly go to K—— & Co., and made a parcel; they likewise recommended us to go to other houses, to buy silk, damask, and carpeting, plaids and shawls, and that they would take them instead of cash for their debt; and we did buy such goods, and sell them to S. & C. at a sacrifice. We sold goods to D—— & Co., and to E——, at a loss of twelve and a half per cent. for the first parcel, and fifteen per cent. on all the others, in order to get their bills to cover S. & C. About Nov. 1827, we began to borrow money of S. & C., and pay them large and extra interest for it. On the 9th of Nov. we borrowed 490*l.*, and accepted a bill for 500*l.*, due 10th of January; the 10*l.* was for the interest thereon. After this time, all money borrowed of S. & C., which was generally from the 4th to the 10th, they used to charge us two and a half per cent. for, if the same was not re-

turned on or before the 12th: this we could rarely do; therefore, upon many occasions, have paid the two and a half per cent. When we began, the stock was taken of S. & C. at prime cost, remnants and all. About 2600*l.* must have been at least twenty-five per cent too dear. After C. knew of Phillip's bad debt, and our great deficiency, he wanted us to destroy the cash-book, which we would not do; his reason for that was, that the loans from him at so late a period might not appear. We borrowed cash of S. & C. after the 4th of September, upwards of 1000*l.*, that we might not fail till he was nearly out. K. and C. had a private meeting before the latter went out of town; and it was then arranged when K. should call on the creditors for assistance, and that they should stop on the 4th of October; he stated, he would rather be from home, and for K. to say, 'that he had applied to S. & C., but, C. being out of town, he could not obtain assistance.' C. expected the creditors would have given time, during which he recommended us to take care of ourselves; and when on his return he found they would not give time, said, 'Have you made anything? (meaning, Have you secreted any property?) and if you have not, lose no time in doing it.' The last goods purchased of S. & C. were, by agreement, charged such prices as would leave them no loss on the balance of their account, in case we paid 10*s.* in the pound. We destroyed I. O. U.s at the request of C., likewise all letters and memorandums relating to their account. Mr. C. has since said, 'You know, respecting the little interest, (meaning the usurious interest,) it can be stated by such things as had been previously settled, such as insurance on French goods, rent on our houses, &c., in order that it might not appear there was more than proper interest charged.' "

On the 21st of May, the bankrupt Kirby being under examination before the commissioners, the following questions were put to him, and the following answers given:—

Q. Do you know Benjamin Corbett, of Pancrass-lane, an accountant?

A. I do; he was employed by us to make out our accounts.

Q. Did you, at any time, make a statement to Corbett of your transactions with S. & C., which Corbett reduced into writing in your presence, and in the presence your partner Thomas?

A. Yes, I did.

Q. Is the paper now produced, marked B, and bearing the mark of an exhibit before us of the 14th of May, the paper before referred to?

A. I believe that to be the statement.

Q. You are requested, for your better information, to read the paper marked B, now produced, and state if those two sheets of paper, purporting to be a copy of such statement, is a copy thereof.

A. It is a copy of the exhibit B before mentioned.

Q. Are the statements therein contained true statements?

To this last question the solicitor of the bankrupt demurred on his behalf as follows:—

I object, on the part of the bankrupt Kirby, to his answering this question, inasmuch as it asks him, whether the following part of the above-mentioned paper, being the copy of the exhibit marked B, is true; that is to say, "and at the same time they advised us to go to K. & Co. and buy three or four boxes of Ogilby's cloth; and we did accordingly go to K. & Co., and made a parcel; they likewise recommended us to go to other houses to buy silk, damask, and carpeting, plaids and shawls, and that they would take them instead of cash for their debt; and we did buy such goods, and sell them to S. & C. at a sacrifice," and also inasmuch as the paper writing declares, that witness and his partner to be at that time insolvent, and as it appears thereby that such purchases were made at the time the bankrupts were insolvent, and for the purpose of satisfying the debt of a particular creditor, the arrangement made for such express purpose would, in my judgment, criminally affect the bankrupts if they answer that question, and therefore I humbly submit that the witness is not bound to answer it.

The commissioners were of opinion that the question must be answered. The question therefore was repeated.

Q. Are the statements therein contained true statements?

A. I decline to answer the question.

Upon this the bankrupt was committed by the commissioners to Newgate; and, being brought up by habeas corpus before the Lord Chancellor, the question was, whether the commissioners had a right to insist on an answer to the question which the bankrupt had declined to answer.

Mr. Collinson, for the bankrupt, contended, that many parts of the statement referred to were of such a kind, that the bankrupt could not be required to answer them, unless he was compellable to criminate himself; that there was nothing in the bankrupt law which deprived the bankrupt of the general privilege secured to every man by the law of England, that he shall not be obliged to criminate himself; and that, though he might have answered as to some parts of the statement, if he had been separately interrogated as to them, yet, as the question was put to him in a general form, and went to matter which he could not lawfully be required to answer, he had a right to refuse to give any answer at all.

Mr. Rose, contrà, argued, that it was in vain to attempt to obtain a full disclosure of the bankrupt's estate, if he were protected from answering questions which might tend to involve him in criminality. Here, the questions related specifically to the dealings and property of the bankrupt; and, if he was not compelled to answer, the whole object of the bankrupt laws would be defeated.

There were referred to:—

1 Jac. 1. c. 15. s. 7, 8.

5 Geo. 2. c. 30. s. 16, 18.

6 Geo. 4. c. 16. s. 36, 39.

Bracy's case, Comb. 390.

Ex parte Meymot, 1 Atkyns, 196.

Ex parte Symes, 11 Vesey, 521.

Ex parte Nowlan, 11 Vesey, 511.

Ex parte Oliver, 1 Rose, 407.

Ex parte Cossens, Buck. 531.

Pratt's case, 1 G. & J. 58.

The Lord Chancellor.—I do not find that there is any authority for holding,

that the general rule of law, that a person cannot be compelled to criminate himself, does not extend to the examination of a bankrupt before the commissioners. There are parts of this statement, as to the truth of which the bankrupt has been required to answer, which he might not be able to answer without criminating himself; and though there are other parts of the statement, as to which he might be compelled to answer, yet, as the question embraced the whole,—both that which was free from objection, as well as that which was open to objection,—the bankrupt had a right to demur to the whole question in the general form in which it was put. The prisoner, therefore, must be discharged.

There are parts of the written statement, as to which it may be very proper to examine the bankrupt minutely.

1829,
& April 20, } ORMOND V. KYNNESELEY.
1830. } BUTLER V. KYNNESELEY.

If a tenant for life, unimpeachable of waste, commits equitable waste, the produce of such equitable waste belongs to the person having the first vested estate of inheritance, though such estate be expectant on the determination or failure of intervening life estates and contingent estates tail: and a bill for an account of the produce of such equitable waste cannot be maintained against the executor of the deceased tenant for life, who committed the waste, by the persons who, upon his death, became tenants for life in possession.

A decree having ascertained the right of the plaintiff to relief, accounts were directed to ascertain the amount due to him: afterwards the plaintiff referred all matters in difference to the decision of an arbitrator; and he, without taking into consideration the question of law decided by the decree, made an award, ascertaining the amount due from the defendant to the plaintiff; afterwards, on an appeal against the decree, it was reversed, and the bill was dismissed:—Held, that the award was not binding.

The original bill was filed, by the late Marquis and Marchioness of Ormonde, in April 1816, against the respondent Tho-

mas Sneyd Kynnersley. According to the case stated in it, Godfrey Bagnall Clarke, being seised in fee of the manor-house, park, and estates of Sutton-cum-Duckmanton in the county of Derby, and of other hereditaments, duly made and published his will, bearing date the 4th of December 1774, and thereby devised all his real estate to Thomas Skipwith and Edward Gibbon, and their heirs, in trust, after payment of certain debts and legacies, to convey the said estates to the use of his brother Gilbert Clarke and his assigns, for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons severally and successively in tail male; with remainder to his, the testator's, sister Sarah Clarke, for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to her first and other sons severally and successively in tail male; with remainder to Clement Kynnersley for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons severally and successively in tail male; with remainder to Wenman Samuel, for life, without impeachment of waste; with remainder to trustees to preserve contingent remainders; with remainder to his first and other sons severally and successively in tail male; with remainder to his the testator's own right heirs for ever.

The testator died on the 26th of Dec. 1774, leaving his brother Gilbert Clarke his heir-at-law; and after the testator's decease, the trustees, in execution of the trusts of the will, paid the testator's debts and legacies, and conveyed his real estates to the several uses declared by the will, or such of them as were then subsisting or capable of taking effect. Gilbert Clarke died without issue, and intestate as to the ultimate reversion in fee in the real estates; and his sister, Sarah Clarke, his heiress-at-law, intermarried with Job Hart Price Clarke; she entered upon and enjoyed the testator's real estates, under the limitations in his said will contained, until 1801, when she died, leaving one son, Godfrey Thomas Robert Price Clarke, and a daughter, Anna Maria Catherine, late Marchioness of Ormonde, and no other issue. The son died without issue,

and under the age of twenty-one years; and Clement Kynnersley, as the next tenant for life, in March 1802, entered into the possession of the estates, and so continued until the time of his death. Kynnersley died on the 23rd of April 1815; he left no issue.

Job H. Price Clarke, and Sarah his wife, had long before levied a fine of the reversion in fee of the testator's estates, to such uses as she by her will in writings should appoint; and she by her will, executed conformably to the terms of the power, devised the reversion to trustees, upon trust to convey the same to the uses and intent, that her daughter, the said late plaintiff, the said Marchioness of Ormonde, should receive an annuity of 1000*l.* during her minority, or until her marriage, and, subject thereto, to the use of certain persons for life, with remainders in tail to the issue of her daughter, Lady Ormonde, in tail; with remainder to the use of Job Hart Price Clarke, his heirs and assigns for ever.

The bill stated, that the mansion-house and park at Sutton-cum-Duckmanton was an ancient family seat, and that, at the time when Clement Kynnersley entered into possession, many timber and other trees were standing and growing in the park, and near the house, which served for ornament and shelter thereto, and were planted for that purpose; that Clement Kynnersley, during the time he was in possession, caused to be felled and cut down many of the ornamental timber trees, or trees planted for ornament or shelter, and divers saplings and young trees, not nearly come to maturity, and also various spring woods, prematurely and before the same, according to the usage of the country, were arrived at a proper state for cutting, and that he sold and disposed thereof for large sums of money, which he received and applied to his own use, and that he committed other acts of waste, spoil, and destruction upon the devised estates; that Wenman Samuel, the tenant for life in remainder expectant on the decease of Clement Kynnersley without issue male, died in the lifetime of the said Clement Kynnersley; that Job Hart Price Clarke was dead, having previously, by indentures of lease and release, bearing date the 15th and 16th of June 1809, duly conveyed and assured all his estate and interest in the devised premises to the plaintiff, the late Marquis of

Ormonde, and his heirs, by means whereof, and of the several devises and limitations aforesaid, the plaintiff and his wife, who had not any issue, became entitled in possession upon the death of Clement Kynnersley, to the before-mentioned estates; and that Clement Kynnersley, by his will, bearing date the 21st of January 1815, appointed the defendant Thomas Sneyd Kynnersley his executor.

The bill also charged, that Clement Kynnersley had suffered the buildings on the estate to become greatly dilapidated.

The prayer was, that an account might be taken of all timber and other trees, growing in or near the said mansion-house and park, and which were ornamental thereto, or which were planted for ornament or shelter thereto, and of other trees or woods growing on the estates, unfit for felling or cutting, and which were felled and cut, and sold or otherwise disposed of by Clement Kynnersley, deceased, and of the monies received by him on the sale thereof, or of such of them as were sold, and of the value of such of them, if any, as were not sold by him; and that an account might also be taken of the state and condition of the repairs of the buildings and premises belonging to the said estate at the time of the death of the said Clement Kynnersley, and that his estate might be declared liable to make good the produce or value of the said timber and other trees and woods which should appear to have been improperly felled or cut, and also the amount of such dilapidations, if any, as there should appear to have been in the said buildings and premises at the time of his the said Clement Kynnersley's death, and also with interest on the produce or value of such trees from the time of the respective felling and cutting the same, and on the amount of the dilapidations from the time of his decease; and that Thomas Sneyd Kynnersley might be compelled to pay the same to the plaintiffs, or into the Court of Chancery, for the benefit of the person or persons ultimately to be entitled to the inheritance of the estates.

Thomas Sneyd Kynnersley by his answer, filed on the 6th of December 1816, denied that his testator had suffered the estate to fall into a dilapidated condition, or that he had felled any timber, except such as it was fit to cut in the due management of the

property, and in order that the growth of other more valuable trees might not be impeded.

The defendant further stated, that, in Michaelmas term 1807, Job Hart Price Clarke and the Marquis and Marchioness of Ormonde filed a bill against Clement Kynnersley, who put in his answer thereto, and added a schedule to such answer, wherein he set forth an account of all the ornamental trees, and the timber and other trees growing in or about the said park, cut down by him whilst he was in possession of the estate.

That answer was filed in June 1808; and it was thereby admitted that he had, in the years 1805 and 1806, cut down certain timber and other trees in Sutton Park, to the value of 3,223*l.* 19*s.* 8*d.*, but insisted that he had a right so to do.

In December 1817, the Marchioness of Ormonde died, and in 1818, a bill of revivor and supplement was filed by the Marquis, to which her executors were made defendants.

Divers witnesses were examined by the plaintiffs and by the defendant, but none of them deposed to any trees having been cut by Clement Kynnersley after the year 1808.

By the decree made upon the hearing of the causes, by his Honour the Vice Chancellor, dated the 6th of May 1820, it was ordered, that the plaintiff's bill, so far as it sought an account of dilapidations of the buildings on the estate, should stand dismissed, without prejudice as to the question of costs; and it was referred to Master Alexander, to inquire whether Clement Kynnersley, in the year 1804, or at any time subsequent during his life, cut or felled any timber or other trees which were planted or left standing for ornament or shelter of the mansion-house or park in the pleadings mentioned, or any other timber or trees growing on the estate in question, that were unfit for cutting and felling; and if the Master should find that Clement Kynnersley did cut any such timber or other trees, then it was ordered, that the Master should inquire whether the same or any part thereof were sold by him, and at what price: and it was ordered, that the respondent, Thomas Sneyd Kynnersley, should be charged with such price; and if

the Master should find that any part of such timber or trees were not sold, he was to set a value thereon: and it was ordered, that the defendant, Thomas Sneyd Kynnersley, should be charged with such value: and it was declared, that the said Thomas Sneyd Kynnersley was liable to answer, out of the assets of the said Clement Kynnersley, what should be found due for the amount of the price or value which should be so found due by the Master.

On the 7th of August 1820, the plaintiff, the Marquis of Ormonde, died, and the suit was revived by his executors, Sir James Graham, bart. and Charles Butler.

In April 1825, the defendant presented a petition of re-hearing of the decree of the 6th of May 1820, thereby stating, that he was advised that the whole of the bill ought to have been dismissed with costs.

The cause accordingly came on to be re-heard before the Vice Chancellor, on the 23rd of April 1825, when his Honour ordered that the decree should be reversed, and that the plaintiff's bill should stand dismissed.

From the last decree of the Vice Chancellor, Mr. Butler had appealed to the House of Lords; but as, after the first decree, all matters in dispute had been referred to the award of a Mr. Parker, who had awarded a considerable sum in respect of the produce of the equitable waste, the House of Lords considered, that the appeal ought not to be entertained, till that award was disposed of; and that the proper course would be, to bring the whole matter before the Court below, by an appeal to the Lord Chancellor, from the last decree of the Vice Chancellor, and by a motion at the same time, on behalf of the defendant, that the award should be set aside.

The Solicitor General, in support of the appeal, argued, that the rule of law, by which, when legal waste was committed, the timber felled belonged to the person having the next vested estate of inheritance, had no application to equitable waste. In equitable waste, the legal title to the timber was in the tenant for life: if, therefore, the analogy of law were to be followed, the timber felled would belong to

him. But a court of equity attached a trust upon him; and for whom was this trust to be created?—for all the persons who might be successively interested under the limitations to which the estate was subject. Timber standing for ornament or shelter was considered, in a court of equity, as part of the *corpus* of the estate. To create a trust, in favour of the person who had the next vested estate of inheritance, would be altogether capricious and contrary to principle.

There were cases in which the Court had directed timber, which was in the nature of ornamental timber, to be felled; and in those instances, it had directed the produce of the sale to be subject to the same limitations as the estate.

Besides, when the waste was committed, Job H. P. Clarke had the first vested estate of inheritance; and his interest, by the deeds of 1809, became vested in the original plaintiff, Lord Ormonde.

Mr. Pepys, contra.

The deeds of 1809 passed Job H. P. Clarke's interest in the land, but could not pass any claim which he, as remainderman, might have against Clement Kynnersley's assets, for the equitable waste committed by him. The question, therefore, simply is, whether the produce of equitable waste belongs to the person having the first vested estate of inheritance, or whether persons having only an intervening life estate in remainder are entitled to have that produce secured, for the benefit of all who may become successively interested under the limitations.

It is admitted, that, at law, the produce of waste belongs to the person having the first vested estate of inheritance; and equity must, in such a case, follow the analogy of law. No authority is produced, to shew that a contrary doctrine has ever been entertained in this court.

Therefore, since the person entitled to the first estate of inheritance in the lands from which the timber in question was cut, at the time of cutting the same, was Job Hart Price Clarke, whose personal representatives are not parties to the suit, the plaintiffs had no interest in such timber, and have no right to maintain a suit relative thereto.

The following cases were cited:—

Bishop of Winchester v. Knight, 1 P. Wms. 406.

Lee v. Alston, 1 Bro. C. C. 194.

Marquis of Lansdowne v. the Marchioness Dowager of Lansdowne, 1 Mad. 116.

Garth v. Cotton, 1 Dick. 183, and 1 Ves. sen. 524.

Hamblly v. Trott, Cowper, 376.

Williams v. the Duke of Bolton, 3 P. Wms. 286, note.

Powlett v. the Duchess of Bolton, 3 Ves. 374.

Delapole v. Delapole, 17 Ves. 150.

As to the award, the question simply was, whether the arbitrator had meant to determine the question of law, as well as the amount of the waste; or whether, considering himself bound by the decree of the 6th of May 1820, he had intended to decide merely on the amount of waste.

The Lord Chancellor.—This case of Butler and Kynnersley arises out of a settlement of property made by the will of Godfrey Bagnall Clarke in 1774. The property was devised by will to Gilbert Clarke, the brother of the testator for life, with remainder to preserve contingent remainders, with remainder to the first and other sons of Gilbert Clarke, in tail male; with remainder to the testator's sister, Sarah Price Clarke, for life, with similar remainders over, to her first and other sons in tail male; with remainder to Clement Kynnersley for life, with similar remainders over to his first and other sons in tail male; with remainder to Wenman Samuel for life, with similar remainders over, and with the ultimate remainder to the testator's right heirs.

Gilbert Clarke died without issue, and, on his dying without issue, Sarah Price Clarke entered and took possession; she had two children, a son and a daughter; the son died in 1802, under age, and the daughter was afterwards Marchioness of Ormonde. On the death of the son, (Sarah Price Clarke having died in 1801, and her son having died in 1802,) Cle-

ment Kynnersley came into possession as tenant for life, and, in the years 1805 and 1806, he cut down some ornamental timber; and a bill for an injunction was filed, in 1807, in the name of Job Hart Price Clarke and others. Wenman Samuel died in the lifetime of Clement Kynnersley; and it is material to consider in whom the inheritance was vested at the time the timber was cut down.

I stated, that, according to the terms of the settlement, the ultimate remainder in fee was in Gilbert Clarke, the brother of the testator: he died intestate as to this remainder; it, therefore, descended to his sister, which sister, Sarah Price Clarke, was also sister of the original testator;—Sarah Price Clarke, therefore, became entitled to the ultimate remainder in fee. On the death of Gilbert Clarke, she married Job Hart Price Clarke, and they levied a fine, which, it was declared, was to enure to such uses, as she should by her will appoint. By her will she created certain life estates, with remainder in tail to the children of her daughter, with ultimate remainder to Job Hart Price Clarke, her husband, in fee. These contingent estates were contingent at the time when the timber was cut down, and the vested remainder in fee at that moment was in Job Hart Price Clarke. Therefore I apprehend it is perfectly clear as a question of law, that, if this had been a question of legal waste, these trees being cut down, the produce of the trees would have belonged to Job Hart Price Clarke, who was the party who filed the bill in 1807.

It was suggested at the bar, during the argument, that, although he had a vested estate of inheritance at the time, it was subject to these contingent estates tail. I apprehend that does not in the slightest degree vary the case; it would not vary the case at law in an action for waste; and further than that, the case cited at the bar is also decisive on the point—I mean the case of *Williams v. the Duke of Bolton*, which afterwards came on in this court under the name of *Powlett v. the Duchess of Bolton*. In that case the Duke of Bolton was tenant for life, and had the ultimate remainder in fee; he wrongfully cut down the timber. There were contingent estates tail depending immediately after that

estate for life : there were estates tail in his children, and afterwards estates tail in the children of all his sisters ; and, subject to the contingency of these estates tail, he took the remainder in fee. The Court, in that case, decided, that a tenant for life, cutting down timber, should not, in his character of owner of the inheritance, claim the benefit of the timber, as that would enable him to take advantage of his own wrong. It is clear, from the language of the Court, in that case, that, if the inheritance had been in a third person, notwithstanding the contingent estates tail, the Court was of opinion, that the party having the estate of inheritance would have been entitled to the produce of the timber. The language of the Court was in these terms :—When this timber was cut, no doubt, at law, the duke would have taken, being the first owner of the inheritance ; but the Court very properly held, that he should not, by a fraud on the settlement which made him tenant for life, gain that advantage to himself by that reversion of the fee. It is quite clear, from the language of the Court in that case, that, if the inheritance had been in a third person, notwithstanding the contingent estates tail, the owners of the inheritance would have taken the money ; and it is quite clear, therefore, as far as relates to the case of legal waste, that the person, having the first vested estate of inheritance, when the timber is felled, would be entitled to the produce of that timber, notwithstanding the existence of intermediate contingent estates of inheritance.

But is there any difference with respect to equitable waste ? No case was cited at the bar for the purpose of shewing there was a distinction between legal and equitable waste ; and, I apprehend, the principle which applies to the one, applies to the other, as far as relates to this point. In fact, the case of *Rolt v. Lord Somerville* (1) shews there is no distinction, in this respect, between legal and equitable waste. That was a case where the father of Lord Somerville, who was tenant for life without impeachment of waste, or rather whose wife was tenant for life without impeachment of waste, cut down ornamental tim-

ber, and the person, who was the next tenant for life, filed a bill for an account, to which there was a demurrer. The Court was of opinion that the next tenant for life had no right to an account, because he had no interest in the produce of the timber, as that produce belonged to the owners of the inheritance. I apprehend, therefore, that the same rule, which applies to legal waste, in this respect applies also to equitable waste.

There was a class of cases cited and relied on as applying to the present case : the cases of *Delapole v. Delapole*, and several others ; but it does not appear to me that those cases apply to the present question ; they were all cases where the timber was cut down under the sanction and by the authority of the Court, because to do so, it was beneficial to the estate. The Court, being applied to for the purpose of giving directions in that respect, imposed such terms as it thought were equitable and proper. Those cases were cases of arrangement made by the Court. That was the general principle acted upon ; and it directed the money to be laid out in the purchase of other lands, to be settled to the same uses. That does not apply to a case where the timber is cut down by the wrongful act of the party, and the persons, therefore, must rest on their legal rights.

It was said that the deed of 1809 would affect this question. By the deed of 1809, Job Hart Price Clarke conveyed all his interest in this reversion to the Marquis of Ormonde ; that deed was executed, after the waste was committed and the timber was disposed of ; and it does not appear to me that the deed can affect the present question. As far as relates to the question at law, where the reversion is assigned after the waste is committed, the assignee of the reversion is not considered as taking any interest in the waste, or to be entitled to maintain an action. It does not appear to me, therefore, that the case is at all varied by the deed of 1809.

Under these circumstances, it appears to me, upon the whole view of the case, that the property in this timber belonged to Job Hart Price Clarke, who had at the time a vested inheritance in fee in this property.

(1) 2 Equ. Abr. 759.

This case came before the House of Lords, and it was sent back to this Court in consequence of a circumstance arising out of an award. Under the first decree, made by the Master of the Rolls, the Master was directed to make certain inquiries; before those inquiries were made, it was agreed between the parties that all matters in difference in the cause, and all matters in difference generally, should be referred to an arbitrator to be named by the Court; an arbitrator was named—Mr. Parker: and Mr. Parker made an award, by which he directed the sum of 3,800*l.* in respect of the waste to be paid to the personal representative of the Marquis of Ormonde, and it was in consequence of the existence of that award that the House of Lords sent back the case to this court, considering it proper that the award should be disposed of before the judgment should be pronounced as to the validity of the decree. Now, upon looking at the affidavits as to the award, I am satisfied that Mr. Parker considered himself bound by the first decree of the Master of the Rolls, and that he did not exercise any judgment as to the question of law; if that decree, therefore, cannot be sustained, it follows that the award cannot be sustained. I am of opinion, upon the whole case, that the second decree of the Master of the Rolls was the right decree, and that the award cannot be sustained, and the appeal ought to be dismissed; but I think, under the circumstances, taking them together, it ought not to be dismissed with costs.

Mr. Pepys.—Does your Lordship mean with respect to the costs which apply to the motion as well as to the appeal?

The Lord Chancellor.—Yes, I think as to the costs of the whole question.

1829. } MOUNTFORD V. PONTON.

Under the 21 Jac. 1. c. 19, a deed, which is over-reached by an act of bankruptcy, is void, though the commission of bankrupt does not issue till more than five years afterwards,

if the party, who claims the benefit of the deed, had, at the time, notice of the act of bankruptcy.

The bill was filed by Sarah Mountford and Isaac Sheffield, as the personal representatives of William Mountford.

It stated, that, in and before the month of October 1816, Andrew Rollo, since a bankrupt, was entitled to the absolute remainder or reversion, immediately expectant upon the decease of his father and mother, John Rollo and Margaret his wife, and the survivor of them, of and in one fifth share of the sum of 4000*l.* five per cent. navy annuities, then standing in the names of John Ponton and Andrew Rollo, as devisees in trust, and executors under the last will and testament of Catherine Allan, spinster, deceased; that, Andrew Rollo, being indebted to William Mountford in a considerable sum, and it being contemplated that he would become indebted in various further sums to W. Mountford, it was agreed between them, that Andrew Rollo should assign to William Mountford his reversionary interest in the said one-fifth part of the sum of 4000*l.* navy five per cent. bank annuities, as a security for the debt then due to William Mountford, and for such further sums as he Andrew Rollo should thereafter become indebted in to him, not exceeding in the whole 500*l.*; that, in pursuance of the aforesaid agreement, an indenture of assignment, bearing date the 16th of October 1816, was duly made and executed between and by Andrew Rollo of the one part, and the said William Mountford of the other part, whereby, after reciting (amongst other things) that he, Andrew Rollo, was then indebted to William Mountford in the sum of 376*l.* 10*s.* 2*d.*, it was witnessed, that he, Andrew Rollo, did bargain, sell, assign, and transfer unto William Mountford, his executors, administrators, and assigns, as a security for the debt then owing by him, or any future debt which he might owe to Mountford, not exceeding 500*l.*, all that one-fifth part, share and proportion, or other the part, share, and proportion, of him Andrew Rollo, of and in the sum of 4000*l.* five per cent. navy annuities, expectant on the decease of the survivor of his father and mother.

The bill further stated, that, sometime in or about the month of March 1817, Andrew Rollo took the benefit of the act for the relief of insolvent debtors; and an assignment of all his estate and effects, not particularly mentioning the aforesaid reversionary interest in the stock, was thereupon made to the provisional assignee; that William Mountford died in February 1821, having appointed the plaintiffs his executor and executrix; that, Andrew Rollo having committed some act of bankruptcy, a commission of bankrupt, bearing date the 20th of March 1824, was duly awarded and issued against him, under which he was found and declared a bankrupt; that the said John Rollo, and Margaret his wife, were respectively dead; and that, at the date and issuing of the commission of bankrupt against Andrew Rollo, there was due and owing from him to the plaintiffs, as personal representatives of William Mountford, the principal sum of 483*l.* 8*s.* 10*d.*, under the aforesaid security, together with a large arrear of interest. The bill charged, amongst other things, that, at the time of the date and making of the said mortgage, Andrew Rollo had not committed any act of bankruptcy, or at least, that William Mountford had no knowledge or notice that any such act had been committed, and Andrew Rollo was not, at the time of committing such alleged act of bankruptcy, indebted to the creditor, on whose petition the commission had issued, in a debt sufficient to support such commission, and that the commission was not granted upon, or supported by, a sufficient and valid legal debt due to the petitioning creditors therein.

The prayer was, that what was due on the security for principal and interest, might be satisfied out of the stock.

The assignees of Andrew Rollo, by their answer, stated, that, on the 9th of November 1816, Andrew Rollo was arrested for debt, and lay in the Fleet Prison upon such arrest from the 16th of November until some time in the month of March 1817; that, while he was in prison upon such arrest, William Mountford applied to him to give him the assignment stated in the bill, to secure what he alleged was then owing to him, and any future advances,—promising him that, as soon as he should get discharged from prison, which, he then con-

templated he would soon be, under the insolvent debtors act, he would put him in a public-house, and assist him to carry on the business of it; that, under these circumstances, the indenture was executed under which the plaintiff claimed; that, although the indenture bears date the 16th of October 1816, and purports to have been executed on that day, yet it was not executed till long afterwards, and when Andrew Rollo was in prison for debt; and that he attended at the office of the plaintiff, Isaac Sheffield, by whom the assignment was prepared, under a day rule, obtained in Michaelmas term 1816, both when the assignment was agreed upon, and when the same was executed; and that the assignment was so antedated, in order that, upon the face of it, it might appear to have been executed before Andrew Rollo had gone to prison; that Andrew Rollo committed an act of bankruptcy, by remaining in prison for debt for two months, namely from the 16th of November 1816 to some time in the month of March 1817, and that, upon such act of bankruptcy, the commission of bankrupt issued against him; and they therefore insisted that, as against them, the assignment to Mountford was fraudulent and void.

By their answer to the amended bill, they stated, that the assignment to Mountford was executed on the 26th of November.

At the hearing of the cause, the defendants, for the purpose of proving that the assignment was antedated, read (under an order to prove the proceedings under the commission *videlicet*), the deposition of the plaintiff Sheffield, who was Mountford's attorney, and from which it appeared, that the assignment was executed on the 26th of November, and not on the 16th of October, the day it bore date; but they did not prove that any fraud was committed, and therefore it was contended on the part of the plaintiffs, that, as no fraud was proved, the Court would not infer fraud.

It appeared also, from the proceedings in the bankruptcy, that the petitioning creditor's debt was completed only by the bankrupt's admission of it in a conversation in 1823; and it was contended with respect to that, that the Statute of Limitations barred the debt as against the plaintiffs, and that they were not bound by the admission of Rollo.

The Vice Chancellor, in giving judgment, stated, that the first question was, whether there was a good petitioning creditor's debt; and he thought there was proof of that by the bankrupt's admission at the latter end of the year 1823. Secondly, whether there was an act of bankruptcy; and he was of opinion that was made out. Thirdly, whether the deed was executed after the 16th of October 1816; and he thought *Sheffield*, by his deposition taken under the bankruptcy, made out that the deed was executed on the 26th of November 1816. Then there was the question whether notice that a party is in prison, before the act of bankruptcy is complete, is notice of such act, and his Honour was of opinion it was. The last question was, whether the party, claiming the benefit of the Act of James, must not be without notice of the act of bankruptcy; and he was of opinion he must; and therefore he dismissed the bill with costs.

From this decree the plaintiffs appealed.

On the appeal, the only question argued was, whether, as the commission had not issued within five years after the alleged act of bankruptcy, the assignment was not protected by the fourteenth section of the 21 James 1. c. 19, which enacts, "That no purchaser for good and valuable consideration shall be impeached by virtue of this act, or any other act heretofore made against bankrupts, unless the commission to prove him or her a bankrupt be sued forth against such bankrupt within five years after he or she shall become a bankrupt."

Mr. Sugden and *Mr. Ching*, in support of the appeal.

The words of the fourteenth section are general, that no purchaser for valuable consideration shall be impeached, unless the commission issue within five years. On what principle is it to be qualified by restricting the protection to purchasers who have no notice of the act of bankruptcy? The act says nothing of notice; and such a construction of the clause does, in fact, introduce new words into it.

There is, indeed, an old case of *Read v. Ward*(1), in which a deed, which consti-

tuted the act of bankruptcy, was overreached by a commission which did not issue till more than five years afterwards. But that was a case of actual fraud: and, of course, an instrument emanating from fraud can never stand in a court of equity. Here there was no fraud. Even if the deed was not executed till the 26th of November, nothing is more common than for a deed to be executed a few weeks after its date; and *Rollo* had not then committed any act of bankruptcy, nor was it to be presumed that he would lie in prison two months, so as to commit an act of bankruptcy.

Mr. Horne and *Mr. Teed* appeared in support of the decree.

The Lord Chancellor was of opinion, that, as *Mountford* had notice of the act of bankruptcy, he was not protected by the statute; and he dismissed the appeal with costs.

1829. }
May 26. } SPARKE v. IVATT.

A custom, that the rector shall occupy, from Lady-day to Michaelmas in each year, forty acres, part of a fen consisting of about 1200 acres, in lieu of the tithes of all hay and fodder arising on the fen, is a valid custom.

The bill was filed by the rector of the parish of Cottenham, in the county of Cambridge, for an account of tithes. As rector he had glebe and demesne lands in the parish.

As to some of the lands, the defendants, the occupiers, set up the following defence by their answer. They alleged, "that there had been from time to time, and from time immemorial, and was then, a certain open or uninclosed common and fen, called *Smithy Fen*, in or within the said parish of Cottenham, containing 1,200 acres or thereabouts; and that there had, from time whereof the memory of man was not to the contrary, existed, and still was existing, a certain ancient custom, usage, and prescription, whereby all the said common or fen (with the exception of forty acres, part

(1) 2 Equ. Cas. Abr. 119.

thereof, consisting of five different pieces or parcels of land, and which had always been, and were then in fixed, certain, and the same places,) was allotted and set apart in or about the month of July in each year, in various lots, and appropriated to or amongst, or for the use of, all the several owners or occupiers thereof (except the rector of the parish for the time being, to whom and for whose use such forty acres, residue of the common or fen, was allotted as therein mentioned,) in order that the same might be laid in for mowing, for the use and on account of the several occupiers, for whom and in whose favour such allotments were so respectively made; and that such allotments were accordingly afterwards, and at various periods between the time when such allotments were so made and the Michaelmas following, mown, and the grass thereof made and converted into hay, but that from the Lady-day, after such lots were so appropriated as aforesaid, and until the Michaelmas-day old style following, the time of mowing thereof, the same remained unstocked with cattle, and no part thereof was fed or used for pasture, till the same was stocked with cattle at such Michaelmas as aforesaid, until when the same was again laid out for mowing; and that, by an ancient custom within the parish, and which had, from time whereof the memory of man was not to the contrary, existed, and still existed therein the forty acres of land, residue of the common or fen, called Smithy Fen, lying dispersedly in the several parts following, that is to say, one piece in Chising Cast, another in Second Cast, another in the furlong, called the Crease Side, another in Great Cast, piece of the Lord's Grounds, and the remaining piece in Foul Fox, and which five pieces of land had been from time immemorial known and distinguished by ancient metes and boundaries, and which forty acres had been from time immemorial fixed and invariable, and in the same places as aforesaid, had been annually occupied, used, and enjoyed, and converted into meadow, or mown, solely and exclusively by the rector of the parish, his lessees or farmers, in lieu and full satisfaction and discharge of all tithes of hay and fodder yearly growing, renewing, increasing, or arising from off the other parts of the common or fen;

and that the forty acres of land had been from time immemorial annually used, occupied, or enjoyed by the rector of the parish for the time being, his lessees or farmers, lessee or farmer, and the produce thereof mown or converted into hay, and taken from off the lands by him or them; and that such forty acres of land had been from time immemorial accepted and taken by the rector, his lessees or lessee, farmers or farmer, in lieu and full satisfaction of all tithes of hay and fodder arising, growing, renewing, or increasing in or upon, or from off all the fen or common called Smithy Fen; and that from time immemorial no tithe of hay or fodder whatever, or any composition or satisfaction for the same, save the forty acres of land, had been ever paid or payable to or for the use of the rector of the parish, his farmers or lessees, farmer or lessee, for or in respect of any tithe of hay or fodder, arising, growing, renewing, or increasing in or upon, or from off the lands, or any part thereof; and that, since the plaintiff had become the rector of the parish, the forty acres of land had been annually in each year used, occupied, and enjoyed by him or by his tenants, and the hay or fodder taken from off the same by him or them, in lieu and satisfaction of all tithes of hay and fodder arising from off the fen, called Smithy Fen, and in the same manner as the same had been theretofore and from time immemorial used, occupied, or enjoyed by the former rectors of the parish, their lessee or farmer, for his or their sole and exclusive use and benefit."

It appeared from the evidence that Smithy Fen was one of the commons of Cottenham: and it consisted of 1068 acres 1 rood 22 perches, and was divided into various pieces of different qualities, some of which, called the Free Grasses, consisted of fixed allotments, of which the commoners had the exclusive occupation from old Lady-day, when they were laid for mowing, unto old Michaelmas-day, when they were thrown open. The rest of Smithy Fen (with the exception of the rector's forty acres) was a shifting common, and was annually set out by lot among the commoners at old Lady-day, for the purpose of being mown or meadowed, until old Michaelmas-day, when they were also

thrown open. The forty acres in question had invariably been occupied by the rector from Lady-day to Michaelmas, when they were thrown open, and from thence until the Lady-day following the whole of Smithy Fen, including as well the Free Grasses (in which the rector had no allotment, but in which the commoners had fixed allotments,) as the shifting allotments and the rector's forty acres, were thrown open and stocked in common by the commoners in proportion to the number of their respective rights.

The rector's forty acres were but a twenty-eighth part of this fen, and were not (acre for acre) of more than an average value with the rest of the fen.

The witnesses for the defendants also stated, that they had heard, and always understood, that these forty acres had been at all times enjoyed by the rector for the time being, and were and are reputed to have been allotted to him in lieu and in full satisfaction and discharge of the tithe of hay and fodder yearly growing, renewing, increasing, or arising from off all other parts of Smithy Fen.

On the 24th of April 1823, the cause was heard before the Vice Chancellor, who directed the parties to proceed to a trial of the following issue, viz. "Whether the forty acres of land, part of the common or fen called Smithy Fen, in the pleadings mentioned to be set out for and occupied in severalty by the rector of the parish for the time being, from Lady-day to Michaelmas in each year, had been immemorially held by such rector for the time being, in full satisfaction and discharge of all-tithes of hay and fodder yearly growing in and renewing within the fen."

The plaintiff appealed.

Sir Charles Wetherell and *Mr. Parker* were for the appellants.

This is, in fact, an alleged custom, to give the produce of forty acres of land instead of the tithe of 1200. Such a custom is bad in law, and is in itself unreasonable: *Fletcher v. Wilkinson* (1), *Sheppard v. Penrose* (2). The validity of such

a custom ought to be determined on by the Court, and ought not to be submitted to a jury.

The issue, as it is framed, does not bring forward the material facts of the case. If the question were to be sent to a jury in any compendious form of words, it ought to be in some such terms as the following:—

"Whether the rector of the parish for the time being is legally bound and compellable to accept the forty acres of land, part of the common or fen called Smithy Fen, in the pleadings mentioned to be set out for and occupied by him in severalty from Lady-day to Michaelmas in each year, in full satisfaction and discharge of all tithes of hay and fodder yearly growing in and renewing within the fen." *Mallabar v. Young* (3).

Mr. Horne and *Mr. Phillimore* appeared for the defendants.

Such a custom as is here relied on has been more than once held to be a good defence to a claim of tithes: *Archbishop of York v. Stapleton* (4), *Chapman v. Monson* (5), *O'Connor v. Cook* (6). It makes no difference that during a part of the year the rector does not occupy the lands in severalty. The forty acres may formerly have been of more value then in proportion to their extent; and, at any rate, the circumstance of the rector always having them, when the fen is not open, instead of merely taking a shifting allotment, is a great benefit to the rector.

Lord Chancellor.—I am of opinion that this custom, if proved, is a valid custom. It is said, that the custom is unreasonable, because no person would have accepted forty acres in lieu of the tithes of nearly 1200 acres. But it is impossible to say what was the state of the land five or six hundred years ago. If the forty acres might have been an equivalent for the tithes at that time—if the agreement might have had a fair origin—it would be sufficient, provided there was evidence to satisfy the jury that that agreement had been

(1) 2 Gwillim, 673.

(2) 1 Levin, 179.

(3) 1 Wood, 408.

(4) 2 Atkyns, 136.

(5) P. Wms. 565.

(6) 5 Vesey, 665.

acted upon from the time of legal memory down to the present day.

In one respect, the form of the issue ought to be amended: it ought to be, not only whether forty acres have been immemorially held by the rector in the manner therein mentioned, but whether they have been held, and ought to have been held, in that manner. The words will then embrace not only what the practice has been, but whether the practice was a binding and obligatory practice.

Perhaps the plaintiff has a right to have the whole of the custom, as stated in the answer, put upon the issue.

1829. }
May. } JONES v. REID.

A demurrer to the whole of an amended bill may be filed, though the original bill has been answered.

Semble—Where a demurrer is allowed to an amended bill, the suit is entirely out of court; and the defendant is entitled to the costs of the whole suit.

The original bill was filed by Jones, who claimed to be a lessee of certain premises, against Reid, who was a mortgagee, and against other defendants. The mortgage, which was now in Reid, had been originally in one Bassett, and was prior in date to Jones's lease. That lease was executed only by the mortgagor: but Jones, by his bill, alleged circumstances which, in equity, would have made Bassett be considered as bound by the lease; and he further alleged, that Reid, when he took the transfer of the mortgage, had notice of the lease, and of the existence of those circumstances. The bill prayed that Reid might be decreed to confirm the lease, and might be restrained from proceeding in an ejectment which he had brought.

Reid answered the bill fully, and denied the greater part of the allegations of the bill. He then moved to make the order nisi for dissolving the injunction (which had been obtained for want of answer) absolute. But the Vice Chancellor thought that there was a case for inquiry in equity, and continued the injunction.

VOL. VII. CHANC.

Reid, by his answer, had stated, that the security, under which he claimed, was a conveyance to a trustee upon trust to pay, first, a mortgage debt to one Rees, and then to pay the mortgage which had been transferred to him.

The plaintiff amended his bill by stating this security, and praying, in the alternative, that he might be allowed to redeem.

Reid demurred to the whole of the amended bill, on the ground that the trustee and the prior mortgagee, who was a *cestui que trust* of that trustee, were not parties; and that those in whom the ultimate equity of redemption was, were not before the Court.

Mr. Sugden appeared for the demurrer, and contended that there was a clear want of parties.

Mr. Horne and *Mr. Swanston*, contra.—Whether there is a want of parties or not, this is a demurrer to the whole of the amended bill; and there is on the files of the court an answer of the same defendant to the original bill, which constitutes the greater part of the amended bill: he, therefore, demurs to the whole of a record, to part of which he has actually answered: *Atkinson v. Hawway* (1).

The Vice Chancellor was of opinion that, the objection for want of parties being an objection to the whole bill, and, the objection not having existed to the original bill, arising for the first time on the amended bill, the demurrer was properly filed to the whole bill, notwithstanding that the original bill had been answered.

The costs of the suit were asked by the defendant, as well as the costs of the demurrer, under the thirty-first order (2). It was submitted, that allowing the demurrer to the amended bill, put the whole suit out of court.

(1) 1 Cox, 360.

(2) That upon the allowance of any plea or demurrer, the plaintiff shall pay to the defendant the taxed costs thereof; and when such plea or demurrer is to the whole bill, then the further taxed costs of the suit also; unless in the case of a plea the plaintiff shall undertake to reply thereto, and then the costs shall be reserved, or unless the Court shall think fit to make other order to the contrary.

The Vice Chancellor was of that opinion ; but, on the application of the plaintiff for leave to amend by adding parties, he gave them leave so to amend.

The Vice Chancellor made the order, and refused the plaintiff the costs of appearing on the motion.

1829. }
June 1. } HARRISON v. COURBOULD.

Publication enlarged, merely on an affidavit, that the party had material witnesses to examine, and meant to examine them forthwith.

Mr. Pemberton moved, on behalf of the defendant, that publication might be enlarged. The affidavit, in support of the motion, stated merely, that the defendant had several material witnesses to examine, whom he meant to examine forthwith.

Mr. Simons, for the plaintiff, opposed the motion ; insisting, that, under the new orders, publication could not be enlarged, unless the party making the application satisfied the Court that there was some special reason which had prevented him from examining his witnesses sooner.

1829. } THE ATTORNEY GENERAL v.
June 1. } ELLISON.

A defendant cannot make a motion, if he is in contempt at the time when the motion is made, though he was not in contempt when the notice of motion was given.

The defendant's order for time had expired ; and being in a situation to have an attachment issued against him, he gave notice of a special motion for further time. Before the motion was made, an attachment issued.

Mr. Knight, for the motion.

Mr. Roupell, *contra*, objected, that the defendant, being in contempt, could not be heard to make the motion.

The Vice Chancellor was of that opinion, and held that the motion could not be made ; but he gave the defendant leave to amend his notice of motion by extending it, so as to include the discharge of the attachment.

END OF EASTER TERM, 1829.

CASES ARGUED AND DETERMINED

IN THE

Court of Chancery.

IN

TRINITY TERM, 10 GEO. IV.

1829. }
July 16. } BROOKMAN v. ROTHSCHILD.

Principal and Agent.

If an agent, employed to sell stock, becomes himself the purchaser of it at the price of the day, and does not at the time communicate to his principal that he is the purchaser, the transaction will not be permitted to stand.

An agent, who was also contractor for the Prussian loan, being directed by his principal to buy Prussian bonds, represents that the purchase has been made; advances money to his principal on a deposit of the bonds; and, afterwards, the principal having directed them to be sold, gives him credit for the amount at the price of the day: in fact, however, no specific bonds had been selected or appropriated as the specific bonds belonging to the principal:—Held, that the transaction cannot stand.

Various alleged sales and purchases of French stock at the price of the day having been represented by the agent as made in pursuance of directions given by the principal, and an account having been settled between them, on which occasion the principal paid the amount of the loss on these alleged transactions:—Held, that the principal ought to

be relieved from the transaction, it being alleged that no sales or purchases were actually made; and the defendant not having given any evidence of the reality of such sales and purchases.

The questions in this cause related to the duty of agents towards their principals with respect to transactions in the purchase and sale of the securities of foreign governments.

The facts, material to the decision, are stated in the judgment of the Vice-Chancellor.

The Solicitor General and Mr. Spence were for the plaintiff:

Mr. Pemberton and Mr. Knight appeared for the defendant.

The Vice Chancellor.—It appears that the plaintiff was, in the month of May 1818, entitled to 20,000 francs of French rentes; and there had been some sort of communication between him and Mr. Rothschild, the defendant, who carries on business in this country, and who also is a partner with his brothers in a house established at Paris, under the name of Rothschild Brothers & Co.: and it is represented that the plaintiff was

induced by a letter, which was written by Mr. Rothschild, to give an order for the sale of 20,000 fr. French rentes. It does not appear to me to be very material for the purpose of determining what relief the plaintiff may be entitled to, to ascertain whether or not the plaintiff did give the order for the sale of the 20,000 fr. French rentes in pursuance of the recommendation of Mr. Rothschild. But I should state as a matter of fact, that the letter, which is represented to have been a letter recommending the sale of the 20,000 fr. French rentes, is not a letter which did recommend the sale of the 20,000 fr. French rentes, but is couched in these words—"French stock here is about 69, and Prussian bonds 82 per and 83 per cent. I think you would do well to sell part of the former and invest it in the latter." Now, the fair construction of that letter is, that it is a recommendation that part of the French rentes should be sold and invested in the purchase of Prussian bonds, leaving it quite open to be determined in the mind of the party to whom it is addressed, to say what portion of the French rentes should be sold.

The letter which the plaintiff writes in consequence of receiving this letter, is dated on the 24th of May 1818, in which he says—"Sir, I have read your obliging communication under yesterday's date. The price of the French 5 per cents. I observe, you quote at about 69 in London. Shall I beg of you to cause my 20,000 fr. rentes in that stock to be disposed of to-morrow, on the best possible terms, both as to price and exchange; the produce you will have the goodness to retain in your hands, until I have determined how to dispose of it, unless there would be a saving of commission in purchasing Prussian bonds immediately with it, so as for the sale and purchase to be considered as one transaction, in which case I would wish it to be immediately invested." Now, in consequence of that letter of the 24th of May, Mr. Rothschild does sell, as he represents, the whole of the 20,000 fr. French rentes. I say, *as he represents*; because he writes a letter to the plaintiff of the 25th of May, in which he says—"Sir, I have the pleasure to acknowledge the receipt of your favour of yesterday, and having had an opportunity to dispose of your 20,000 fr. rentes at 69 and 28.90,

I have embraced the same, and beg to inclose you the last prices from Paris, by which you will perceive that on the 21st they were only 68,25 per cent. therefore, I feel confident you will approve of this transaction. I have invested the proceeds of this sale in Prussian bonds, say 19,000 bonds at 82½ per cent. which is the lowest it could be obtained at."

It appears to me that that letter of the 24th of May is a direct and plain representation that Mr. Rothschild had, in pursuance of the letter of the 24th of May, made a sale of the 20,000 francs of French rentes. Now, it appears as a fact that there was no sale of the 20,000 fr. French rentes, but that Mr. Rothschild took the 20,000 fr. of French rentes to himself—giving credit for the sum of 11,000*l.* and a fraction, which would be the price of the 20,000 fr. French rentes sold at the prices quoted in his letter,—and that he invested that sum of 11,000*l.* and a fraction in the purchase of Prussian bonds.

The first question, then, upon this case is, whether that transaction, with regard to the sale of the 20,000 fr. French rentes, shall stand;—and my deliberate opinion is, that that transaction ought not to stand; because, independently of the question whether there was more or less of confidential agency on the part of Mr. Rothschild, the very least that can be said in the case is, that Mr. Rothschild was an agent to sell, by the receiving of the letter of the 24th of May, and his determination to act upon it; and I conceive it was his bounden duty, therefore, to sell in the true sense of selling, that is, to sell to a third person, and not to take to himself the French rentes, and to give the plaintiffs credit for that which appears on the face of his answer, as I am bound to admit, to be the fair price of the day. It appears, from the answer of the defendant, that he had another transaction respecting French stock on that very day, and that he himself sold, I think, a portion of French stock at a lower price than that with which he charged himself in respect of taking to himself the plaintiff's 20,000 fr. French rentes. But the general principle, which this Court has always acknowledged and applied, must be maintained in this case, namely, that the person, who is the agent to sell, if he accepts the agency, is bound to sell, and is not at liberty to take to him-

self the stock and give the party an equivalent for it.

It has been said, that, if such a construction is put upon this transaction, it will tend to undermine many transactions which daily take place in the great commercial houses in London. Now, whether it does so or not, my opinion is, that an individual has a right to complain of a transaction, in which an agent does not do that which he has said he would do, and where he represents that he has done that which he was requested to do, whereas he has done quite a different thing.

No evidence has been given to shew, that such an act, as this which is now complained of, is daily taking place among the great houses in London; and, therefore, I must consider the allegation as mere statement, and as a speculative argument not founded in fact.

It appears to me that, in this transaction, the plaintiff is entitled, at his option, either to have the present price of 20,000 fr. French rentes, and the dividends, or to have invested in his name 20,000 fr. French rentes, he repaying to Mr. Rothschild, the 11,000*l.* and a fraction, which was the sum for which he had credit in account with Mr. Rothschild; and I think he must repay that sum of 11,000*l.* and a fraction, with interest at five per cent.

Now, the next part of the case relates to the purchase of some Prussian bonds; and, it appears, that, about the month of June 1818, Mr. Rothschild, as the plaintiff represents it, recommended to the plaintiff to purchase Prussian bonds; and it appears that the plaintiff agreed to purchase from Mr. Rothschild 40,000*l.* in Prussian bonds at 82, and at the same time he purchased 5000*l.* other Prussian bonds at 81½, and at the same time, other 5000*l.* Prussian bonds, at 81 per cent. For those Prussian bonds, the plaintiff was not able to pay; but the transaction was, in effect, that the price of the bonds should be advanced by Mr. Rothschild to the plaintiff, and that the plaintiff should give his promissory note for the amount. It appears that the transaction was carried on according to that understanding: because there was a purchase apparently made of bonds to the amount of 50,000*l.* for which the broker made out a charge of 41,639*l.* There is

however a little difference of statement in that respect, between what the defendant represents and what the plaintiff represents; but it is quite immaterial to the general view of the case: and the plaintiff gives a cheque to the broker for the difference of money between the 41,639*l.* 16*s.* 6*d.* and 41,500*l.* and then gives his promissory note for 41,500*l.* to Mr. Rothschild.

Those purchases were made in June 1818; and it appears that the plaintiff had purchased bonds to the amount of 10,000*l.* of other persons in the months of April and May 1818; and that he afterwards purchased bonds from other persons to the amount of 5,000*l.*

Then, in the months of September and October 1818, the plaintiff wished to borrow of Mr. Rothschild two sums of money, first of all, I think, a sum of 8,500*l.* and afterwards, the sum of 4,200*l.*; and for the purpose of securing to Mr. Rothschild the payment of the promissory notes, which the plaintiff gave him for those two sums, in the first instance, he deposited 11,000*l.* of bonds, and in the next instance, 6,000*l.* of bonds. The plaintiff himself represents this as one transaction; but, upon the broker's evidence, it appears divided into two in the way I have now stated. There was, as I have said, a deposit made of bonds, and the plaintiff enumerates in his bill the bonds for 17,000*l.*, making, however, a mistake as to one of the bonds.

However, Mr. Rothschild has, by his schedule to his answer, stated what those bonds were; and it appears they comprehended the 10,000*l.* Prussian bonds purchased by the plaintiff of other persons; the 5,000*l.* Prussian bonds purchased of other persons, and 2000*l.* bonds, part of 14,000*l.* Prussian bonds which had been purchased by the plaintiff from the defendant in October 1818. It appears, that an account was made out in the month of October, which shewed what was due in respect of the 50,000*l.* bonds; and it appears that, shortly afterwards, all the bonds as well the 50,000*l.* bonds, as the 17,000*l.* bonds, were sold at the rate of 75 per cent.

Now, the consequence was, that there would be a very considerable loss to the plaintiff, because he had purchased the bonds upon an average at something about 81 per cent. or thereabouts, and they were sold

at 75. It appears, that, with the produce of the bonds, the 41,500*l.* promissory note was considered as cancelled, and that the promissory note which had been given for 8,500*l.*, for which he had made a deposit of the 11,000*l.* bonds, was also considered cancelled; but there remained the promissory note for the 4,200*l.*, which was the promissory note in respect of which there was made the deposit of the 6000*l.* bonds; and it appears that, inasmuch as the proceeds of the 67,000*l.* bonds would not pay off both the promissory note for 8,500*l.* and the promissory note for 4,200*l.*, and also the promissory note for 41,500*l.*, the plaintiff made a further deposit with Mr. Rothschild, first of 5,000*l.* bonds, and then of 500*l.* bonds, which bonds were afterwards disposed of, and thereby the promissory note for 4,200*l.* was paid off, and, as I understand, the surplus of the proceeds was accounted for to the plaintiff.

It is observable in this part of the transaction, that there really was no money whatever paid by the plaintiff in the first instance, and the way in which he has suffered an injury is, that he has in effect been compelled to pay the difference between the price he paid for the 50,000*l.* bonds, and the price at which they were sold, out of the proceeds of those other bonds, which he deposited.

Now the question is, whether this transaction shall stand? In other words, whether the plaintiff is not entitled to have paid to him such sums of money as he has lost in the way I have described? Now, I apprehend, that it was absolutely necessary, in order to support the transaction, that it should appear that there was a *bonâ fide* purchase of the 50,000*l.* bonds; but, I think it does appear most distinctly from what the defendant himself represents in his own answer of the transaction, that there was no such *bonâ fide* purchase of the 50,000*l.* Prussian bonds; because, in that passage in his answer in which he sets forth an excuse for himself in regard to what is imputed to him with respect to the 17,000*l.* bonds, he states that he never selected any bonds for the 50,000*l.* Prussian bonds.

According to the construction I put upon the letters that passed, and the broker's evidence, I am of opinion that there ought to have been a selection of the 50,000*l.*

Prussian bonds; that there ought to have been an appropriation of them. There should have been a statement made to the plaintiff of what were the numbers of those bonds; and, for a reason which struck me very forcibly, when I read over the scheme of the Prussian loan; because it does appear, that the Prussian bonds were liable from time to time to be redeemed; that there was a given time allowed for the redemption of them, and it was necessary, therefore, that every person should distinctly know by the numbers of the bonds, what were the Prussian bonds in which he had a specific interest. Now, it was quite impossible for the plaintiff to know during this transaction, what were those bonds in which he had a specific interest; and I take it on the evidence to be perfectly manifest, that there was no purchase at all of the 50,000*l.* Prussian bonds; that therefore the transaction was bottomed in that which turns out not to be true; and from the effect of that I apprehend the plaintiff has a right to be relieved upon the plain principle in equity, that mankind shall be bound by the representations they make, and if they make false representations, they must take the consequences of their own false representations. I apprehend, therefore, on this part of the case, the plaintiff is entitled to be relieved, by having the account opened, so as to have repaid to him the losses he may have sustained from time to time, or the sums he ought to have received, from the circumstances and in the way I have stated. The account does not appear; and therefore, I can only give, at present, the principle on which the relief is to be administered.

I observe in this part of the case, that the plaintiff has asked such relief as, I cannot think, he is altogether entitled to receive; because he has asked relief with interest, upon the supposition that the 50,000*l.* Prussian bonds were sold in a way which he did not authorize; but it appears to me, that if the transaction is to be considered as one that fails altogether, by reason of the 50,000*l.* Prussian bonds never having been purchased at all, it is quite impossible to give relief on that ground, and also on the ground that the sale was against the direction, and the authority of the plaintiff.

The plaintiff has also asked relief in respect to the sale of the 17,000*l.* bonds; and

he has asked that Mr. Rothschild may be charged with the sale or price of 17,000*l.* bonds, with interest at 5*l.* per cent. thereon, from the time at which he actually sold them. With respect to that part of the transaction, it appears to me that I am not at liberty to give any relief; because a passage of the answer, which was read, states most distinctly that the plaintiff himself consented to the sale of the 17,000*l.* bonds upon a representation that Mr. Rothschild made to him, that at any time he should have bonds of an equal amount. He says expressly, "that, when the said bonds were deposited with him as aforesaid, he, this defendant, according to the best of his recollection and belief, stated to the said plaintiff, that he might have occasion to deliver out Prussian bonds to other persons; and that, as he wished to avoid signing more than was necessary, he, the defendant, mentioned to the said plaintiff that he should, in case of need, use his bonds; and that the said plaintiff gave his full consent to his doing so, it being understood that this defendant would give him other bonds of equal amount at any time when required." Now, this is positively sworn to in the defendant's answer, in a passage which was read by the plaintiff, in order that he might make use of it for another purpose, and there is not one particle of evidence whatever to contradict this statement which the defendant has made. In my opinion the defendant is entitled to have the benefit of this statement, and, therefore, in that respect, there cannot be any relief.

I should, with respect to this particular passage, take occasion to remark, that the defendant has in his answer, in two or three different places, stated that the plaintiff knew all the circumstances—that he was aware of all the facts respecting the transactions. Now, I must say, that that general statement of the defendant appears to me to stand in a very different situation from the positive statement with regard to one precise fact. The defendant makes his statement generally with respect to all the transactions. Now, it appears to me, that there is no ground whatever for supposing that the plaintiff could have known all the circumstances of the case, which the defendant says he had knowledge of. The whole course of the conduct of the parties shews that the

plaintiff was acting on the supposition, that the representations were true as made by the defendant. Therefore, though I give the defendant the benefit of this statement with respect to this one specific transaction, I think it right to withhold from him the benefit which might arise from the large and general statement he has made as to the plaintiff's knowledge of *all* the facts in the transactions.

The last part of the case was this,—that in the end of 1818 and beginning of 1819, there was an agreement that the plaintiff should purchase a large quantity of French rentes, which, as I understood, were not to be paid for until the month of June; and representations were made to the plaintiff, that, at different times, and in various sums, French rentes had been purchased, to the amount altogether of about 115,000*fr.* rentes. It appears that, in May 1819, it was stated that 5,000 *fr.* of those French rentes were sold to a person of the name of Blakesly, and that the price of those 5,000 *fr.* rentes was paid to Mr. Rothschild. It was represented that the plaintiff, on the advice of the defendant, was anxious to sell the 110,000 French rentes, which were the remainder of the French rentes, after deducting what had been sold to Mr. Blakesly; and that, in consequence of the urgency of the case, an express was sent to Paris, and that in this way there was a sale, and thereby a loss was sustained. It appears that the plaintiff was desirous soon afterwards to have a re-investment of the produce of the 110,000 *fr.* French rentes which had been sold in Paris; and then there was a representation made, that the produce was invested in the purchase of 105,500 *fr.* French rentes. Then, it appears, that, in the month of September, a representation was made, which induced the plaintiff to think there should be a sale of the 105,500 *fr.* French rentes; that he went over to Paris; that there was a communication then with Rothschild Brothers & Co., and on the 22d of September, it was stated that the 105,500 *fr.* French rentes were sold, the consequence of which was, that the plaintiff became, upon this transaction, indebted to Mr. Rothschild altogether in a sum not exceeding, I think, 4000*l.*; and when the account was finally made up on the 10th of December 1819, it then appeared, there was a sum of 1,600*l.* and a fraction

due to Mr. Rothschild, which sum of 1,600*l.* and a fraction the plaintiff paid to Mr. Rothschild.

Now, the question is, whether, in respect to all the circumstances which related to this alleged purchase and sale, alleged repurchase and resale, the plaintiff is entitled to relief? And that will depend upon the questions—was there any purchase—was there any sale—was there any repurchase—and, was there any resale?

In the first place, the plaintiff has expressly charged by his bill, that all those sales and resales, purchases and repurchases, were fallacious and fictitious; and, upon reading the defendant's answer, I do not perceive that he ventures in direct terms to traverse that allegation. He certainly states circumstances, which, taken as a simple narrative, would be a representation that there were such purchases and such sales; but it does not at all appear to me, that the defendant might not be taken to be speaking of that which was represented, as much as of that which really took place. And I cannot but observe, that there has been a laxity of phrase upon the subject of sale and resale to be found in the evidence.

Now, it is remarkable that the defendant himself has stated in his answer a circumstance which would have afforded a very easy method of solution, whether the sales were true or false, because, he says in his answer—"That, in all sales of French rentes, it is necessary for the seller, in whose name the rentes are inscribed, to give over the certificates, denoting the inscription to have been made in his name, with a power of attorney to the purchaser to have the rentes transferred into his name." If there had been the first purchase, and then a sale, and then the second purchase and then a resale, how easy it would have been, by producing the certificates and power of attorney, to have manifested that that really took place, which the plaintiff says, did not take place, and which I do not see the defendant himself has ventured to say in express terms actually did take place. The plaintiff has entered into evidence to shew, that, in point of fact, no such transaction took place. Now, here I am quite willing to give effect to the observations which were made by the defendant's counsel, that the

evidence, which the plaintiff has offered on this point, is not the most cogent and conclusive that might have been obtained; but then it is *some* evidence, and it appears to me that the onus of proving that it was a real transaction lies on the defendant; and I have looked over the evidence of the defendant in vain to find one particle of proof to shew that any one part of this transaction was real; and there are circumstances of suspicion attending the correspondence, which cannot fail to raise in the mind of any person who reads it a very strong notion that there was something that was unreal, which it was an object on the part of Mr. Rothschild and his brothers to have concealed; because, in that letter written on the 20th September 1819, by Rothschild Brothers & Co., to Mr. Rothschild in this country, there is this expression—"Due attention shall be paid to your cautions respecting Mr. Bell and Mr. Brookman"—and it does not appear, from any of the letters which are here produced, or copies of any of the letters, what were the cautions which had been so communicated by Mr. Rothschild in this country to Rothschild Brothers & Co. It is evident that something took place, therefore, which does not now appear, and that Mr. Rothschild himself thought it necessary to give cautions respecting it: whereas, if it were an open transaction—a matter that ought to have taken place, it would have been unnecessary to have given any cautions respecting it. On this part of the case, also, Mr. Brookman will be entitled to be relieved, by having repaid to him all the sums which he has paid in respect of these purchases. I think, in the course of all these transactions, the interest has been five per cent., and I think all these sums ought to be repaid with interest at five per cent. from the time at which the transaction took place.

It has been said on the part of the defendant, that the plaintiff comes too late. There would be something in the observation, provided it could be made out that the plaintiff could have come sooner; but it appears to me there is no evidence whatever, that the plaintiff did know, prior to the filing of his bill, what the real transactions were; on the contrary, the letters he wrote, in the end of the year 1823

said in the month of January 1824, are letters which convey to my mind the most satisfactory evidence that the plaintiff did not know the real nature of the transactions. He writes in the most humble manner, supplicating for a small loan or gift, because of the state of extreme penury to which he had been reduced; and he states, that, upon searching over his papers, he finds some miserable pittance of interest which he had not been allowed on some of the transactions, and in respect of that he makes a claim. In respect of that a small sum was sent to him by Rothschild Brothers & Co.; and a similar application was made to Rothschild here, which was not noticed, and the bill was filed in consequence. Now, the conduct of men seems to me to be much better evidence than what they can possibly write; and here I find this individual putting himself in the situation of a humble supplicant, asking in the most submissive manner for a small pittance in respect of a small mistake; and it appears clear to my mind, that the man, who so wrote, could not have known what was the magnitude of his legitimate demand against Mr. Rothschild. My opinion is, that this plaintiff comes into court with sufficient speed, and that he is entitled to have the relief I have pointed out; and I also think, considering the nature of the case, the plaintiff is entitled to have his costs from the defendant.

1829. { *In the matter of the GARSTANG*
 Aug. 1. { *CHURCH TOWN SCHOOL, ex*
parte REV. J. PEDDER.

A petition for the regulation of abuses in a charity, if preferred by one person only, cannot be sustained under the 52 Geo. 3. c. 101, though certified by the Attorney General.

A petition to the Lord Chancellor, as exercising the visitatorial power vested in the King, cannot be sustained, if the facts upon which the right of the crown to be visitor depends, are contraverted, and the visitatorial power of the crown be denied.

This was a petition to the Chancellor by the Rev. John Pedder, clerk, vicar of the
 VOL. VII. CHANC.

vicarage and parish church of Garstang, in the county of Lancaster.

It stated, that, until the inclosure therein-after mentioned, there was an open piece of land or common, called Church Town Green, but which had lately been inclosed, situate in the township of Kirkland, in the parish of Garstang; that, many years since, a grammar-school for the benefit of the children of the inhabitants of the village or hamlet of Kirkland and its vicinity was founded, and a school-house was erected on a piece or parcel of ground then forming part of the said common, and given for that purpose by the owner, with the consent of the persons interested therein, at the expense of such inhabitants; that for a century past and upwards a master had, from time to time, been appointed of the said school, which had generally been known by the name of Church Town School, or Garstang Church Town School, and the sons of the inhabitants of the neighbourhood of the school, sometimes to the number of one hundred and upwards, had, during that period, been educated at the said school; that the parcel of ground and the school-house erected thereon were originally and for a long period of years vested in certain feoffees in trust, from time to time appointed for that purpose, and who acted as the trustees thereof, and of whom the vicar for the time being was always one, and the master of the school during such period as aforesaid was always nominated and appointed by such feoffees or trustees, and was duly licensed by the bishop of the diocese within which the school is situate; that the school, at the time of and shortly after its foundation, was endowed with some property, the interest and produce of which was applied to the maintenance and support of the master of the school; and that several benefactions had since been made for the benefit and support of the school and the master thereof, and particularly by individuals who were members of the family of Butler, and who were for many years the owners of the manor of Kirkland and an estate called Kirkland Hall, situate in the township of Kirkland. Then, after setting forth the particulars of some of these benefactions, it stated, that, in 1791 or 1792, a house or residence for the master of the school was built on a spot of ground near the school, and forming

part of Church Town Green, principally if not entirely, out of money in the hands of Alexander Butler, who was then lord of the manor of Kirkland, belonging to the school; that Thomas Butler Cole, esq., the present owner of Kirkland Hall, and of the manor of Kirkland, received and invested a sum of 400*l.* belonging to the school in a purchase of a sum of 633*l.* 13*s.* 3*d.* three per cent. consolidated bank annuities, and afterwards, in or about the year 1816, sold out the same for the sum of 521*l.* 19*s.* 7*d.*, and he had since retained such last-mentioned sum, and also another sum of 180*l.* belonging to the school, in his own hands, and had allowed and paid interest thereon to the master of the school; that, in 1812, the old school-house was pulled down and a new school-house was erected a short distance from it on part of Church Town Green, out of money collected from, and subscribed by, the inhabitants of the township of Kirkland and the adjoining district for that purpose, including the sum of 10*l.* advanced by the trustees of Thomas Butler Cole, who was then a minor; and that Thomas Butler Cole had since appropriated a small piece of ground adjoining thereto as playground for the use of the boys, who had previously always been in the habit of playing on the green, and had enclosed the remainder of the land called Church Town Green, and appropriated the site of the original school-house to his own use; that, until the year 1758, the master of the school was always appointed by the vicar and the other feoffees or trustees, but that, in the year 1758, Alexander Butler assumed to himself, and afterwards, without any authority for that purpose, exercised the power of appointing the master of the school; that on the 7th day of January last, Robert Butler Cole appointed Mr. Armer to be school-master, who was, in various respects, an unfit person for the office; that the right of appointing the master was in the vicar and the other trustees for the time being of the school; but there were now no means of appointing such other trustees without the direction of the Lord Chancellor; and that it belonged to his Majesty by the Chancellor to visit the school; and that the interests of the charity required the Chancellor, in exercise of the visitatorial power, to remove Mr. Armer from his situ-

ation, and otherwise to regulate the charity and the appointment of the master of the school.

The prayer was, that the master might be removed, and that various inquiries might be made and directions given touching the property of the charity, and for its future regulation and management.

The petition was signed by Mr. Pedder; and the Solicitor General (the office of Attorney General being then vacant) subscribed a certificate annexed to it, stating that the petition had been submitted to him, and that it was proper to be heard.

There was the affidavit of Mr. Pedder in support of the petition.

Mr. Ward, the deputy registrar of the diocese of Chester, stated, by affidavit, the entries which he found of licenses of masters of the school in question. There was one in 1688, on the nomination of Lady Gerard, as guardian to her daughter; one in 1719, on the nomination of the vicar of Garstang and other two persons, trustees of the school; one in 1741, on the nomination of the vicar and other three persons, being a majority of the trustees; one in 1749, and another in 1750, on the nomination of the vicar and another person, trustees of the school; and one in 1758, on the nomination of Alexander Butler.

Thomas Butler Cole, respondent, by his affidavit, stated, that he believed the school and the school-house belonging thereto were originally built upon the waste, by leave and permission of the then lord of the manor of Kirkland, and owner of the Kirkland Hall estate; but he did not know, nor had he ever heard, that any conveyance was ever made thereof to any feoffees or trustees for the school, or that there were ever any feoffees or trustees appointed of the school; but he believed that the lord of the manor of Kirkland, and owner of the Kirkland Hall estate, for the time being, had, for the last seventy years and upwards, acted as the sole trustee of the school, and had, during that period, solely nominated and appointed the master of the school, without the interference or intermeddling of the vicar of the vicarage and parish church of Garstang or any other person; and that

the legal estate in the school and school-house and premises was vested in him, the deponent, as lord of the manor of Kirkland, and owner of the Kirkland Hall estate, and that the right of nominating and appointing a master to the school was solely vested in the deponent in that capacity. He denied that the site either of the old school or of the present school, or of the school-house and garden, was ever granted to any feoffees or trustees, or that the school was, in strictness, a grammar-school; the elements of reading, writing, and arithmetic being taught therein; that, for the last seventy years and upwards, the deponent and his ancestors, the lords of the manor of Kirkland, and the owners of the Kirkland Hall estate, had had from time to time the sole nomination and appointment of the master of the school; and that about twelve successive masters had been nominated and appointed by them; that there was formerly an old school on Church Town Green, on the opposite side of the road to the present school; and that the same, being in bad repair and too small, was taken down in or about the year 1812, and the present school was erected and built upon Church Town Green, by the leave of the trustees of the deponent, who was then a minor, and the expenses of such building were defrayed by subscription, including the sum of 20*l.* given and subscribed by the trustees of the deponent, and the sum of 10*l.* advanced and lent by the trustees of the deponent, and an ample piece of land adjoining thereto had been since added to it and appropriated by the deponent as a play-ground, for the use of the school; and that the school-house, for the residence of the master, was erected in 1791 or 1792 upon the Church Town Green, by Alexander Butler, the then lord of the manor or lordship of Kirkland, and the expenses of such building (amounting to 31*l.* 12*s.* 8*d.*, or thereabouts) were defrayed by him, partly out of funds in his hands left for that purpose by the wills of Margaret Butler and Jane Butler, and partly out of his own monies; but that no grant or conveyance was ever made of the site of the premises to any feoffees or trustees.

There were the affidavits of aged persons, shewing that the masters had been usually appointed by the lord of the manor.

The respondent was not the heir-at-law of those who were lords of the manor, at or shortly after the period of time to which the existence of the school could be traced back.

One of the bequests for the benefit of the school was by the testator placed under the management of Alexander Butler and his heirs, proprietors of Kirkland; another of them under the management of Alexander Butler, and his heirs and assigns, proprietors of Kirkland Hall; and the third was a bequest for the benefit of the school to the person who, at the time of the testator's death, should be entitled in possession to Kirkland Hall. These three benefactions were by ladies belonging to the Butler family.

Sir Charles Wetherell and *Mr. Walker* appeared to support the petition; and, the jurisdiction being objected to, they argued that the petition was maintainable either as a petition under the statute, or as a petition addressed to the visitor.

The Solicitor General and *Mr. Spence*, contra.

This petition is altogether irregular. It cannot be considered as presented under the statute of 52 Geo. 3. cap. 101; for, under that statute, two or more persons are required to present any petition; and, in the present case, the petition is preferred by *Mr. Pedder* alone.

It cannot be entertained as addressed to the Lord Chancellor as exercising the visitatorial power of the king; for it is denied that the king is the visitor.

The origin of the school cannot be accurately traced, nor is it known how or when the old school was built, or at whose expense, or who were to be the objects to partake of the benefit of it. Most probably it was originally built upon the lord's waste, called Church Town Green, by his leave or permission, and perhaps in a great measure out of his own funds; and, in the absence of any grant or conveyance, the soil of the school and premises must now be vested in *Mr. Cole* as lord of the manor of Kirkland, and sole devisee of the late *Alex. Butler*, and who is now the only person interested in the waste ground or common upon which the school was built.

There is reason to presume that this is a manor school, and still parcel of the manor, and that the lord of the manor for the time being is the visitor of the school, and has a right to nominate the master, and to regulate the charity. When the king founds a charity, his successors are visitors—*Eden v. Foster* (1); but if a private man founds, his heir is visitor, unless the founder makes another man and his heirs visitors—*Attorney General v. Rigby* (2). The heir-at-law of Mr. Butler, or whoever else may be considered the founder, may be the visitor, and ought to have been served with the petition—*Attorney General v. Gaunt* (3): for, if the present petition be proceeded in, the parties may have again to litigate the question upon a petition preferred by such heir-at-law, and the funds of the charity may be thus wasted, and the parties interested put to unnecessary expenses.

The Court, therefore, cannot even inquire, on this proceeding, whether the king is or is not visitor.

Lord Chancellor.—This is a petition, the prayer of which, amongst other things, is, to remove the master of the Garstang school, and for other purposes stated in the prayer of the petition. It was at first stated that this petition was presented under the 52 Geo. 3, but, in fact, there is only one petitioner, and upon reading the petition, it appears not to have been presented under that act, but to have been presented to the Chancellor as representing the king, his Majesty being, under the particular circumstances of this case, as it is supposed, visitor of the school. Now, it appears to me unnecessary to enter into the merits of the question as far as relates to the character and the appointment of the master, or to the other matters contained in the prayer of the petition, unless I am satisfied in the first instance that the crown is the visitor. I do not think, unless a clear case appears upon the face of the petition not controverted, shewing that the crown is the visitor, when I am called upon, as representing the crown, to remedy an abuse of the charity, that I can go into a controverted

case for the purpose of establishing the fact, that the crown is in truth the visitor.

In all cases of this description, in which it is stated, and is not controverted, that the crown is the visitor, the crown as visitor by the Chancellor, if the case is made out in point of fact that any abuse exists, applies such remedies as are proper for the case.

Now, in this particular instance, the very fact of the title of the crown as visitor appears to be in controversy. The case is this:—it appears that the school was originally built upon the waste, upon the soil of the lord. That fact is not disputed, but it is suggested by Mr. Pedder, the petitioner, that it was built at the expense of the inhabitants. There is no evidence whatever of that fact: he says he is informed, and believes, that it was built at the expense of the inhabitants; he does not state from whom he received that information; there is nothing more than the ordinary allegation of information and belief, that, at some former period, it was built at the expense of the inhabitants. The case is quite void of all evidence for the purpose of establishing that fact. There is nothing therefore, whatever, to shew that; and the only fact, which is not controverted, is, that the school was built upon the waste of the soil of the lord.

It appears, that at an early period, as far back as the year 1718 or 1719 there were trustees of this school; who those trustees were, however, does not appear. It appears that there were trustees, because, in searching the register of the diocese, Mr. Ward, the registrar, gave evidence that it was upon the nomination of the trustees, that the master, I think in the year 1719, was licensed; and there are two subsequent entries carrying this down to the year 1758. In the year 1758 Mr. Alexander Butler, I think, who was lord of the manor, appointed a master, and from that period, down to the present time, a period of upwards of seventy years, the appointment has always been uniformly and constantly by the lord of the manor. Now, there are no circumstances in this case to satisfy me, that the crown has anything to do with it. Many inquiries would be necessary for the purpose of ascertaining who is the visitor: it would be necessary to ascertain at what

(1) 2 P. Wms. 325.

(2) 3 P. Wms. 145.

(3) 3 Swanst. 148, n.

period the school was built—who was the lord of the manor at that time—who is the heir of that lord, or perhaps, who were the trustees, and who is the surviving trustee. No such inquiries have been made; this petition is stripped of all those circumstances: there is not such a clear case upon the face of this petition, undisputed on the other side, as to lead me to the conclusion, that the King is, at this moment, in consequence of there being no other visitor, entitled to act as visitor. Therefore I conceive that I cannot, as representing the crown, under these circumstances, interpose for the purpose of inquiring into this supposed abuse of this charity, for the purpose of ascertaining whether the crown is or is not visitor. Another mode of inquiry should be adopted. It does not appear to me that, by presenting a petition to the crown, or to the Chancellor, as representing the crown, stating its visitatorial capacity, I can assume, as the case at present appears, that the crown is the visitor, so as to give the relief which is prayed for, if, under the circumstances of this case, such relief ought to be granted. Therefore, I think I am bound to dismiss this petition.

Petition dismissed with costs.

1829. } *Ex parte* GORTON, in re
Aug. 13, 15. } LOCKER.

The Chancellor has jurisdiction, under the 6 Geo. 4. c. 16. s. 8, to declare the forfeitures and enforce the repayment prescribed by that clause.

The original petition was presented, in order to enforce against Gorton and Johnson the provisions of the 8th section of the Bankrupt Act. That section enacts, "That if any such trader, liable by virtue of this act to become bankrupt, shall, after a docket struck against him, pay to the person or persons who struck the same, or any of them, money, or give or deliver to any such person any satisfaction or security for his debt, or any part thereof, whereby such person may receive more in the pound in respect of his debts than the other creditors, such pay-

ment, gift, delivery, satisfaction, or security shall be an act of bankruptcy; and if any commission shall have issued upon the docket so struck as aforesaid, the Lord Chancellor may either declare such commission valid, and direct the same to be proceeded in, or may order it to be superseded, and a new commission may issue, and such commission may be supported either by proof of such last-mentioned or of any other act of bankruptcy; and every person so receiving such money, gift, delivery, satisfaction, or security as aforesaid, shall forfeit his whole debt, and also repay or deliver up such money, gift, satisfaction, or security as aforesaid, or the full value thereof, to such person or persons as the commissioners acting under such original commission, or any new commission, shall appoint, for the benefit of the creditors of such bankrupt."

In the present case, it was alleged, that in March 1826, after Gorton and Johnson had struck a docket against Locker, who was in partnership with Smith, upon a debt of 194*l.*, they sold the debt for 19*s.* in the pound, to one Keeling, who was merely the agent of Locker, and received from him, for costs and for the purchase-money, 212*l.* 10*s.* and then abandoned the commission. In May 1826, a joint commission issued against Smith and Locker, and the original petition was presented by the assignees under the joint commission. On the 3rd of April 1827, his Honour the Vice Chancellor made an order on that petition declaring, that Gorton and Johnson had forfeited their debt of 194*l.*; and under such order that they should repay the sum of 212*l.* 10*s.* to such person or persons as the major part of the commissioners in the joint commission of bankrupt awarded and issued against Smith and Locker should appoint, for the benefit of the creditors of the bankrupt Locker, who should come in and prove their debts under the joint commission; that the commission of bankrupt awarded and issued against Locker, bearing date the 4th of March 1826, should be superseded, and that the costs of the supersedeas, and incidental thereto should be paid by Gorton and Johnson.

Gorton and Johnson appealed.

On the appeal, two points were argued: first, that there was no jurisdiction on pe-

tition in bankruptcy to inflict a penalty, but that the complaint must be made in a court of law, where the party would have the intervention of a jury : secondly, even if the Court had jurisdiction, yet, if there was a shade of doubt upon the case, the Court would not decide such a question upon affidavit : and here the essential part of the guilt was positively denied by those to whom it was imputed.

The circumstances of the case are fully stated in the judgment of the Lord Chancellor.

Mr. Pepys and Mr. Rose were in support of the appeal :

Mr. Horne and Mr. Rolfe, *contrà*.

August 13.—*The Lord Chancellor* expressed his opinion to be, that the Court had jurisdiction to make the order, which the Vice Chancellor had pronounced. The only doubt was, whether the parties ought to be sent to a jury.

Mr. Horne insisted that the facts were so clear, that, unless every case was to go to a jury, the present ought not to be sent for further investigation.

August 15.—*The Lord Chancellor*.—I have read the affidavits, for the purpose of seeing what would be the proper course to be taken ; and they confirm the opinion I expressed at the time of hearing the case.

There were two points made in this case ; one was, with respect to the jurisdiction of the Court ;—and if I should be of opinion that the Court had jurisdiction, then the other was, whether it was a fit case for the Court to exercise its jurisdiction for the purpose of compelling the repayment of the money which had been advanced, and of declaring that there was a forfeiture of the debt.

Upon the first part of the case, namely, the question of jurisdiction, I entertain no doubt whatever. A docket had been struck ; a commission had been sued out ; and the petitioning creditor had obtained irregularly and improperly a part of the property of the bankrupt. I think, under these cir-

cumstances, adverting to the provisions of the act of parliament, this Court has the power, and is bound to compel the repayment of the money ; and it has the power, by giving full effect to the provisions of the statute, to declare a forfeiture of the debt. Therefore the case resolves itself into this—whether, upon these affidavits, this Court ought to exercise its jurisdiction ; or whether, under the particular circumstances of the case, before it declares the debt to be forfeited, the opinion of a jury should be taken.

Now, the facts of the case, as I collect them from the affidavits, are these :—*Mr. Johnson*, the petitioning creditor, goes down to that part of the country where *Locker*, the bankrupt, lives, and there *Locker* applies to him to take so much in the pound in payment of his debt, in order that no proceedings might be taken under the commission. *Johnson* refuses to take it, and leaves the place. He afterwards confers with his attorney, *Mr. Harding*, and a meeting subsequently takes place between *Mr. Griffin*, the attorney for the bankrupt, *Mr. Johnson*, the petitioning creditor, and *Mr. Harding*, his attorney. At that meeting *Mr. Griffin* renewed the proposition, and *Mr. Johnson* rejected it. *Griffin* then offered on his own account to purchase the debt. *Johnson* considered that that would be the same thing, *Griffin* being at that time the attorney of *Locker*, and he refused to accede to that proposal ; but, he said, if some other purchaser could be found, he should have no objection to sell his debt for 19*s.* in the pound, upon his receiving, in addition to the 19*s.* in the pound, all the expenses he had incurred in striking the docket, and in the proceedings consequent upon that step. The parties then separated, *Johnson* having authorized his attorney, *Mr. Harding*, to contract with any person unconnected with the bankrupt for the sale of the debt. It does not appear that *Johnson* returned again to the country. *Griffin* afterwards communicated with *Keeling*, a partner in a flint-mill, and employed by the bankrupt to collect in the debts and to post his accounts. An interview took place between *Keeling* and *Eden*, the brother-in-law of the bankrupt, and a clerk in the banking-house of *Thomas Smith* and *John Locker* the bankrupt. *Eden* offered to provide the

money for Keeling to purchase the debt with, upon which the latter went to Griffin and said he would purchase the debt. Griffin went to Harding, made this statement, and the contract was agreed upon. This was communicated to Locker the bankrupt. Griffin afterwards drew up an assignment of the debt—it was sent to London for approval—the instrument was executed and returned to the country. In the mean time Keeling obtained the money from Eden, which he got from Mrs. Locker, to complete the contract with. Keeling then went to an inn opposite the bankrupt's house with Griffin, where Harding was waiting—paid him the amount of the debt, and received the assignment executed by Johnson; the money he paid amounting not merely to 19s. in the pound, but including all the costs which had been incurred in striking the docket, and 6l. as an additional sum for interest on a bill of exchange for 300l.

Now, that is the nature of the transaction; and, standing thus, it is full of suspicion; for it seems most extraordinary that Harding should imagine any stranger would, for the purpose of securing this debt, pay, not only 19s. in the pound, but a sum equivalent to 22s. in the pound.

On the other side, however, it is sworn by Johnson most positively, that he directed his solicitor, Mr. Harding, in contracting for the sale of this debt, to confine such contract to a person unconnected altogether with the bankrupt. He swears he himself knew nothing of Charles Keeling as having any connexion whatever with the bankrupt, that he knew him only as a member of that flint-mill; for the bill of exchange for 300l. was drawn upon him as one of the members of that firm, or rather, it was drawn on that firm, of which he was one of the partners. He says, he had no suspicion whatever that the debt was purchased by Keeling for the bankrupt. And, with respect to that circumstance which pressed very strongly on my mind at the time of the argument, namely, that the sum which was paid was more than the amount of the debt, he says, when he went into that part of the country it was represented to him that it would be productive of great evil to many persons in that neighbourhood, if the banking-house, in which Locker was a partner, should be-

come bankrupt; that Keeling, therefore, under that feeling, had been induced to purchase it for more than it was really worth, and that he had been induced to purchase it on that account. Such is the explanation he gives of the transaction. Harding too, who was on the spot at the time, says, that he did not suppose the debt was purchased by Keeling on the part of the bankrupt; he pledges his character and credit to that statement.

On the other side, though the facts are stated for the judgment of the Court, it is not distinctly sworn by the parties making the affidavits, that they believed, or supposed, that, at the time when this transaction took place, the parties selling the debt supposed they were contracting through Keeling with the bankrupt.

There being no affidavit then on the one side, stating distinctly that the parties knew at the time that they were acting fraudulently or improperly, and any improper motive being distinctly denied by affidavit on the other side, I think it would be too much for me to decide upon the facts without the intervention of a jury. I think, every thing will depend on the cross-examination of Mr. Harding, who will be a competent witness. Therefore, if the appellants wish it, the question may be tried in an issue, whether or not, when this contract was entered into, or at the time when Harding was acting for Johnson, Johnson believed or suspected that Charles Keeling was acting for the bankrupt.

1829. } FRY V. WATSON.

On a motion for an injunction by a plaintiff in an interpleading suit, no affidavit is necessary except the affidavit denying collusion.

The Vice Chancellor granted an injunction on a bill of interpleader on the application of the plaintiff. There was no affidavit verifying the allegations of the bill, but merely the common affidavit denying the collusion.

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Rush, to pay the yearly sum of 100*l.* unto such person or persons as my trustees or trustee shall think proper for or towards the respective maintenance, education, and support of my two last-mentioned grandchildren, during their respective minorities; and I do hereby further direct my trustees and trustee for the time being, by and out of the annual produce of the respective portions or fortunes given to or provided for my grandchildren Waltham Christian Burmester, Mary Burmester, George Burmester, Isaac Waltham Rush, and Elizabeth Jane Rush, to pay the yearly sum of 50*l.* unto such person or persons as my trustees or trustee shall think proper for or towards the respective maintenance, education, and support of my five last-mentioned grandchildren, during their respective minorities; and I do hereby further direct my trustees and trustee for the time being, by and out of the annual produce, portion, or fortune given to or provided for my great-grandchild Thomas Pople, to pay the yearly sum of 25*l.* unto such person or persons as my trustees or trustee should think proper for or towards his maintenance, education, and support during his minority; and I do hereby further declare, that all the residue of such annual produce, after payment of the several yearly sums of 25*l.*, 100*l.*, and 50*l.*, and 25*l.*, shall be suffered to accumulate for the benefit of my grandchildren; and, as to all the money to arise and be produced from such sale or sales as aforesaid, and the stocks, funds, and securities in or upon which the same shall be so laid out and invested as aforesaid, subject to the payment of the several annuities hereinbefore by me given, upon trust, that they, the said trustees, and the survivors and survivor of them, and the executors, administrators, and assigns, of such survivor, shall and do pay, assign, and transfer the same and every part thereof unto, between, and amongst all and every my grandchildren, viz. Samuel Lozell, Fanny Lozell, Harriett Lozell, John Lozell, and Maria Lozell, Isaac Waltham Rush, Anna Elizabeth Rush, Jane Rush, Waltham Christian Burmester, Mary Burmester, George Burmester, and Jane White, who shall be living at my death, and who shall respectively live to attain the age of twenty-one years, in equal shares and proportions."

VOL. VII. CHANC.

Anna Ainsworth died an infant and unmarried. Waltham Ainsworth and William Ainsworth were still infants.

The question was, whether their respective legacies vested in them, before they attained twenty-one.

The Vice Chancellor, by his decree, dated the 28th of March 1825, declared, that the legacies given to Waltham Ainsworth and William Ainsworth, and Anna Ainsworth, the daughter and sons of the testator's grand-daughter Sarah Ainsworth, would become payable only in the event of their respectively attaining the age of twenty-one years.

Against this part of the decree Waltham Ainsworth and William Ainsworth, and the administrator of Anna Ainsworth, appealed, praying that it might be declared that they were entitled absolutely to their legacies, the time of payment only being postponed, and also to interest thereon at four per cent. from the end of one year after the death of the testator.

Mr. Horne and *Mr. Pemberton* were in support of the appeal.

The Lord Chancellor was of opinion, that, when the testator said, "in case any or either of my said grandchildren shall happen to depart this life under that age, then the legacy to him, her, or them, so dying, shall sink and not be paid," the phrase "said grandchildren" could not be taken strictly. It could not be extended to Sarah Ainsworth, though she was a grandchild. But he thought it included all the persons named after her, to whom legacies were given, and that it included the great-grandchildren, the Ainsworths. He therefore affirmed the judgment.

1829. } *BASS V. RUSSELL AND OTHERS.*

*A testator gave to his wife 300*l.* a year and an annuity of 100*l.* a year for each of his three children during their respective minorities, for their maintenance, with a direction that, upon the death or marriage of his wife, the 300*l.* a year should be*

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divided among his three children in like manner as his other effects; and, subject thereto, he gave all the residue of his personal estate to his three children and the survivors or survivor of them:—*Held, that they took a vested interest in their respective shares at the death of the testator.*

Edward Hawthorne duly made and published his last will, bearing date the 31st of July 1816, which, after giving specific and pecuniary legacies, proceeded as follows:—

"I give and bequeath my leasehold houses in Cadogan-place, and all other my personal estate and effects not hereinbefore disposed of by me, unto my said executors, upon trust, out of the rents, interest, and annual proceeds thereof, to pay unto my said wife, Elizabeth Hawthorn, the sum of 800*l.* per annum during such time as she shall continue my widow; and also the further sum of 100*l.* per annum for each of my three children, which is to be paid to her during their respective minorities for their support and maintenance; and, from and after the decease or marriage of my said wife, then the said annual sum of 300*l.* shall go to and be divided amongst my children in like manner as the other part of my estate and effects is hereinafter by me given to them; and, subject to the payment of the said annual sum of 300*l.* to my said wife, and to the annual payment to her for the maintenance and support of each of my children as aforesaid, I give and bequeath my said leasehold houses and all other my personal estate and effects not herein by me disposed of unto my three children, Harriet Hawthorn, Margaret Hawthorn, and Edward Barron Thomas Hawthorn, and the survivors and survivor of them, share and share alike. And I declare it to be my will that the provision hereby made for my daughters is meant to be for their sole and separate use and benefit, independent of any husband they or either of them may marry, and shall not be alienated or disposed of, but continued out by my said executors and trustees for their use, and be paid into their hands upon their respective receipts."

The son Edward died, in 1884, intestate and unmarried, leaving a brother and

sister of the half blood, and his two sisters of the whole blood, him surviving.

It was stated, that the widow of the testator was then dead; but counsel did not agree upon the fact, whether she survived the testator or not.

The bill was filed by the brother of the half blood; and the question was, whether the share of the deceased brother vested in him, so as to be divisible among his next of kin, or upon his death went over to his two sisters of the whole blood.

Mr. Roupell and *Mr. Pemberton* appeared for the plaintiff.

There is no period of division here, different from the death of the testator: therefore the shares vested absolutely at that time. *Cripps v. Woleatt* (1). The gift of the residue is subject to the annuities, and, therefore, must have been meant to take effect, while the annuities were subsisting. The direction that the shares of the daughters should be to their separate use, shews an intention that the vesting should not be postponed.

Mr. Pepys and *Mr. Ellison*, contra.

The testator has provided for his children during their minorities, and has then given the residue to them and the survivors of them. The residue is given to them, when they no longer want maintenance: and the gift must be construed to be to such of them as shall attain their full age. *Russell v. Long* (2), *Mendes v. Mendes* (3).

The Master of the Rolls.—The single question here is, what is the period of division. The testator first carves out an annuity of 300*l.* a year for his widow during her life, and then he gives her 100*l.* a year for the maintenance of each of the children during their respective minorities; and then he gives the whole residue, subject to these annuities, to his three children and the survivors of them. This is a gift which is necessarily to take effect at the death of the testator: and I must refer the word "survivors and survivor" to the

(1) 4 Mad. 11.

(2) 4 Ves. 551.

(3) 3 Atk. 619.

period at which they are to take their interests according to the intention of the testator, namely, his own death.

1829. } HARDINGE & PRATT.

Construction of will—Vesting of shares of a residue.

The testatrix, Sarah Otway, by her will bearing date the 27th of March 1782, (among other things) gave and devised unto George Hardinge and Augustine Greenland, their heirs and assigns, all her freehold lands, tenements, and hereditaments; and she also gave unto the said George Hardinge and Augustine Greenland, their executors, administrators, and assigns, all her leasehold messuages or tenements.

Then, after directing the sale of her personalty and her leaseholds, and of certain freeholds, and providing for the payment of her debts and legacies, she ordered that her trustees should stand possessed of the clear produce, upon trust, to invest the same in government or real securities; and that they should, during the respective natural lives of her seven daughters, and during the natural life of Robert Mayne, esq., husband of her late daughter, Sarah Mayne, deceased, pay, apply, and dispose of the interest, dividends, and yearly produce thereof, as the same should arise and be received, in manner following, that is to say, to pay, apply, and dispose of one equal eighth part or share of the interest, dividends, and yearly proceeds, or so much thereof as to her trustees should seem necessary, for and towards the respective maintenance and education of each and every of her seven then surviving daughters, as should, at the time of her death, be under the age of twenty-one years and unmarried; and to pay, apply, and dispose of one full and equal eighth part of the interest, dividends, and yearly proceeds to each and every of her said seven daughters, who should at the time of her death have attained her or their ages of twenty-one years, or been married, and also to pay and apply and dispose of one full eighth part of the same interest, dividends, and

yearly proceeds to such of her daughters as should be under the age of twenty-one years and unmarried at the time of her death, as soon as they should severally attain their ages of twenty-one years, or be married, with the consent of her trustees; and also to pay, apply, and dispose of one full eighth part of the same interest, dividends, and yearly proceeds to Robert Mayne for his life, such seven full eighth parts so directed to be paid to each and every of her seven daughters being of the age of twenty-one years, or married, or on their attaining that age, or being married with consent as aforesaid, to be paid unto such person or persons, and for such ends, intents, and purposes, manner and form, as each and every of her seven daughters, notwithstanding their then present or future coverture, by any note or notes, writing or writings, to be by her or them signed with their own proper hands, should direct or appoint, or permit and suffer them respectively to receive and take the same for her and their own sole and separate use and benefit during the terms of their natural lives, to the end that the same should not in anywise be subject or liable to the debts, engagements, or control of their respective husbands; and from and after their respective deceases, did and should apply and dispose of the interest, dividends, and yearly proceeds of their several eighth parts unto such of their several and respective husbands, his or their assigns, as should have married any of her seven daughters in her lifetime, and to such husband or husbands as should, with such consent in writing of her trustees, marry any of her daughters under the age of twenty-one years, after her death, or otherwise permit and empower him or them to receive and take the same for his and their own use and benefit during his and their respective lives; and from and after the several deceases of Robert Mayne, and each and every of her seven surviving daughters, and of each and every of their husbands who should so become entitled to an estate for life, the testatrix directed that her trustees should stand possessed of the several and respective equal one-eighth parts of each and every of her seven daughters, and the funds and securities upon which the same should be

placed out, and the interest, dividends, and yearly proceeds arising from the same, upon trust, as to the one eighth part of each and every of her seven daughters, and of the remaining one eighth part, when and as the trusts thereinbefore mentioned should respectively end or determine, to and for the use and benefit of all or any one or more son or sons, daughter or daughters of the respective body of each and every her seven surviving daughters lawfully begotten, and of the issue of the body of her late daughter Sarah Mayne by Robert Mayne, her late husband, and of all or any the child or children, of all or any such issue, son or sons, daughter or daughters, in case such issue, son or sons, daughter or daughters, should die in the lifetime of their mother or father, or in the lifetime of the survivor of them, leaving issue him, her, or them surviving, in such shares and proportions as Robert Mayne, respecting his children, by her late daughter Sarah, and as her seven surviving daughters and their respective husbands, the mothers and fathers of such child or children, at any time during their lives, by any deed or deeds, instrument or instruments in writing, or by his or her last will and testament, attested as therein mentioned, should direct or appoint, with or without power of revocation, to such son or sons, daughter or daughters of their respective bodies, or of all or any of the child or children of all or any such son or sons, daughter or daughters, in case such son or sons, daughter or daughters should die in the lifetime of his or their respective mother and father or the survivor of them, leaving issue him, her, or them surviving ; and, in default of any such direction or appointment being made by Robert Mayne, or by any of her surviving daughters or their respective husbands, and until such direction or appointment should be made, and as to such parts touching which no direction or appointment should be made, in trust for all and every the son and sons, daughter and daughters of the respective bodies of her seven surviving daughters lawfully begotten, and of the issue of the body of her late daughter Sarah Mayne, equally to be divided between or amongst them, share and share alike, if more than one, and, if but one such child, then in

trust for such only child, it being her will and intent that the issue of each of her seven surviving daughters, who had been married or should marry in her lifetime or afterwards, with such consent as aforesaid, should, after the deaths of their respective mothers and fathers, and that the issue of such of her daughters as should marry after her decease under the age of twenty-one years without such consent as aforesaid, should, after the death of their mother, take the part of his, her, or their respective mothers in manner thereinbefore directed ; and that the issue of her late daughter Sarah Mayne should, after the death of Robert Mayne, their father, take the one eighth part or share, of which he, by virtue of that her will, was to receive the interest during his life, such shares as aforesaid to become an interest vested in, and to be paid to such son or sons, daughter or daughters respectively of the bodies of her seven surviving daughters, and of her late daughter Sarah Mayne, by Robert Mayne, at the times and in manner thereafter mentioned ; and, in case there should be no child or children of the body or bodies of any one or more of her surviving daughters who never have been married lawfully begotten, or, being such child or children, and the child and children of her daughter Ann Cunningham, then born, or which should thereafter be born of her body, and the children of her daughter Sarah Mayne should all happen to die before their or any of their shares of and in the respective one eighth part of his, her, or their respective mother, and of and in the one eighth part thereof, intended for the benefit of the issue of the body of her late daughter Sarah Mayne, should become an interest vested in him, her, or them, by virtue of the appointment, or of that her will ; then, that they, her trustees, should assign and transfer the one eighth part of each and every her eight daughters of whom there should be no such child or children, or, being such, who should all happen to die before their or any of their shares should become an interest vested as aforesaid ; and the interest or dividends thereof which should accrue from the death of the survivor of each and every her several and respective daughters, and her and their several and re-

spective husband and husbands, who should marry in her lifetime or after her death, under the age of twenty-one years, with such consent as aforesaid; and from and after the death of Robert Mayne, and from and after such failure of issue as aforesaid, unto the respective executors, administrators, or assigns of the survivors of her several and respective daughters and their several and respective husbands, in equal shares and proportions.

The testatrix died in March 1788, leaving five daughters her surviving, namely, Alicia Otway, afterwards Alicia Bale, Aurea Otway, afterwards Aurea Lambard, Grace Otway, Maria Otway, afterwards Maria Forster, and Jane Otway, afterwards Jane Macmurdo, and leaving Thomas Lambard, the husband of a deceased daughter Sophia, and Francis Otway Cunningham, the only child of a deceased daughter Ann Cunningham, and leaving William Mayne, Robert Mayne, Frederick Mayne, and Charles Mayne, the four children of her deceased daughter, Sarah Mayne, her surviving.

Robert Mayne, the father, died in the lifetime of the testatrix.

Francis Otway Cunningham, the only child of Ann, died in June 1794, under the age of twenty-one years, and without issue, whereby his one eighth part of and in the estates and effects of his grandmother survived to the daughters Alicia Bale, Aurea Lambard, Grace Otway, Maria Otway, and Jane Otway, and William Mayne, Robert Mayne, also Frederick Mayne, and Charles Mayne, who were entitled to one seventh part among them.

Jane Macmurdo died on the 5th of October 1813, without ever having had any child or children, leaving her husband her surviving, who thereupon claimed to be entitled to his deceased wife's share of the fund: and, by orders made in 1813 and 1814, her share was transferred to him.

Grace Otway died on the 4th day of January 1821, intestate, and without ever having been married; and the petition was presented by her administrator, praying, that the stock and cash, which was standing to the account of her share of the estate, might be transferred to him.

The question was, whether, under the words of the will, the share of Grace Otway,

in the events which happened, vested in her absolutely.

The petition had been argued before Lord Eldon: but he had given no judgment.

It was again argued before Lord Lyndhurst.

Mr. Pepys, for the petition:

Mr. Phillimore, contra.

The Lord Chancellor.—Grace Otway was one of the eight daughters of the testatrix. She was entitled, during her life, to a share of the property left by her mother; and in the event of her marriage, and of her husband surviving, he would be entitled during his life. The original decree directed, that, after her death, and the death of her husband, any party should be at liberty to apply; so that there was no decision on the point.

Grace Otway attained her age of twenty-one years, but never married. The question is, are her personal representatives entitled to the share of the property allotted to her? In my opinion, the reasonable construction of the will is, that the personal representatives of Grace Otway are entitled.

In 1813 came on the case of *Mr. Macmurdo*, who was the husband of one of the daughters; and Lord Eldon directed that daughter's share of the fund to be paid to *Mr. Macmurdo*. When the present petition was before Lord Eldon, his attention was directed to the order of 1813; and he appears to have hesitated with respect to the order, which he himself had made. I am satisfied, however, that that order put the correct construction on the will.

Now, although that decision does not absolutely govern the present question, yet it is strongly confirmatory of the opinion I entertain as to the construction of the will.

She having attained the age of twenty-one and never married, her personal representatives are entitled to this property. The order must be made pursuant to the prayer of the petition.

1829. } GRAY V. FOLDS.

A testator gave the residue of his estate to trustees, upon trust to pay, apply, and dispose of it to two women, A and B, when they should attain their respective ages of twenty-one years, directing that their shares should not be subject to the control of their husbands : but in case both or either of them died without issue living at the time of their respective deceases, then he gave the share of her or them so dying to his nephews and nieces :—Held, upon the whole context of the will, that the executory devise over of the residue was not confined to the death of A and B, or either of them, under twenty-one, and without leaving issue, but would take effect upon their respective deaths at any time, without leaving issue then living.

Thomas Heath, by his will, gave to Matilda Storer and Mary Storer all his household goods, plate, linen, china, and wearing apparel; and, after giving some legacies, proceeded as follows :—

"Also I give and bequeath unto them, Thomas Folds and Thomas Westwood, all that my leasehold estate, consisting of ten messuages or dwelling-houses, with the appurtenances thereunto belonging, situate, lying, and being in Loveday-street, in Birmingham aforesaid, one of which is now in my own occupation, to hold to them, Thomas Folds and Thomas Westwood, and the survivor of them, his executors and administrators, for and during all my term, estate, and interest, which shall be to come and unexpired therein at the time of my decease, subject nevertheless, to the ground-rent and other outgoings, to be from time to time payable for the same, and also subject, as after mentioned, upon trust to pay, apply, and dispose of the rents, issues, and profits of my leasehold estate and premises (after payment and discharge of the ground-rent, outgoings, and the expenses of repairs to the same,) or a competent and sufficient part thereof, for and towards the maintenance, education, and other benefit of them, Matilda Storer and Mary Storer, until they and each of them shall attain their several and respective age and ages of twenty-one years; and when and as each of them, Matilda Storer and Mary Storer shall attain

the age of twenty-one years, upon trust, to pay, apply, and dispose of the rents, issues, and profits of the premises (subject as aforesaid) in equal moieties or shares unto them, Matilda Storer and Mary Storer, or otherwise permit and suffer them, Matilda Storer and Mary Storer, to have, receive, and take the same in the proportions aforesaid; to and for their own sole and separate use and benefit, for and during so long of my term, estate, and interest therein, as they shall happen to live, whose receipt and receipts, notwithstanding coverture, shall be from time to time a good and sufficient discharge and discharges for the same, to the intent that the same rents, issues, and profits, or any part thereof, shall not be at any time in the power of, or under the control, intermeddling, debts, forfeiture, or engagements of any husband or husbands with whom they, the said Matilda Storer and Mary Storer, or either of them, may hereafter intermarry, but that the same be had, received, and taken by them, in the proportions aforesaid, to and for their and each of their own sole, separate, and distinct use and benefit in all events; also I give and bequeath unto them, Thomas Folds and Thomas Westwood, and the survivor of them, his executors and administrators, all my ready monies and securities for money, debts, and all other my personal estate and effects of what nature or kind soever and wheresoever, not hereinbefore by me disposed of, and of which I shall die possessed or entitled unto, upon trust, that they, my said trustees, and the survivor of them, his executors and administrators, do and shall, as soon as conveniently may be after my decease, collect, recover, receive, and get in all such outstanding monies as shall be due and owing to me from any person or persons whomsoever at the time of my decease, and with all convenient speed after my decease sell, dispose of, and convert into money, all such part of the residue of my estate and effects which shall not consist of money; and the monies so to be collected and raised, together with all such ready money as I may die possessed of, I hereby direct my trustees to pay, apply, and dispose of into the proper hands of them, Matilda Storer and Mary Storer, in equal parts, shares, and proportions, when and as they and each of them shall attain their several

and respective age and ages of twenty-one years, whose receipt and receipts alone (notwithstanding coverture) shall be a good and sufficient discharge and discharges for the same, to the intent, that the same or any part thereof shall not be at any time in the power of, or be subject or liable to the control, intermeddling, debts, forfeiture, or engagements of any husband or husbands they or either of them may intermarry, but that the same may be at their own sole and separate use and disposal; but, in case both or either of them, Matilda Storer and Mary Storer, shall happen to depart this life without issue of her or their body or bodies lawfully begotten, living at the time of her or their decease or respective deceases, then I do hereby give and bequeath the part or share, parts or shares of her or them so dying unto and amongst all and every my nephews and nieces equally share and share alike; and, in case both or either of them, Matilda Storer and Mary Storer, shall happen to depart this life without leaving issue as aforesaid, living at the time of her or their decease or respective deceases, then I do hereby give and bequeath the part or share of her or them so dying as aforesaid, of and in all and every my leasehold estate unto my nephews and nieces, to hold the same to them, my nephews and nieces, their executors, administrators, and assigns, as tenants in common, and not as joint tenants, for and during all the then residue of the term of years then to come and unexpired therein, subject to the annual or other ground-rent thenceforth to become payable for the same."

The question was, whether Matilda Storer and Mary Storer took an absolute interest in the residue on attaining twenty-one.

Master of the Rolls.—The question here is, whether the latter part of the will does not shew that the executory devise over was to take effect, if the two ladies died, whether before or after twenty-one, without leaving issue. The residuary property was not to be at any time in the power of their husbands; which would scarcely be consistent with an absolute interest as soon as they attain twenty-one. As to the leasehold estate, it is clear that it is to go over to the nephews and nieces, at the death of

the two ladies at any time, if they leave no issue then living: and the fair inference is, that his intention was the same with respect to the residue.

I must therefore declare, that there is a good executory devise over, in the event of the respective deaths of Matilda Storer and Mary Storer, without leaving issue living at the time of their respective deceases.

1829. } BURLTON v. WALL.

A commission of bankrupt is issued against A and B; afterwards a commission is issued against A, C, D, and E; the second commission is then superseded as to A:—Held, that it is a valid, legal commission against C, D, and E.

On the 29th of March 1826, a commission of bankrupt issued against Thomas Coleman and Edward Wellings, under which they were declared bankrupts.

On the 30th of March 1826, a commission of bankrupt was issued against Thomas Coleman, John Morris, John Beebee Morris, and Thomas Morris, bankers, under which they were declared bankrupts. The plaintiffs were chosen their assignees; and, in July 1827, contracted to sell lands, which had been the property of John Morris, to the defendant.

On the 10th of May 1828, the Vice Chancellor made an order, superseding the commission against the four, as against Thomas Coleman, his estate and effects, without prejudice to the validity of the commission as to the other three, or their certificates.

The bill was filed by the assignees for the specific performance of the contract.

The defendant, by his answer, submitted to perform the agreement upon having a good title made to him; but objected to the title on the ground that the commission of the 30th of March 1826 was invalid, in consequence of the existence of the previous commission of the 29th of March 1826, notwithstanding the order of *supersedeas*.

The Master had reported that a good title could be made, and the defendant excepted.

The question turned upon the 16th sect. of the 6 Geo. 4. c. 16, which enacts "That any creditor or creditors, whose debt or debts is or are sufficient to entitle him or them to petition for a commission against all the partners of any firm, may petition for a commission against one or more partners of such firm, and every commission issued upon such petition shall be valid although it does not include all the partners of the firm; and in every commission against two or more persons, the Lord Chancellor may supersede such commission as to one or more of such persons, and the validity of such commission shall not be thereby affected as to any person, as to whom such commission is not ordered to be superseded, nor shall any such person's certificate be thereby affected."

Mr. Bickersteth and *Mr. Wigram* were in support of the exemption.

As the law stood before the late act, there might be a commission of bankrupt against all the partners in a firm, or there might be separate commissions against all or some of them severally; but there could not be a commission against some of them, including more than one and yet not including all. This was altered by the first part of the 16th sec. of 6 Geo. 4. c. 16, which enables a commission to be taken out against some of the members of a partnership without including them all. As a necessary consequence of the old state of the law, a commission, which was issued against several partners could not have been superseded as to one, and remained in force against two or more. This defect was cured by the latter part of the clause, which provides that a commission may be superseded as to one or more of the persons named in it, without affecting its validity as to the others. But if the commission, as against all named in it, was originally invalid, superseding it as to some cannot make it valid as to the rest. Now, here the commission against Coleman and the three Morrisises was void; because there was a previous existing commission against Coleman; and the superseding it as to Coleman cannot make it valid as to the other three.

Mr. Rose and *Mr. Beames* argued, that

by the order of *supersedeas* the commission stood in every respect as if Coleman had not been named in it. It was, therefore, valid, and the assignees could convey the legal fee.

The following cases were cited:—

Till v. Wilson, 7 B. & C. 684.

Ex parte Bullen, 1 Rose, 186.

Ex parte Thompson, 1 Rose, 285.

Ex parte Crew, 16 Ves. 236.

Ex parte Ranson, 1 Ves. & B. 160.

Ex parte Bygrave, 2 G. & J. 391.

The Master of the Rolls.—The argument is, that the sixteenth section of the 6 Geo. 4. c. 16, was intended only to apply to cases of valid commissions, and that it was not meant to apply to cases where the commission was invalid, because a prior commission had issued against one of the bankrupts. Now, the words of the clause are general, and there is no ground for restricting their operation; the more especially as it is in such cases as this that the operation of the sixteenth section is most beneficial. I have no doubt that a principal reason of the enactment was, in order to give validity to commissions which, originally, were not valid, by enabling the Lord Chancellor to supersede them as to one person or more.

In the present case, the Vice Chancellor has superseded the commission as far as it regards Coleman. Now, if the argument used on the part of the purchaser is right, the Vice Chancellor had no authority to do so; for he contends that the clause does not apply, except to commissions originally valid. The Vice Chancellor, when he made the order, must have been of a contrary opinion; and I never could determine that the Vice Chancellor had fallen into an error. I have no authority to rehear, or reverse the Vice Chancellor's order to supersede; and, therefore, if my opinion were other than it is, I could not allow the exception. All that I could do would be, to desire the parties to bring the matter before the Lord Chancellor; but my opinion entirely concurs with the Vice Chancellor. I must, therefore, decree a specific performance, but without costs.

1829. { J. H. LANGSTON v. SIR C. M.
POLE, BART., AND OTHERS.

Devise—Construction of.

A testator devised lands to trustees, upon trust to convey the same to his son J. H. L., for life, remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the said J. H. L., severally, successively, and in remainder, one after another, as they, and every of them, should be in seniority of age or priority of birth, &c., with divers remainders over. The will contained various provisions as to portions, &c., which were to take effect only on a general failure of issue male of J. H. L.; and there was a power of charging the lands with portions for the children of J. H. L. other than an eldest or only son:—Held, on the whole context of the will, that, notwithstanding he was omitted in the enumeration, the first son of the testator's son J. H. L. took an estate in tail male expectant on the death of his father.

John Langston devised all his manors and lands unto and to the use of trustees, upon trust, so soon as his son J. H. Langston (the plaintiff) should attain twenty-one years, to convey, settle, and assure the same to the use of the plaintiff and his assigns for life; remainder to trustees to preserve contingent remainders; with remainder to the use of the second, third, fourth, fifth, and every other son of the plaintiff in tail male in succession; with remainder to the testator's second and other sons successively in tail male; with remainder to trustees for five hundred years; with remainder to the plaintiff's daughters in succession in tail general; with remainder to trustees for ninety-nine years; with remainder to the testator's eldest daughter, Maria Sarah Langston, for her life; remainder to trustees, to preserve contingent remainders; with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the body of her, the testator's said daughter, lawfully to be begotten in tail male successively; and, for default of such issue, to the use of other trustees, their executors, administrators, and assigns, for the term of six hundred years; with remainder to the use of the first, second, third, fourth, fifth, and all and every

other the daughter and daughters of the body of the testator's said daughter, Maria Sarah Langston, to be begotten, severally and successively, in tail general; and, for default of such issue, to the use of the testator's daughter Elizabeth Catherine Langston, for her life; remainder to trustees for preserving contingent remainders; with like remainders to the use of the sons of Elizabeth Catherine Langston successively, and their heirs male; and, for default of such issue, to other trustees therein named, their executors, &c., for the term of seven hundred years; with like remainders to the use of the daughters of Elizabeth Catherine Langston, and the heirs of their bodies; and, for default of such issue, to the use of the testator's daughter, Caroline Langston, for her life; with like remainders to trustees, and to her sons successively, and their heirs male; and, for default of such issue, to the use of other trustees therein named, their executors, &c., for a term of eight hundred years, upon the trusts, and for the intents and purposes, thereafter mentioned, with like remainder to the use of the daughters of C. Langston, and the heirs of their bodies; and, for default of such issue, to the use of the testator's daughter, Agatha Sophia Maria Langston, for her life; with like remainders to trustees, and to the sons of Agatha Maria Sophia Langston, successively, and their heirs male; and, for default of such issue, to the use of other trustees, their executors, &c., for the term of nine hundred years, with like remainder to the use of the daughters of her, Agatha M. S. Langston, and the heirs of their bodies; and, for default of such issue, to the use of the testator's daughter, Henrietta Maria Langston, for her life; remainders to trustees, for preserving contingent remainders; with like remainder to the sons of her, Henrietta Maria Langston, and their heirs male; with remainder to other trustees therein named, their executors, &c., for the term of one thousand years; with like remainder to the use of the daughters of her, H. M. Langston, and the heirs of their bodies; with remainder to the use of the testator's sixth and other daughters thereafter to be born, successively, in tail general; with remainder to the use of other trustees, for the term of one thousand five hundred years, with remainder to the use of the testator's

sister Sarah, the wife of Peter Cazalet, esq., her heirs and assigns.

The trusts of the term of five hundred years were as follows:—"That if there should be *no son* of his son, James Haughton Langston, nor *no future son* of his the testator's own body, or there being any such son or sons, if he and they should all die without issue male before any of them should attain the age of twenty-one years, and there should be two or more daughters of the body of his the testator's son, J. H. Langston, then they the trustees and the survivor of them, and the executors, administrators, and assigns of such survivor, should, after the decease of his (the testator's) son, the plaintiff J. H. Langston, and such failure of issue male of his body and of his the testator's own body as aforesaid, by mortgage or sale, &c., levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters (other than and besides an eldest or only daughter) as thereafter mentioned. But, nevertheless, the payment of the same portion or portions shall be postponed until the end of twelve calendar months next after the decease of him my son, and failure of issue male of his body and my body as aforesaid; and then the portion or portions shall be payable with interest for the same, after the rate of 4*l.* by the year for each sum of 100*l.* from the time of the commencement of the term of five hundred years in possession."

The trusts of the term of ninety-nine years were—"That, in case there should be *no son* or daughter of the body of him, J. H. Langston, nor *no future son* of the testator's body, or, there being any such son or sons, daughter or daughters, all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain his, her, or their age or ages of twenty-one years, then, that they, the trustees, should, after the decease of the plaintiff, James Haughton Langston, and such failure of issue as aforesaid, by mortgage or sale, &c. levy and raise certain annuities for the use and benefit of each of the testator's youngest daughters, Elizabeth Catherine Langston, Caroline Langston, Agatha Maria Sophia Langston, and Hen-

rietta Maria Langston, respectively, or such of them as should not from time to time be in the actual possession of, or entitled to, the hereditaments, under and by virtue of the limitations in that his will contained.

The trusts of the several terms of six hundred, seven hundred, eight hundred, nine hundred, and one thousand years, were for raising annuities and portions for the younger daughters of the testator's daughters.

The trusts of the term of one thousand five hundred years were—"That in case there should be *no son* or daughter of the body or respective bodies of J. Haughton Langston, or of the testator's then present daughters, or of any of them, nor any future son or daughter of the testator's body, or, there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and every such daughter and daughters should depart this life without issue, before any of them should attain his, her, or their respective age or ages of twenty-one years, then they, the said trustees, &c. should within twelve calendar months after the several deceases of the plaintiff and the testator's then present daughters, and failure of all such issue as last aforesaid, by mortgage or sale, &c. raise the sum of 80,000*l.*, and pay one moiety thereof unto his sister, Mary Ann Arnold, and the other moiety thereof unto his nephew, Haughton Farmer Okeover."

The testator also provided and directed that it should be lawful for J. H. Langston from time to time during his natural life, in case there should be any child or children of his body lawfully begotten, *other than and besides an eldest or only son*, by any deed &c. by his will, to charge the hereditaments thereinbefore devised, with the raising and payment of any principal sum or sums, not exceeding in the whole 25,000*l.*, for the portion or portions of any one, two, or more of the younger son or sons, or daughter or daughters, of the body of him the plaintiff, lawfully to be begotten, born in his lifetime: or within due time after his decease. And the testator further directed, that in like manner it should be lawful for each of his daughters before named, when they should respectively be in the actual possession of his devised estates, in case there should be any child or children of their respective bodies,

lawfully begotten, other than an only son, by deed or will, to charge all or any part of the devised estates, with the raising and payment of any sum not exceeding in the whole 25,000*l.*, for the portions of any one, two, or more of their respective younger children. The testator gave all the residue of his personal estate unto the plaintiff, if and when he should attain the age of twenty-one years; but, if he should die under that age, leaving a child or children, then to such child, or, if more than one, to such children equally; but if the plaintiff should die under the age of twenty-one years, and there should be no son or daughter living at the time of his death, then to the testator's daughters equally.

The testator died in February, 1812, leaving the plaintiff, James Haughton Langston, his only son and heir-at law, and the said testator's several daughters, in the will named, him surviving.

The bill was filed by J. H. Langston. It alleged that it was the testator's intention that his will should contain a direction that the settlement directed to be made should contain a limitation to the plaintiff's first son in tail male, immediately before the limitation to his second son; that the draft of the will contained a direction that such a limitation should be inserted in the will, but in the engrossment of the will executed by the testator, this direction was omitted by the mistake or negligence of the person who engrossed the will.

The bill prayed that the will and codicils might be established, and the trusts thereof carried into execution; and that, in making the settlement and conveyance directed by it, a limitation might be inserted whereby the lands and hereditaments might be settled and assured to the use of the plaintiff's first son in tail male in remainder, immediately before the limitation to the use of the plaintiff's second son in tail male.

At the original hearing of the cause, on the 8d of February 1826, Lord Gifford, then Master of the Rolls, directed a case to be made out for the opinion of the Court of King's Bench; and the question was—Whether the first son of the testator's son, J. H. Langston, took any estate under the testator's will.

In the case made for the Court of King's Bench, the trusts of the terms were very briefly stated.

The Court of King's Bench certified that the said Henry Langston, the first son of the said J. H. Langston, did not take any estate under the will.

The cause came on to a hearing upon this certificate.

Mr. Pepys and *Mr. Knight*, for the plaintiff, contended that the certificate of the Court of King's Bench did not put the proper construction on the will, and that the eldest son of the plaintiff would take an estate tail.

Mr. Horne and *Mr. Wray*, contra.

The Master of the Rolls.—I should now take upon myself to decide this question, were it not that, as the construction of this will must necessarily be the same in equity as at law, I do not think it decent to decide in opposition to the certificate of the Court of King's Bench, without putting the matter in a course of further investigation. I shall follow a course, which has sometimes been pursued by Lord Eldon, who, when dissatisfied with the certificate of one court of law, sent the same case for the opinion of another court of law. I shall not, however, send the case to the Common Pleas in precisely the same form in which it has been presented to the Court of King's Bench; because, it appears to me, that material circumstances are omitted in the case, on which the certificate has been given. I refer to those limitations of the several terms, which are not to take effect, unless there be a failure of all the sons of the plaintiff, and to the clause providing portions for children of the plaintiff other than the eldest or only son. Let the clauses I refer to be fully stated, in the case; and let the opinion of the Court of Common Pleas be taken on it. There is a clause requiring whoever shall succeed to the property, to take the arms and name of the testator: but I lay no stress on any argument, which might be thence raised; and that clause ought not to be inserted in the case.

The question here really is, whether it does not appear on rational implication from other parts of the will, that the word

first has been omitted by the clerical mistake of the person who engrossed the will, though it must be considered as having been the expressed will of the testator.

A case stated in the manner directed by the Master of the Rolls, was argued before the Judges of the Court of Common Pleas in Michaelmas term last, (see *post*, Common Pleas Reports, p. 1, where the whole case is set out at length); upon which argument, and after having considered the case, the Judges of that court certified that they were of opinion, that the first son of James Haughton Langston took an estate in tail male, under the will, expectant on the decease of his father James Haughton Langston.

July 28.—The cause now came on to be heard on further directions.

Mr. Bickersteth and *Mr. Wray* contended that the certificate of the Common Pleas ought not to be confirmed.

The Master of the Rolls.—The two courts of law having differed, this question can never be finally settled except by the Court of appellate jurisdiction. I should, therefore, confirm the certificate of the Court of Common Pleas, whatever my own opinion were, in order that the parties might proceed immediately to the Court of last resort.

My own opinion however is, that the Common Pleas have come to the right conclusion. The case depends not on any technical rules of construction, but on the plain principles of common sense. It is exactly the case of *Lady Newburgh*, in the House of Lords.

Every court is bound by the expressions of a testator. But you must look to every part of a will; and it is from the whole will, taken together, that the construction is to be collected. Here the question is, whether, in the first clause of the will, where the estates are limited to the sons of the plaintiff, the word *first* has been omitted by mistake. Now, that it must have been omitted by mistake, either on the part of the testator or the drawer of the instrument, is evident from other parts of the will.

After making provisions for the daughters of his son, he enlarges those provisions, if his son should have daughters only, and no sons. Why were the benefits given to the daughters to depend on the circumstance of there being no eldest son, unless such eldest son was to take some interest in the lands?

There is another clause which affords as strong an inference as can be drawn from any expressions. The testator, looking to the case of there being other sons of the plaintiff besides an eldest son, makes a provision for every one of those sons except the eldest. According to the construction which the King's Bench put upon the will, he was thus creating a charge for a grandson who would take the whole estate. It is clear, therefore, that this testator did not mean to exclude the eldest son of the plaintiff.

It is not pretended here that the eldest son was otherwise provided for, or that any reason existed, which could have induced the testator to exclude him from the family property. He plainly considered the eldest son of the plaintiff as a person who was to take benefits under his will.

I do not consider the question here as depending upon the principle of the cases in which estates have been raised by implication. The point is simply—Must you not consider that the word *first* has been omitted by mere mistake?

The certificate of the Court of Common Pleas must be confirmed.

1829. } *BARTON v. CROXALL.*

A and B, being tenants in common of certain premises, made partition by lease and release; and a satisfied mortgage term, which existed in B's undivided moiety, was assigned to a trustee on trust, as to the premises allotted to A, to attend the inheritance: Held, that a prior will of A was not revoked by these transactions.

John Barton, by his will, dated in September 1775, devised his real estates, among which was an undivided moiety of certain premises, of which he and Carter Barton

were tenants in common, in fee. Afterwards, J. Barton and C. Barton agreed to make a partition, which was carried into effect, by indentures of lease and release, bearing date respectively the 15th and 16th days of June 1791—the release being between Carter Barton, of the first part; the testator, John Barton, of the second part; Joseph Scott, a mortgagee for a term of a thousand years of Carter Barton's undivided share, of the third part; John Dale, of the fourth part; and Charles Palmer, of the fifth part. By these deeds, Carter Barton and the testator conveyed the premises unto John Dale, to the uses, as to certain parts of them, of Carter Barton, his heirs and assigns for ever, and as to the other parts of them, of the testator, his heirs and assigns for ever, free from all incumbrances except a mortgage term of a thousand years created of Carter Barton's moiety of the said premises, and then vested in Joseph Scott; and the said Joseph Scott, in consideration of the principal and interest to him paid by Carter Barton, assigned the undivided moiety of the premises so in mortgage to him, to Charles Palmer, his executors, administrators, and assigns, for the residue of the said term of a thousand years therein then to come and unexpired, in trust, as to the premises conveyed to John Barton, his heirs and assigns, to attend and wait upon the freehold and inheritance thereof; and as to the other part of the premises, in trust for Carter Barton, his heirs and assigns, and to attend and wait on the freehold or inheritance of the south side or moiety of the premises.

The testator died 31st of March 1792.

The question was, whether the will was revoked by the deeds of June 1791.

Mr. Beames, for the heir-at-law, contended, that the assignment of the term of a thousand years, in trust to attend the inheritance, changed the interest of the testator. There was something done beyond mere partition: and, on the authority of *Tickner v. Tickner* (1), the will must be held to be revoked.

Mr. Pepys and *Mr. Bickersteth*, contra.—Partition is not a revocation of a former will:

Luther v. Kirby (2): and here nothing has been done except to make partition. The assignment of the mortgage term on trust to attend the inheritance does not alter the nature of the testator's interest. The testator was seised of the premises allotted to him in severalty, in exactly the same manner as he had been before seised of his undivided moiety.

The Master of the Rolls.—It is admitted that a mere partition, without more, does not revoke a will. But the will is revoked if the nature of the interest be changed. Here the nature of the interest was not changed; the assignment of the mortgage term to attend the inheritance does not revoke the will; it had no effect on the testator's share; and with respect to it, was altogether useless. I must therefore hold that the will was not revoked.

1829. }
July. } ST. JOHN V. STIRLING.

If an agent for a purchaser, having a general authority, contracts to purchase such title as the vendor has, the Court will compel specific performance of the contract.

In August 1825, the plaintiff, Sir Walter Stirling, entered into a negotiation with Mr. Merriman, as the agent of the defendant General St. John, for the purchase of a life annuity, which had been granted to the latter by Sir Thomas Champneys. In answer to one of Mr. Merriman's letters on the subject (Mr. Merriman resided at Marlborough,) Sir W. Stirling, on the 9th of Sept. 1825, wrote the following letter to him:—

"I have the honour to acknowledge the receipt of your favour of the 8th instant, and finding that my friend Mr. Bayley is on his way into Somersetshire, have asked the favour of him to settle the business with you, in regard to General St. John, and shall be perfectly satisfied with the arrangement that he shall make with you on my account. I am perfectly satisfied of your marked and particular attention to me, and shall be most happy to express

(1) Cited in 3 Atkyns, 742.

(2) 8 Vin. Abr. 148, pl. 30.

upon all occasions my sense of the obligation."

On the superscription of this letter were the words "Per favour of Mr. D. Bayley;" and he delivered it to Mr. Merriman. Mr. Bayley was a professional man (a barrister, it was said), and he concluded an agreement on behalf of the plaintiff for the purchase of the annuity on certain terms, one of which was, that Sir W. Stirling should accept such title to the annuity as General St. John had. On the 28th of Sept. Sir W. Stirling wrote to Mr. Merriman a letter, containing the following passage:—

"Your favour of the 27th instant I have just had the honour to receive.—I am much obliged by your kindness in arranging General St. John's annuity with Mr. Bayley."

The bill was filed for a specific performance of the contract.

The defendant, by his answer, submitted that General St. John could not make a title to the annuity—that Bayley had no authority to conclude a contract for purchasing the annuity without a title; and that General St. John had filed a bill against Sir Thomas Champneys, and had had a receiver appointed, in which suit the right to the annuity was in litigation.

Mr. Bickersteth and *Mr. Phillimore* were in support of the bill.

Mr. Pepys and *Mr. Knight* appeared for the defendant.

It is admitted that there is a suit pending as to this annuity; and though, as we are not parties to the suit, we do not know what the points raised in it are, yet it must be presumed to involve the right to the annuity. This, therefore, is a contract for the sale of that which is the subject of litigation, and is contrary to the policy of the law: *Wood v. Downes* (1).

The contract was entered into without authority: for it never can be supposed

that any man would authorize an agent to contract for the purchase of the property, without any inquiry as to title.

Even if such a contract were made, this Court would not interfere to compel performance of such an agreement. It will not force a purchaser to pay for that which may turn out to be nothing.

The Master of the Rolls.—One objection to the decree sought by this plaintiff is, that Bayley had no authority to enter into such a contract. Now, the letters of Sir W. Stirling state what that authority was; and it is a general authority to conclude a contract on such terms as he in his discretion should think fit. That letter is as wide in its terms as can be conceived; Bayley, therefore, had full authority to make it a term of the contract, that Sir W. Stirling should accept such title as General St. John had; and this Court will compel the specific performance of the contract, without any inquiry into the vendor's title.

Another objection is, that the title to this annuity was in litigation at the time of the contract. But this allegation is not supported by any evidence. It is said, that it appears that General St. John has filed a bill for a recovery of the rents of the estates on which the annuity is secured, and to have those rents impounded, and that it is to be thence inferred that the title is in litigation. I can draw no such inference. Nothing is more common than to file a bill for a receiver, where the title of the incumbrancer is not in question, for the purpose of having the rents secured: and, in the present case there was a dispute between another incumbrancer and General St. John as to their respective priorities. If the title to the annuity had been in dispute, the defendant could have shewn that it was so in dispute: for every person (though not a party to a suit) has a right to office copies of the proceedings in that suit for the purpose of giving them in evidence.

(1) 18 Ves. 122.



REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of King's Bench.

MICHAELMAS TERM	1
HILARY TERM	125
EASTER TERM	173
TRINITY TERM	291

CASES ARGUED AND DETERMINED

IN THE

Court of King's Bench,

COMMENCING IN THE

SITTINGS BEFORE MICHAELMAS TERM, 9 GEO. IV.

1828. }
Oct. 27. } PAGE 8. NEWMAN.

Statute of Limitations—Process.

A latitat duly issued, returned, and continued, to save the statute of limitations, is well connected with a bill of Middlesex, by which the defendant is ultimately brought into court; the description of process being the same; and the latitat always pre-supposing a bill of Middlesex.

On a reference to this case (1), it will be seen, that the question was, whether a bill of Middlesex was a good continuance of a latitat duly returned, and entered on the roll, in order to save the statute of limitations. An amendment in the plaintiff's replication was on that occasion suggested by Mr. Justice Bayley. The suggestion was adopted, and the plaintiff accordingly amended his replication, by not only setting out the latitat, return, and continuances down to the bill of Middlesex, but also adding that the latitat was sued out with intent to declare upon the cause of action in this cause. [The form of the replication as amended will be found in 5 *Law Journ.* K.B. 264.] To

that replication the defendant demurred; and the plaintiff having joined in the demurrer, the case now came on for argument.

Mr. Reader, for the plaintiff.—The replication having been amended according to the suggestion of one of the learned Judges, the plaintiff submits that he is entitled to judgment. It has been decided in many cases, that a latitat is a good commencement of a suit as regards the statute of limitations. This has always been held, from the case in *Styles*, 156, down to the present time. The latitat is, for this purpose, in the nature of an original. And, supposing it to be a good commencement of the process, it has been well continued. A good test by which to try whether it has been so continued is found in presenting the question, "What other course could the plaintiff have pursued?" The defendant is ultimately found in Middlesex; and is there served with the only process applicable to his then state of locality. If it should be held that, in such a case, a bill of Middlesex is not the proper process, the inevitable consequence would be that every defendant who chose to keep himself within that county would escape altogether. A latitat is admittedly a good commencement of a suit; and if it

(1) 5 *Law Journ.* K.B. 263.
Vol. VII. K.B.

be, why may it not support all the necessary subsequent process to bring the defendant into court? The other side must contend, that, in the present case, the bill of Middlesex was the commencement of a new suit. The latitat pre-supposes a bill of Middlesex; and the want of a bill of Middlesex, in point of fact, is never any objection to it. Suppose then, in point of fact, a bill of Middlesex had issued previously to the latitat, would not the bill of Middlesex subsequently issued be a good continuance of the former one? The authorities on the present question are perfectly consistent with reason. Even process which is voidable, if it be not absolutely void, will be sufficient to take a case out of the statute. This was held in *Karver v. James* (2), and appears to be confirmed by the cases mentioned in the note to that case. The same was also held in the more recent case of *Plummer v. Woodburne* (3), where it was held, that an *ac etiam* writ was a good continuance of common process, and that the continuance need not be by *alias* and *pluries* writs.

Mr. Comyn, contra.—The plaintiff's argument assumes certain facts which do not appear. It may be admitted that the latitat was a good commencement of the suit. The allegation newly introduced is merely that the causes of action are the same; and, no doubt, the two processes are sufficiently connected by the averment. Still the plaintiff, in order to justify his issuing a bill of Middlesex upon a latitat, should have averred that the defendant was not to be found in the county of Kent when the bill of Middlesex was sued out. The plaintiff is bound to sue out the same kind of process. None of the cases in *Willes* apply to the present: no case has yet decided that a bill of Middlesex is a good continuance of a latitat.

Mr. Justice Bayley.—I have no doubt that in this case the bill of Middlesex was a good continuance of the latitat. I agree in the argument of the defendant's counsel, that the process must be the same in point of description; and, I think, the process in this cause satisfies that rule. That a latitat is a good commencement of a suit, has been decided over and over again. It was so

held in *Johnson v. Smith* (4), and has been the practice ever since. The ancient practice was to issue a precept into the county in which the Court sat; and that was called a bill of Middlesex (5); and if the defendant could not be found in that county, a writ of latitat issued into another county, reciting the bill of Middlesex and the return of the sheriff of that county, that the defendant was not found within the bailiwick; and the latitat therefore invariably pre-supposes the return to a bill of Middlesex. It is now clearly established, that a defendant is not at liberty to inquire whether, in fact, any bill of Middlesex has been so issued and returned. Here the bill of Middlesex is recited; and the latitat is stated to be "for the plea and bill aforesaid." The bill of Middlesex subsequently issued is for the same cause of action, and appears to me to be well connected with the previous process. It is *ejusdem generis*. If you begin by bill you must go on by bill; if by original, you must go on by original; and here the plaintiff has, I think, properly carried on his proceedings by bill.

Mr. Justice Holroyd.—I also think that the process is well continued from the first proceeding by latitat. The description of process is the same. The promises and undertakings are averred to be the same, and the suit throughout to be the same. And I know of no other course which the plaintiff could properly have taken in order to bring the defendant into court, by process running into the county of Middlesex.

Judgment for the plaintiff.

1828. }
Oct. 29. } PHILLIPS v. ALLAN.

Foreign Judgment — Cessio Bonorum — Sequestration.

1. Semble — That a foreign judgment between the two parties to a contract made in this country is *prima facie* evidence between

(4) 2 Burr. 950.

(5) And accordingly when the Court sat at Oxford, by reason of the plague, Michaelmas 1665, the process was called by bill of Oxford.—See Trye's *Jus. Filizar*, 101. This fact is adopted by Blackstone, 3 Comm. 284.

(2) Willes, 255.

(3) 4 B. & C. 625; 7 D. & R. 25; 4 Law Journ. K.B. 6.

the parties, provided there be no legal objection on the face of the proceedings.

2. But the discharge of a defendant in Scotland, under the law there called the *cessio bonorum*, is not pleadable in bar to an action for debt which arose in this country, unless it appear that the creditor has received a dividend, or otherwise claimed the benefit of that law.

3. The mere appearance of the English creditor before the Scotch Court, and his opposing the debtor's discharge under the law of *cessio bonorum*, is not such a claiming by him of the benefit of that law, as to deprive him of his right afterwards to sue the debtor in England.

4. But an English debt, proveable under a Scotch sequestration, is barred by the 54 Geo. 3. c. 137.

This was an action of *indebitatus assumpsit*. The declaration contained a count upon a bill of exchange, accepted by the defendant; another for goods sold and delivered; with the usual money counts, and a count upon an account stated.

The defendant pleaded, "that, after the accruing of the said several causes of action, and before the exhibiting of the plaintiff's bill, to wit, on &c., he, the said defendant, was a prisoner for debt, at the suit of one John Sim, in a certain prison called the Tolbooth of Canongate, in that part of the united kingdom called Scotland, to wit, at &c.; and being so in prison there, he, the said defendant, afterwards (to wit), on &c., to wit, at Westminster, aforesaid, did present unto the Lords of his Majesty's Council and Session of that part of the united kingdom called Scotland, as aforesaid, a certain petition, setting forth that upon the 20th of March 1826, aforesaid, he, the said defendant, was incarcerated in the Tolbooth of Canongate aforesaid, by virtue of letters of caption, raised at the instance of John Sim, merchant, (meaning the aforesaid John Sim,) and that he, the said defendant, was thereafter arrested in the said Tolbooth by virtue of letters of caption, raised at the instance of certain other persons therein named; and that he, the said defendant, was continually oppressed and also in danger of being arrested at the instance of certain persons thereafter named, his real or pretended creditors, (naming

among others the said plaintiff); and also that the inability of him, the said defendant, to pay his debts was not occasioned by any fraud in him, but was owing to misfortunes and losses sustained by him, as would, if required, be particularly condiscended in the course of that process. And that, although he had made offer to convey his whole effects to his said creditors, yet they refused to accept thereof, or consent to his being set at liberty; and, therefore, that it ought and should be found and declared by decree of the Lords of Council and Session aforesaid, that the inability of the said defendant to pay his debts was not owing to fraud but to misfortune; and that, it being so found and declared, he, the said defendant, should be ordained to be set at liberty from the said prison upon his granting a disposition *omnium bonorum*, upon oath, in favour of his creditors, in such form as the said Lords should direct; and all Judges, messengers, and officers of his Majesty's law, should be discharged from putting any diligence into execution against him, and from troubling, molesting, or incarcerating him, in time coming, for payment of any debts due by him to the persons named in the said petition, and others; and that the said Lords of Council and Session ought to dispense with him, the said defendant, wearing the habit directed to be worn by bankrupts, by any law or practice or otherwise, after the form and tenor of the laws and daily practice of Scotland, used and observed in the like cases in all points. Whereupon, afterwards, to wit, on &c., at &c. according to the course and practice of the said Court of the Lords of Council and Session, it was ordered that notice should be given to the creditors named in the said petition, (and among others to the said plaintiff,) to compare before the Lords of Council and Session aforesaid, at Edinburgh, or wherever they might happen to be for the time, on the 20th of June 1826, in the hour of cause, with continuation of days, to answer at the instance of the said defendant in respect of the matter in the said petition contained. And that afterwards, to wit, on &c., at &c., according to the course and practice of the said Court, notice was given to the creditors named in the said petition, (and among others to the said plaintiff,) to compare as aforesaid. Whereupon, after-

wards, to wit, on the said 20th of June aforesaid, to wit, at Westminster aforesaid, in the county aforesaid, the subject matter of the said petition, according to the course and practice of the said Court, was considered, to wit, to the 3d of March 1827, at which day, to wit, on the day and year last aforesaid, to wit, at Westminster aforesaid, in the county aforesaid, according to the course and practice of the said court, the subject matter of the said petition was heard and considered before the said Lords of Council and Session, and certain creditors of the said defendant (and among others the said plaintiff,) did appear by counsel, and were heard in opposition to the said defendant in respect of the said petition, and the subject matter thereof. Whereupon it was afterwards, to wit, on the day and year last aforesaid, at Westminster aforesaid, in the county aforesaid, considered and adjudged in the said court, that the said Lords having heard counsel for both parties, did find the said defendant entitled to the benefit of the process aforesaid, upon lodging in process a disposition of his effects, and also upon making oath in terms of the acts of *sederunt*. Whereupon the said defendant afterwards, to wit, on &c. at &c., according to the said course and practice, did lodge in process a disposition of his effects, and also made oath in terms of the acts of *sederunt*, and thereupon became, and was entitled to be discharged, and was then and there discharged out of custody. And that, from the time of the said imprisonment to the time of the said discharge from custody, the said plaintiff had no cause of action against him, the said defendant, save and except the causes of action in the said bill mentioned. And that afterwards, to wit, on &c., certain funds, goods and chattels of the said defendant of great value, to wit, of &c., became available and might have been recovered under the said disposition for the benefit of the creditors of the said defendant, and for the benefit among others of the said plaintiff, to wit, &c. And that all and singular the proceedings aforesaid, were pursuant to, and in conformity with the laws of Scotland aforesaid, and that, according to the said laws, the said Lords of Council and Session were competent and authorized to act as aforesaid in the premises, to wit, at &c. Whereby, and by

reason, and by the force and effect, of the laws of Scotland aforesaid, he, the said defendant, hath become absolutely discharged in respect of his person, lands, goods and chattels, from the several causes of action aforesaid," (and so concluded in bar).

There was another plea, similar, except that it treated the discharge of the Scotch Court as being unaccompanied by any condition; and a third special plea treating the discharge as a discharge of the person only.

To these pleas the plaintiff replied, "that the causes of action severally accrued to the plaintiff within this kingdom of England." To this the defendant demurred; and the plaintiff joined in demurrer.

Mr. Barstow, for the defendant.—The question is new as far as regards authority. There has been no case exactly like the present in all its circumstances; and it must therefore be considered, in some degree, upon principle. From the language of the plaintiff's replication, it appears that he would advance as a maxim, "that a contract made in one county is not to be governed by the laws of another." The defendant is under no necessity to dispute such a maxim. He admits it. And, for the present, he may concede that the judgment of the Scotch Court is to be considered in all respects as that of a foreign court. Conceding this, the defendant relies upon three propositions.

First,—If a contract be made in this country, and both parties appear before a foreign court, in respect of the subject matter of the contract, that Court may adjudicate upon it.

Secondly,—If the judgment of that Court appear to be consistent in principle with the laws of this country, it will be noticed by the Courts in this country.

Thirdly,—If it be not impeached when pleaded, it may bind the parties here, as it would have bound them in the foreign country.

The first proposition requires no argument for its support. It is merely a statement that the subjects of this country may apply for justice in foreign countries. The laws of this country take notice of foreign contracts; and the Courts of this country enforce them according to the laws of the

country in which they were made. The subject matter in the present case is personal contract,—and, in general, personal contracts are neither stationary nor local, but follow the persons of the parties. This principle is distinctly laid down by Lord Loughborough in the case of *Sill v. Worwick* (1). “It is indeed a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality. The meaning of the proposition is, *not* that personal property has no *visible* locality; but that it is subject to that law which governs the person of the owner.” If then, foreigners and English subjects may, in this country, enforce contracts made abroad, and it were held, that contracts made in this country cannot be dealt with at all by foreign countries, the subjects of this country would be under great hardship. Whilst liable to the full extent of all the obligations cast upon them by the laws of foreign states, they would be stripped of all power to enforce their rights, either against foreigners or their fellow-subjects. The statute of limitations would be in full force against the plaintiff, beginning to run from the time of the cause of action accruing, and open to the defendant to avail himself of it if he ever returned, whilst the plaintiff would be debarred all means of recovering his demand abroad. It is submitted, therefore, that, as on the one hand, we adjudicate upon contracts made in foreign countries, taking care to observe the laws of each country; and, as we expect foreign Courts to notice our judgments; so, on the other hand, foreign Courts may adjudicate upon contracts made in this country, they taking care to observe our laws,—and we, by the comity of nations, will notice their judgments. But, considering that the law of a country in which a contract is made is part of the contract itself, it may be admitted that the foreign Court can no more apply foreign laws to a contract made in this country than an English Court can apply the English law to a contract made in a foreign country. This leads to the second proposition.

It is assumed by the first, that foreign Courts may reasonably be permitted to *deal* between

the parties to a contract made in this country—that they may exercise the moderate power of seeking to *do justice* between them. It is impossible to put it more moderately. Then comes the question: What attention will the Court in this country pay to a foreign adjudication? It may be assumed that they will not reject it altogether, merely because the contract was made in this country—that, at the least, they will examine it. If they should refuse to examine it, and reject it altogether, there would be an end of the foreign jurisdiction; because, in that case, a person summoned before such a jurisdiction would be entitled to object to it. He might say, “I object to your jurisdiction because the contract was made in England. I object to your proceeding in a case wherein the plaintiff and I shall not be upon equal terms. If you give judgment against me you will enforce it; but if you give a conclusive judgment in my favour, the Courts in England will pay no attention to your decision; and your judgment in my favour will be no protection to me.” The cases on this subject, as far as regards foreign judgments, relate chiefly to judgments where the *cause of action* arose in a foreign country—and this is the circumstance which gives a novelty to the present case. Several of the cases relative to the effect given to foreign judgments will be found collected in the Note to the case of *Walker v. Witter* (2). They all apply to cases where the plaintiff is seeking to maintain an action upon a foreign judgment; and, from the whole, as well as from a Note to the case of *Collins v. Lord Matthem* (3), it appears that a foreign judgment is *prima facie* evidence of the debt; and is conclusive unless it be impeached by the other party. There are indeed cases in which the Court, perceiving that the judgment is unjust on the face of it, will give it no attention whatever. Such was *Buchanan v. Rucker* (4), where it appeared on the face of the proceedings, that the judgment was given in the defendant's absence, and that the defendant never had any notice of the process; the declaration being nailed on the Court House door. It did not appear that he had ever been within the jurisdiction of the Court.

(2) 1 Doug. 1.

(3) 5 East, 475.

(4) 9 East, 192.

(1) 1 H. Bl. 691.

But, subject to this reservation, a foreign judgment is *prima facie* evidence to charge a defendant. He may impeach it; but there is no decision, no principle upon which he could impeach it *merely* because the cause of action arose in this country. If, for instance, a man were to be sued in a foreign Court for money lent in England, and judgment were in that Court to pass against him, the plaintiff might here sue in *assumpsit* upon that judgment, and the judgment would be *prima facie* sufficient. The plaintiff would not be under any necessity to prove the money lent. And surely in such a case the defendant never could successfully plead in bar, that the cause of action arose in England. Then, upon the same principle, and for the same reason, a foreign judgment is *prima facie* evidence for a defendant. If it is *prima facie* sufficient to charge, it must be *prima facie* sufficient to discharge him. Undoubtedly, it is subject to question and to inquiry in one case as it is in the other. For this, the case of *Plummer v. Woodburn* (5), is an authority in point. There, to an action of *assumpsit*, the defendant pleaded, as to some of the counts, that he had been sued in a court of judicature in the island of St. Christopher; that he pleaded *non assumpsit*, upon which issue was joined; that the jury found a verdict for him, the defendant, and that judgment was given in his favour on that verdict. The plaintiffs, in answer to that plea, replied matters upon which he relied, to shew that the judgment ought not to conclude them. The defendant demurred to the replication, and the Court gave judgment for the plaintiffs. But the reason of their doing so is important. It was, because it did not appear that the judgment of the Colonial Court was *conclusive* in the colony. If it had appeared that the judgment was *conclusive*, it seems the plea would have been a good bar. The plaintiffs in that case did not venture to reply, "that the causes of action arose in England," although it is easy to perceive that the fact was so; for, the defendant having pleaded the statute of limitations to the whole, the plaintiffs, as to some of the counts, replied that the causes of action arose while the defendant was at the island of St. Christopher; and, as to the other

counts, they took issue on the plea. It appeared also that the plaintiffs were merchants residing in England. The plaintiffs in that case only sought to have further inquiry; and they were allowed to have it, because the judgment did not appear to be *conclusive*. Here the plaintiff seeks to exclude the judgment altogether, although it does appear to be *conclusive*. Assuming then that the Court will go so far as to examine this foreign judgment, it remains to be seen whether that judgment is consistent in principle with the laws of this country. The proceeding is called that of *cessio bonorum*; and is analogous, in some respects, to the bankrupt laws, and in others, to the insolvent law, of this country. There appears to be no want of severity in the Scotch laws against a debtor. Bankruptcy was formerly considered disgraceful to a degree amounting nearly to infamy, and it subjected the debtor to be branded by the wearing of a particular habit. His discharge was in some cases very limited, but in none was he entitled to any species of discharge unless he satisfied the Court that his insolvency was not caused by any fraud, but was attributable to losses and misfortunes. This leads to a consideration of the case of *Sidaway v. Hay* (6). It is here cited to shew that there is a proceeding in Scotland, analogous to our bankrupt law, which binds the English creditor whether he be a party to that proceeding or not. That was a proceeding under the law of sequestration. The present is under the law of *cessio bonorum*. In that case the debt was contracted in England. The defendant pleaded his discharge under a sequestration issued according to the 54 Geo. 3. c. 137. The defendant did not there plead, as he does here, that the plaintiff availed himself of the proceeding; but simply, that the debt was proveable under the commission.

[*Mr. Justice Bayley*.—Nor does it appear here that the plaintiff availed himself of the Scotch proceeding.]

It appears he did all that it was in his power to do in the course of the proceeding. The Court, in that case, upon a consideration of the act of parliament, decided that the defendant was discharged although the cause of action arose in England. That

(5) 4 B. & C. 625; 7 D. & R. 25; 4 Law Journ. K.B. 6.

(6) 3 B. & C. 12; 4 D. & R. 658.

case arose undoubtedly under a particular act of parliament; but it is observable that that act was passed in order to force debtors in Scotland to give up their property for the benefit of their creditors. It was intended to give creditors, by a compulsory process, at least the same benefit which they would have under the ordinary law by the voluntary proceeding of *cessio bonorum*. The act provides for various acts of bankruptcy, imprisonment being one; and it enables the creditor to petition this very Court of Session for a sequestration. Now, if a creditor in England would be bound by this act of parliament, whether he came in under the sequestration or not; (and the case of *Sidaway v. Hay* decided that he would;) surely, a creditor in England who chooses to appear before the Scotch Court, oppose the debtor, and take all the benefit of the *cessio bonorum*, is equally bound with the debtor. And if the judgment of Lord Tenterden in that case be read, substituting the proceeding of "*cessio bonorum*" for that of "sequestration," and "the plaintiff's own consent" for "the act of the legislature," it will appear to be a judgment in favour of the present defendant. His Lordship observes, "Now, it appears to us, that these notices would not have been required by the legislature unless it had been intended that the discharge should operate upon *English* as well as Scotch creditors.

"No sufficient reason has occurred to us for giving the opportunity of inquiring into the affairs and conduct of the bankrupt, and of objecting to his discharge, to persons against whom the discharge would be inoperative, with reference to a proceeding in an English Court. If it be said, that it was intended only to enable English creditors to take the benefit of the sequestration, if they should so think fit, and to object to the discharge for the purpose of retaining their right of suit in Scotland, this argument will contain an acknowledgment that English creditors may have the benefit of the sequestration; and then, it being clear that the bankrupt is deprived of all his property for the benefit of all his creditors who choose to partake of the distribution of it by an act of the legislature, justice seems manifestly to require, that no one who may partake of the benefit should be allowed to sue the debtor,

whose all has been thus given up, if, by accident, he may happen to meet with him in England."

It being clear, then, that the sequestration law, a law passed by the legislature of this country, will bind the English creditor, whether he come in under the sequestration or not; it being clear also, that this English creditor has *chosen* to come in under the law of *cessio bonorum*, it is not incumbent on the defendant to shew that the latter gives the creditor all the advantages of the former: the creditor has adopted the law with a knowledge of it.

[*Mr. Justice Bayley*.—He may not have known the law to which he was a foreigner.]

That cannot be assumed in his favour. A man who appears before a court of justice, and is heard by his counsel, is not presumed to be ignorant of the law to which he is a suitor. But, even the English law, in its spirit, has not been violated by this course of proceeding. In principle, though not altogether in detail, the laws appear to be the same. If the creditor intended to rely upon any defect in the foreign law, or to assert that he was ignorant of that law, he should have shewn this by his replication; though even then, it might not be unfair to bind him by a law of his own choosing. On the whole, it is submitted, that the judgment of this Court is *prima facie* evidence for the defendant: because, first, the judgment of the Court, by analogy to the sequestration law, is not at variance with the law passed by the English legislature, or with the English bankrupt law; secondly, because the plaintiff appeared before the Court, and pleaded to its jurisdiction; and thirdly, because the judgment of such a Court would be *prima facie* evidence in the plaintiff's favour. The reason here is stronger; for in one case, the debtor might be forced to appear and plead to the foreign jurisdiction; while, in the present, the creditor came in, and pleaded to it of his own accord. Supposing, then, that the judgment of the Court is merely *prima facie* evidence for the defendant, the present argument arrives at the third proposition—that, as the plaintiff was bound by the proceedings in Scotland, he ought to be bound by them here. The defendant before the Scotch

Court, gave up his property as the price and consideration of his being discharged, after having shewn that he was a proper object for the benefit of the Scotch law. The plaintiff was a party to that compact. He has obtained all the benefit for which he stipulated.

[*Mr. Justice Bayley.*—There is the difficulty which presses you. You cannot shew that the plaintiff has derived any benefit from this proceeding.]

He has had all that he bargained for. If, by his pleading, he had stated any new matter, it might be different. If he had replied, that the defendant obtained his discharge by fraud ; that he had not given up all his property ; that he had failed in any one of the conditions imposed upon him by the Scotch Court, the case might be very different. But it stands admitted by the pleadings, that the defendant has performed his part of the compact, and that the plaintiff is seeking to escape from his. Can there be a doubt that, when the parties appeared before the Scotch Court, the agreement between them was this : the defendant said, "I am willing to give up my property to you, my creditors ; to submit my conduct to examination. You may oppose me before this Court, which shall judge between us. If the Court, upon examination, be satisfied with my conduct, and order me to be discharged from my debts, upon my submitting to the *cessio bonorum*, will you be content?" And the creditors said, "We will." Was not the agreement the same in meaning as if it had been expressed in so many words ? This part of the question introduces the case of *Buchanan v. Smith* (7), upon which the other side will rely. That was an action of assumpsit. The defendant pleaded his discharge under an insolvent act of the state of Maryland, in the United States. But the facts, and the conduct of the parties, were very different from those which appear in the present case. The defendant did not expressly state that he had inserted the plaintiff's debt in his schedule : he said, in general terms, "a list of his creditors." It did not appear, that the plaintiffs had the slightest notice of the proceedings until they saw them detailed

in the plea. Still less did it appear, that they had appeared before the American Court, and opposed the defendant's discharge ; and these facts appear to be reasons for the present defendant, even using in his favour the judgment of Lord Kenyon in that case. It was as follows :—

"It is impossible to say, that a contract made in one country is to be governed by the laws of another. It might as well be contended, that if the State of Maryland has enacted, that no debts due from its own subjects to the subjects of England should be paid, the plaintiff would be bound by it. This is the case of a contract lawfully made by a subject in this country, which he resorts to a court of justice to enforce ; and the only answer given is, that a law has been made in a foreign country to discharge these defendants from their debts, on condition of their having relinquished all their property to their creditors. But, how is that an answer to a subject of this country suing on a lawful contract made here ? How can it be pretended, that he is bound by a condition, to which he has given *no assent, either express or implied* ? It is true, that we so far give effect to foreign laws of bankruptcy, as that assignees of bankrupts deriving titles under foreign ordinances, are permitted to sue here for debts due to the bankrupts' estates ; but that is, because the right to personal property must be governed by the laws of that country where the owner is domiciled." —Then his Lordship is made to refer to a case of *Ballantine v. Golding*, which has nothing to do with the present, taken from *Cooke's Bankrupt Laws*—He goes on :—

"But, in the same page of the book, from whence that was quoted (*Cooke's Bankrupt Laws*), is to be found an opinion of Lord Talbot directly contrary to the conclusion we are desired to draw in this case ; for there, he held, that, though the commission of bankrupt issued here attached on the bankrupt's effects in the plantations, yet his certificate would not prevent him from being sued there for a debt arising therein."

Every search has been made for such a case decided by Lord Talbot, and it has not been found.

But, in a new edition of the same book, p. 488, appears a marginal note, saying

this was only an opinion given by Lord Talbot as counsel; and *Beames, Lex Mercatoria*, is referred to. Yet even there, it is not said upon what authority it is vouched that he gave such an opinion at all. As it stands, it would be an extraordinary opinion; though, at the most, it does not go the length of this case; for it does not appear that this supposed case from Mr. Talbot's opinion, was one in which the creditor had proved his debt under the commission, and opposed the defendant's certificate.

The learned Reporter, Mr. East, gives a note referring to the case of *Waring v. Knight*, before Lord Mansfield at Nisi Prius, in which his Lordship is said to have given the same opinion as that held by Mr. Talbot. He again quotes *Cooke's Bankrupt Laws* for this: neither can that case be found; but in the case of *Sill v. Worswick* (8), Lord Loughborough said, he could not find that case; that it did not appear how the debt was contracted, or how the suit was carried on; that, at most, it was but a decision at Nisi Prius; and that it was against the current of authorities.

Whether it was or not, it had no bearing on the case of *Buchanan v. Smith*. There are some other cases as to the effect of a discharge by the foreign laws, analogous to bankruptcy. They were all noticed and disposed of by Lord Tenterden in the Scotch sequestration case of *Sidamay v. Hay*. *Smith v. Buchanan* has already been noticed. In *Potter v. Brown* (9), the debt was an American debt. *Pedder v. Mac Master* (10) came before the Court on a motion to enter an *exoneretur* on the bailpiece; and the Court refused to interfere in a summary way: that was the case of a discharge at Hamburgh. *Quin v. Keefe* (11) came before the Court in the same way, and was similarly disposed of. It afterwards went off upon a defect in the plea: and it is a remarkable fact, that in no one of these cases did it appear that the plaintiff in the action had recognized the jurisdiction of the foreign court. In the absence then of any authority against

the defendant, and looking at the case upon principle, a reference may be made to some of the consequences which would follow the deciding that the plaintiff is not bound by these proceedings. The first which presents itself is, the injustice to the defendant. He gave up his property on the faith of the compact with the plaintiff: he submitted to the plaintiff's opposition. If that opposition had been well founded, the Scotch Court would not have discharged him. Even had it been successful, and the imprisonment had thereby been prolonged, the reason is exactly the same. The plaintiff's right to get rid of his engagement is the same, whether the opposition was successful or not. The next is, the injustice towards any English creditors of the defendant who may not have had notice of the proceedings before the Scotch Court. They probably can have no advantage from the assignment of the property in Scotland, while the plaintiff will be entitled to his share of it. At all events, those English creditors have had no opportunity of opposing the defendant's discharge. But, above all, there is the injustice towards the Scotch creditors. This plaintiff has had all the advantage of being one of them: he has been allowed with them to oppose the defendant's discharge; and with them to come in upon the fund.

[*Mr. Justice Bayley*.—It does not appear that the plaintiff has received, or has ever claimed any thing.]

His dividend must be set apart; and the fund divisible among the creditors is by so much reduced. The Scotch creditors cannot sue in this country. They, beyond all question, will be barred by those proceedings. But, if the plaintiff be allowed to recover, he would, in breach of faith with them and the Scotch Court, be allowed to take his share of the property in Scotland, and yet seize that property in England which ought to go into the general fund. This prominent fact in the case relieves it from that difficulty, which might otherwise attend it, if it had to be considered upon the general question of international law. The plaintiff voluntarily came before the Scotch Court, and pleaded to its jurisdiction. He does not, in the slightest degree, impeach their judgment; and, upon every principle, (in the absence

(8) 1 H. Bl. 693.

(9) 5 East, 124.

(10) 8 Term Rep. 609.

(11) 2 H. Bl. 553.

of authority the other way,) he ought to be bound by that judgment.

Hitherto the defendant's case has been considered upon the admission, that the Court of Session in Scotland is to be considered entirely as a foreign court. But that court is to be considered as a court within the United Kingdom, though of local jurisdiction; and its judgment is therefore entitled to a greater degree of attention, than that of a mere foreign court. Appeal lies from the judgment of that Court to the same ultimate jurisdiction as that to which the judgments of this Court may be carried. Its proceedings are subject to the same legislature; and several acts of parliament have been passed to regulate them. Among them is the 50 Geo. 3. c. 112. respecting this very proceeding of *cessio bonorum*. It is, therefore, impossible to treat this as the judgment of a court in a foreign country, the subjects of which are not bound by the legislature of this. In England, the case of *Sidaway v. Hay* has decided, that an English debt, proveable under a Scotch sequestration, is barred. In Scotland, there was a case carried up to the House of Lords, *The Bank of Scotland v. Cuthbert* (12), wherein, upon the same principle, it was decided, that a Scotch debt, proveable under an English commission, is barred: and in *Selkirk v. Davis* (13), in the House of Lords, upon a question, whether the member of a firm, having houses of trade in England and in Scotland, should be considered as an English or a Scotch creditor, Lord Eldon said, "Whatever may be the difficulties, yet there is no difficulty if the Scotch creditor thinks proper to come in under the English commission. Then he is, to all intents and purposes, an English creditor." And, in the next page, speaking of such a person filling the character of a debtor, he says, "When that person applied to the English Commission, he consented to bring in his foreign debt under its distribution." So, with regard to our insolvent law: Scotch creditors may come in and oppose the insolvent, and share the fund with the English creditors. Indeed, one of the provisions of the Insol-

vent Act, 7 Geo. 4. c. 57. s. 42, is for the insertion of advertisements in the Edinburgh Gazette. It may be inferred, that they could not afterwards sue the debtor in Scotland. According to section 61, they could not sue him here at all. It is obvious, that, in our law, we expect the Scotch Court to take notice of both our bankrupt and our insolvent laws, and to give effect to them. The converse cannot fairly be resisted. The English Courts will take notice of the law of Scotland, and give effect to it. In the present case, there is no necessity to lay down any general rule, because the plaintiff, by his own act, has rendered it unnecessary. It is not competent for him to say, that the Scotch Court had no jurisdiction; for he pleaded to it. On the whole, it is submitted, that there is no authority against the defendant; and that principle is with him. By giving judgment for him, the Court will preserve uniformity of proceeding in all courts of justice relative to either bankruptcy or insolvency. A decision for the plaintiff will produce uncertainty and injustice, and will cause unequal distribution, and conflicting claims among creditors of the same class, and who have all agreed to be bound by the same jurisdiction.

Mr. Alderson, contra, was stopped.

Mr. Justice Bayley.—I am of opinion, that the facts disclosed by the pleadings in this cause, are not sufficient to bar the plaintiff's right of action. The creditor is no more barred in respect of an English debt by a Scotch proceeding of this description, than he would be by an Irish commission of bankruptcy. I admit, that English subjects are bound by act of parliament, in respect of English debts proveable under a Scotch sequestration: but they are so bound, simply because the legislature, capable of binding English subjects, has declared, that they shall be. That was the ground of the decision in the case of *Sidaway v. Hay*. The act of parliament passed to regulate Scotch sequestrations, evidently imported an intention to bind English creditors. Among other provisions, I remember there was one for the insertion of advertisements in English, as well as Scotch, newspapers. The Scotch sequestration law is, therefore, the general law of Great Bri-

(12) 1 Rose's Cases in Bankruptcy, 462.

(13) 2 Ibid. 318.

tain; but, the law relied upon in this case (the law of *cessio bonorum*.) is purely a Scotch law, and is applicable to Scotland only. I should think that it is a proceeding which binds in respect of Scotch debts only; but, at all events, there is not enough in this case to bind the English creditor. The argument of the defendant's counsel seems properly to admit, that if it had not been for the fact of the plaintiff having appeared before the Scotch Court, and opposed the defendant's discharge, there could not be a question raised upon the point. Reliance is therefore placed upon this fact; and it is said, that the plaintiff has come in and shared with the Scotch creditors. I cannot find that this is the case; and it is the want of this fact which has pressed upon the whole of Mr. Barstow's argument. Where does it appear that the plaintiff has shared with the rest of the creditors? It is said, that the plaintiff will be "entitled" to a dividend; but it does not appear that he has ever claimed a dividend, or claimed any benefit whatever from this proceeding. For this reason, I think the foundation of the argument entirely fails. Let us see what the proceeding really was. The defendant being in prison in Scotland, petitions the Scotch Court for relief; and his petition states his apprehension of being sued by his other creditors; and he prays, that, under certain conditions, those creditors may be restrained from suing him. But from suing him where? In Scotland undoubtedly—in the Scotch Courts. The Court in question had no power to restrain a proceeding in a court belonging to a foreign country. Notice is then given to the creditors; and, among others, to the plaintiff. Some of the creditors appeared, (among them the plaintiff,) and opposed the defendant in respect of his petition, and the subject-matter thereof.—[Here the learned Judge read the pleas.]—But what was the subject-matter? What was the prayer of the petition? Why, that he might be discharged from the Scotch prison, and freed from further suit by the Scotch law. The plaintiff, it is said, appeared before the Scotch Court; opposed the defendant, and thereby admitted the Scotch jurisdiction. I grant that he did. He had a right to do so. It being prayed by this defendant that the plaintiff might be prevented from suing him

in Scotland, the plaintiff opposed that prayer. The Court granted the prayer; and I admit that the plaintiff cannot sue the defendant in Scotland. It is impossible to carry it any further than this. If it had been shewn that the plaintiff had, of his own accord, gone in, and had shared with the Scotch creditors, the case might call for consideration; but the fact which would raise that question is wanting. For these reasons, I think, that the replication is a good answer to the pleas, and that the plaintiff is entitled to judgment.

Mr. Justice Holroyd.—I think this case is directly in principle with *Smith v. Buchanan*; and is distinguishable from that of *Sidaway v. Hay*. The utmost that appears by the defendant's plea, is, that property "became available" for the plaintiff and the rest of the creditors under this proceeding. It does not appear, that the plaintiff claimed to share it. The plaintiff claimed no relief under the proceeding; for his merely appearing before the Scotch Court cannot be considered as an application for relief. His appearing to oppose the petition would be quite consistent with the fact of his having appeared to object to the jurisdiction of the Court.

Mr. Justice Littledale.—I am of the same opinion. It seems to be admitted, that, if it were not for the appearance of the plaintiff before the Scotch Court, there would be no question whatever on the subject. But his merely appearing and opposing the prayer of the petition, does not, I think, deprive him of his right to sue in England for an English debt. If he had sought relief under the proceeding, and had taken a dividend under it with the rest of the creditors, the case might be different. The want of this fact has been a difficulty which has affected Mr. Barstow's argument throughout. I think, that in order to bind an English creditor by the Scotch proceeding of *cessio bonorum*, it must appear that the creditor has sought the relief given to creditors by that proceeding.

Judgment for the plaintiff.

1828. } PAUL AND OTHERS v. NURSE
Oct. 28. } AND ANOTHER.

Landlord and Tenant—Assigning without consent.

1. *A covenant that the lessee, his executors or administrators, will not assign without the consent of the lessor, does not bind the assignee of the lessee, so as to enable the lessor to maintain ejectment for the breach of the covenant.*

2. *And semble, that the lessor has no remedy whatever against the assignee.*

3. *But if he have any, he cannot sue the assignee for breach of the other covenants in the lease subsequent to his assigning over; founding his action upon the supposed privity of estate. He must recover, if at all, upon an action against the assignee for damages, by reason of the assignee having wrongfully destroyed the privity of estate.*

Action of covenant by the representatives of the lessor against the assignees of the lessee. Several breaches were assigned, charging non-payment of rent, not repairing, want of good husbandry, &c. The declaration also set out a covenant in the lease, which provided that it should be lawful for the lessee, his executors, or administrators, upon the determination of the term (but not before) to take down and remove a certain windmill or grist-mill, round-house, and other buildings then standing, or thereafter to be erected and built, upon part of the demised premises. The breach assigned upon this covenant was, that before the determination of the term, the defendants (being assignees of the term) did take down and remove from and off the demised premises, the said windmill or grist-mill, and round-house; and kept and continued the same so taken down and removed for a long space of time, to wit, from thence hitherto; whereby the value of the demised premises and the security for the rent were greatly diminished.

The defendants, after other pleas, pleaded fifthly, as to the non-payment of rent, that, after the assignment to them, and before any part of the rent mentioned in the declaration became due, the defendants assigned the premises and all their interest therein, to one Edmund Nurse the elder, to hold to him the said E. N. for the remainder of the

term; and that the said E. N. entered by virtue of that assignment.

To this plea the plaintiffs replied, that in the indenture the lessee covenanted, for himself, his heirs, executors, administrators, and assigns, that he, his executors or administrators, would not assign during the term, without the consent of the lessor; and that the lessor had never given any consent to the lessee to assign to any person.

To this replication the defendants demurred, and the plaintiffs joined in demurrer.

The defendants pleaded, (their eleventh plea,) that the defendants did not take down, or remove from or off the premises, the said windmill or grist-mill, or round-house.

To this plea, the plaintiffs demurred, and assigned for special causes of demurrer, that it did not answer the whole of the breach, inasmuch as it did not deny the *keeping and continuing* the mill so taken down and removed. The defendants joined in demurrer; and it was insisted on their behalf, that the plea was sufficient: for if they had not taken down and removed the mill, it was impossible that they could keep and continue it so taken down and removed, which keeping and continuing down was matter of aggravation only. The Court, very early in the argument, intimated an opinion against the plaintiffs on this point, being of opinion that the plea was sufficient, for it answered the words of the covenant; and the argument was therefore directed chiefly to the main point, arising out of the fifth plea.

The defendants, in support of their demurrer to the replication to the fifth plea, advanced the following points:

1. The covenant being, that the lessee, his executors and administrators, should not assign, did not extend to assignees; and here the defendants were sued as assignees. In support of this objection the case of *Doe dem. Cheere v. Smith* (1) was referred to.

2. Admitting that the defendant was chargeable, as assignee, upon the covenant against assigning, yet the plaintiff had misconceived his remedy. It ought to have been an action on that covenant, charging, as a breach, that the defendants had assign-

(1) 5 Taunt. 795.

ed without consent; and not, as this was, an action for the non-payment of rent.

3. That it was a clear rule of law, that an assignee is not liable for any breach of covenant charged to have occurred after he had assigned over.

Mr. Kelly for the plaintiffs.—Undoubtedly if this were an ejectment for breach of the condition, it could not be maintained. But there is a distinction between proceeding for a forfeiture by reason of the condition broken, and proceeding on the deed for the rent. The defendant cannot set up his own breach of covenant in answer to the demand for rent. He is estopped from setting up his own wrongful act. All the cases from *Dumpor's* case (2) and downwards, admit of this distinction; for in all the cases the proceeding is for the forfeiture, by reason of the condition broken. That was the case in *Doe d. Cheere v. Smith*, which is relied upon by the defendants. And in the case of *Doe d. Boscamen v. Bliss* (3), Sir James Mansfield said, the profession had always wondered at *Dumpor's* case; and the learned Judge shewed no disposition to extend it.

Mr. Justice Bayley.—Even if you are right in that argument, your remedy is only on the covenant, for damages. Here you are not going for damages, by reason of the breach of that covenant: you are suing for the rent, upon the supposed privity of estate. The privity of estate is gone; if you like, you may bring an action against them for destroying that privity.

Judgment for the defendants.

[*Note*.—The Court (especially Mr. Justice Littleale) intimated an opinion unfavourable to the plaintiffs, even had they brought the action in a proper form.]

1828. } CHATFIELD v. PARKER AND
Oct. 27. } ANOTHER.

Pleading—Conflicting Creditors—Title.

1. *Where a creditor sets up title under an elegit, he must by his pleading aver seisin in*

the debtor. The mere setting out the inquisition, in which seisin is averred, will not be sufficient.

2. *But the inquisition must be set out, as well as the averment of seisin—(per Mr. Justice Holroyd).*

3. *Where both parties to a suit claimed under the same person, the plaintiff being in possession under a demise, and the defendant being a creditor by a subsequent judgment, elegit and inquisition; the title of the former was preferred, although there had been a prior demise to another person;—it being held, that the judgment creditor, claiming through the debtor, was estopped by his acts; and that as the plaintiff under the demise had a good title against the debtor, and against all but the prior lessee, he was entitled to maintain trespass against the judgment creditor, for disturbing his possession.*

Trespass for mesne profits.

Pleas—

1. Not Guilty.

2. The entry justified under an elegit, issued upon a judgment obtained by the defendant Parker against the Right Hon. John Evelyn Pierrepont Dormer, Lord Dormer. This plea set out the judgment, the elegit, directed to the sheriff of Warwickshire, (in which county the premises lay,) and the inquisition. The latter stated, that Lord Dormer was seised for life of one messuage, &c. setting out the parcels; the plea then averred, that the defendants in the due execution of the writ, entered into the *locus in quo*, the same being part of the premises set out in the inquisition; and so justified.

3. A similar plea, not setting out the inquisition at length; but averring, that the sheriff, in execution of the elegit, caused to be delivered to the defendant Parker, a moiety of the tenement in the declaration mentioned, being a moiety of the lands and tenements in the bailiwick of the sheriff: whereof the said John Evelyn Pierrepont Dormer, Lord Dormer, or some person or persons in trust for him, on the day of the obtaining judgment by Parker, was or were seised; and so justified the entry.

To the second plea, the plaintiff replied, that the said Lord Dormer being seised in his demesne for his life of the premises in the declaration mentioned, did, before the

(2) 4 Co. 119.

(3) 4 Taunt. 735.

day of the giving of judgment for Parker, against the said Lord Dormer,—to wit, &c., by indenture made between Lord Dormer of the first part, William Samler and John Coope of the second part, and the plaintiff of the third part,—demise to the plaintiff the said tenements for a term of two hundred years; by virtue of which demise the plaintiff entered and continued in possession until the committing of the trespass complained of. Concluding with an averment, that Lord Dormer was living at the time of the commencement of the suit. There was a similar replication to the third plea.

The defendant, thereupon, cravedoyer of the deed mentioned in the replication, from which it appeared to be as follows :—

By indenture, dated the 14th of March 1820, between the Right Hon. *Evelyn Pierrepont*, Lord Dormer, of the first part; William Samler, and John Coope, two of the Directors of the Pelican Insurance Office of the second part; and the plaintiff Chatfield of the other part—

Reciting the title by which Lord Dormer derived his Life Estate ;

And reciting, that by indenture, dated the 18th of June 1819, and made between the said Evelyn Pierrepont, Lord Dormer of the first part; the said Samler and Coope of the second part; and Thomas Dawes, gent. of the third part—The said Lord Dormer, in consideration of £14,998, granted unto Samler and Coope (in trust for the members of the Pelican Insurance Company,) an annuity of £1725 for his lordship's life; and to secure the same, did demise the premises thereafter mentioned to the said Dawes, for the term of one hundred years: and also reciting a contract between the same parties for the grant of another annuity by Lord Dormer, during his life, of £800, in consideration of £6998 to be charged upon the said premises—

It is witnessed, that in consideration, &c. Lord Dormer granted an annuity of 800*l.* for his life, charged on—[Here followed a description of the parcels; corresponding, with some slight difference, with the names set out in the declaration. That slight dif-

ference was noticed in argument, but was not encouraged by the Court and was not pressed. Indeed, the identity was sufficiently averred in the pleading. There was another objection as to the identity of Lord Dormer, which will appear afterwards]. There were general words after the description, thus—"or elsewhere in the county of Warwick, which were devised as aforesaid to the said Lord Dormer for life."

And to secure the payment of this annuity, Lord Dormer demised the premises to Chatfield for two hundred years, if Lord Dormer should so long live.

The deed thus appearing upon oyer, the defendants demurred to the replication; and they also added, as special cause of demurrer, that the commencement of the supposed life estate of Lord Dormer was not shewn in the replication; that the replication did not shew how Lord Dormer became tenant for life; that the replication did not shew that Lord Dormer, the lessor in the demise, was called by the same names as the said Lord Dormer mentioned in the plea; that the replication did not shew that Lord Dormer could make any valid demise to the plaintiff. There was a similar demurrer to the replication to the third plea. The plaintiff joined in demurrer.

Mr. Serjeant Edward Lawes for the defendants.—First, the replication does not aver, that the Lord Dormer who demised, is the same, against whom the defendant recovered judgment, and who is mentioned in the plea.

[*Mr. Justice Bayley*.—You do not put the identity in issue.]

But there are authorities in point in favour of the objection; the name is different; and identity cannot be assumed,—it was so held, in *Field v. James Winlow*, otherwise called *John Winlow* (1). There the plaintiff declared, that the said James, by the name of *John*, made his bond to the plaintiff. The defendant prayed oyer of the bond, by which it appeared, that in the bond, the defendant was called *John*, and in the condition *James*. The defendant demurred, and, although the plaintiff had averred the identity, "the Court held, that the action lay not, for *John* cannot be *James*."

(1) Cro. Eliz. 897.

[*Mr. Justice Bayley*.—Now, is that case consistent with common sense? (2)]

Whether it be or not, there are other cases in conformity with it. They are *Panton v. Chowles* (3), and *Watkins v. Oliver* (4). And in *Evans v. King* (5), Lord Chief Justice Willes, speaking of them, said "Whatever might be my own opinion if this were a new point, I think I am obliged by these authorities." The subsequent cases of *Cole v. Hindson* (6), *Scott v. Soans* (7), and *Shadgett v. Clipson* (8), might aid the plaintiff, if he had averred the identity of Lord Dormer; but he has not done so. The replication is also bad, inasmuch as it states a demise to the plaintiff for 200 years; whereas, it appears by the deed on oyer, that it was for 200 years, if Lord Dormer should so long live. The averment, that Lord Dormer was living, does not help this; for the title of the plaintiff is misdescribed. Next, the plaintiff has not shewn the commencement of the life estate of Lord Dormer.

[*Mr. Justice Bayley*.—You claim under him yourself.]

Yes; but not under that demise.

[*Mr. Justice Holroyd*.—You are estopped by his acts.]

Not unless I claim under the same title.

[*Mr. Justice Bayley*.—But you both claim under his life estate. It is mentioned in your own inquisition.]

True; but it does not follow, that it is the same life estate. The life estate, upon which they rely, may, by some means, have terminated; and a subsequent life estate may have been acquired; and under that we claim.

[*Mr. Justice Bayley*.—Then, you should have taken issue upon their averment of the seisin of Lord Dormer for life.]

The replication is open to another objection. The legal estate was not in Lord Dormer. It appears, by the recital in their

own deed, that the legal estate had passed to Dawes, for the term of 100 years, by the deed of 1819.

[*Mr. Justice Bayley*.—But you claim under Lord Dormer. The demise is good as against him; and the plaintiff is in possession, which possession you disturb.]

But, if we both claim under Lord Dormer, the plaintiff cannot complain of our disturbing his possession, unless he has the right to possession.

Mr. Platt, contra.—If the defendant's pleas are bad, there is an end to the argument, as to the replication. The pleas are bad, in not averring substantively, that Lord Dormer was seised. They only aver, in one plea, that the inquisition stated that he was seised; and in the other plea, and that by mere intendment, that Lord Dormer, or some one in trust for him, was seised. Besides, all this, as matter of defence, might have been given in evidence under the general issue. The plaintiffs are in possession, and they sue for the injury done to their possession.—[Here he was stopped.]

Mr. Justice Bayley.—I am of opinion, that, upon these pleadings, there ought to be judgment for the plaintiff. Actual possession is sufficient to enable a plaintiff to maintain trespass against a wrong-doer. The defendants endeavour to shew, that they are not wrong-doers; but as the foundation of their defence, under the elegit and the inquisition, they should have averred that Lord Dormer was seised. They, however, set up the inquisition, and seek to justify their entry under it. The plaintiff replies a prior demise by Lord Dormer, and an entry under it. Both parties, therefore, claim under Lord Dormer. Then come the objections to the plaintiff's replication:—first, on account of the variance in one of his lordship's names, it is said, that the identity does not sufficiently appear. But it says, "the said Lord Dormer;" and that I think is sufficient, describing him, as the same person. It would bind Lord Dormer himself; for if he pleaded in abatement, the plaintiff might reply, that he was as well known by the name of John Evelyn Pierrepont, Lord Dormer, as by that of Evelyn Pierrepont, Lord Dormer. Next, it was said, that this property was not specifically conveyed, and little variances were

(2) But see the note to the case; see also *Reeves v. Slater*, 7 B. & C. 486; 1 M. & R. 265; 6 Law Journ. K.B. 77.

(3) Moor, 896.

(4) Cro. Jac. 558.

(5) Willes, 554.

(6) 6 Term Rep. 254.

(7) 3 East, 111.

(8) 8 East, 328.

pointed out; but there are general words to give the plaintiff a title, for the indenture conveys, in general terms, all the property of Lord Dormer in the county of Warwick. Then, it is said, that there was a prior demise to Dawes; and consequently, that Lord Dormer could not demise to Chatfield. But as it would not be competent for Lord Dormer himself to take this objection, as he would be estopped from saying that he had not demised to Chatfield, I think the defendants, (who claim under Lord Dormer, and by a right under Lord Dormer subsequent to the demise to Chatfield,) can be in a situation no better than Lord Dormer would be in, himself; and consequently, that they also are estopped. Dawes might enter if he pleased; but, subject to the interest of Dawes in the 100 years term, there was a good demise to Chatfield, and it was good against all the world, but Dawes. Here, then, the plaintiff has this demise, and is in the actual possession; for the replication avers entry and possession. I think, therefore, the replication is a good answer to the plea.

Mr. Justice Holroyd.—I think the pleas are bad in point of law. In order to recover possession under an elegit, the judgment creditor must prove that the person against whom the judgment was obtained, and elegit issued, had a title. The first special plea contains no such averment. As to the last plea, I think that is bad for want of setting forth the inquisition.

Judgment for the plaintiff.

[*Note.*—As to the necessity of shewing the commencement of the particular estate, see *Co. Litt.* 303, *b*; 1 *Leon.* 177; *Cro. Eliz.* 153, 4; *Com. Dig.* tit. 'Pleader,' E. 20, 21. Tenant by sufferance may maintain trespass against a stranger, 2 *Roll.* 551. l. 42. Bare possession sufficient, 1 *East*, 244; 4 *Taunt.* 547.]

1828. }
Nov. 8. } SPARGO v. BROWN.

Pleading—Inconsistent Counts.

A plaintiff may, on the trial, abandon any count or counts in his declaration, and rest

his case entirely upon other counts, inconsistent with those he has abandoned.

Accordingly, where a tenant, in an action for an excessive distress, had inserted in his declaration two counts, setting out the tenancy, and complaining of an excessive distress, and had added a count in trover, he was allowed, on the trial, to abandon the two first counts; rest his case entirely on the third, and leave the defendant to prove the tenancy.

This was an action on the case.—The first and second counts related to an alleged excessive distress; the third was in trover. The cause was tried at the last Assizes for the county of Cornwall, before Mr. Justice Park.

The plaintiff, on the trial, abandoned his two first counts, and relied entirely on the count in trover; and, under this count, he proved the seizure of the goods, and other facts, which abundantly proved a conversion by the defendant, unless a tenancy, between him and the plaintiff, were established. The course thus adopted took the defendant's counsel by surprise, as they came prepared merely to try the question relative to an excessive distress; supposing the tenancy to be undisputed. They objected, therefore, to the plaintiff taking this course, but the learned Judge allowed him to do so; and the plaintiff having obtained a verdict,

Mr. Halcomb moved to set it aside.—A plaintiff ought not to be allowed to go into a case totally inconsistent with his own record, and without giving any notice of his intention to do so. The first and second counts expressly described the plaintiff as tenant to the defendant; and it was the question growing out of those counts, that the defendant came prepared to try. (There were other points which need not be here noticed).

Lord Tenterden.—As to your first point, it is clear, that a plaintiff may abandon one count, and give evidence inconsistent with it; each count is in the nature of a separate action.

Rule refused, except as to the other points.

1828. }
Oct. 28. } TOOLEY v. NICHOLLS.

Covenant—Pleading—Husband and Wife.

In an action on a covenant that a married woman should join in levying a fine, and executing a deed to declare the uses thereof, in order to bar her dower,—it was held, that the plaintiff's declaration, which averred merely an application to, and refusal by her to join in a fine, and to execute the deed, was insufficient, in not averring an application to the covenantor, in order that he might have an opportunity of seeking to obtain her consent.

Action for breach of covenant.

The declaration set out an indenture dated 27th July 1826, made between the plaintiff of the one part, and the plaintiff's wife and the defendant, her father, of the other part. After reciting differences between the plaintiff and his wife,—that they had agreed to separate,—and that the plaintiff, with the approbation of the defendant, had agreed to allow her 30*l.* a year, it was witnessed, that the plaintiff covenanted to pay his wife 30*l.* a year by weekly instalments. Then came the covenant upon which the action was brought. By this, the defendant, for the consideration aforesaid, did covenant with the plaintiff, that the plaintiff's wife should, whenever thereunto requested, join in levying a fine, and executing any deed which might be required of her by the plaintiff, in order to bar her right of dower. The declaration then averred performance generally on his part; and that he was seised in fee of a certain estate, whereof his said wife was entitled to dower; and that he duly requested her to join him in levying a fine, and to execute a deed to lead the uses thereof, in order to bar the dower, yet she, when so requested, did not, nor would, &c., but wholly refused, &c.

The defendant, after setting out the deed on oyer, pleaded, first, that no memorial of the deed was inrolled according to the Annuity Act.

This plea was at once given up by the defendant's counsel, and was not further noticed. The consideration not being a pecuniary one, the annuity deed of course did not require inrolment under the 53 Geo. 3. c. 141.

VOL. VII. K.B.

He next pleaded, that the defendant had not paid the annuity to the wife, according to the terms of his own covenant. To this plea there was a demurrer, the object of which was to raise the question, whether that covenant was a condition precedent. But the turn the case took, rendered it unnecessary that this question should be discussed.

He also pleaded, that the plaintiff had not at any time given notice to the wife of any time or place, at which, or of any persons authorized, before whom, she was to attend to be examined, according to the statute, as to her assent to levy the fine, and to execute the deed mentioned in the declaration.

To this plea the plaintiff demurred, and the defendant joined in demurrer. In support of the demurrer, the plaintiff advanced the following points:—

That the plea contained no legal answer to the breach of covenant charged in the declaration—the declaration charged, that the wife was duly requested to join the plaintiff in levying a fine, and executing a deed to lead the uses thereof; and that it was not necessary, therefore, that any notice should be given to her, as by the plea was contended; for that a breach of the covenant was committed by her refusal to execute the deed when requested, and that it was not necessary for her to attend before any person to execute such deed.

Mr. Busby, for the plaintiff, was proceeding in support of the demurrer, when, by

[*Mr. Justice Bayley*.—I think your declaration is defective. You do not shew that you applied to the defendant, or gave any notice to him.]

[*Mr. Justice Littledale*.—Nor do you shew that any writ of covenant was sued out.]

There need not have been. Her refusal to execute a deed to lead the uses of a fine, to be afterwards levied, was a breach of the covenant.

[*Mr. Justice Bayley*.—But all that you appear to have done may have been behind the back of Nicholls. You should have given him notice, that he might use whatever influence he had, in order to induce her to consent, and not subject him to an action by reason of her refusal. Neither do you shew that you actually tendered the deed to her, nor do you give any fact as a reason for dispensing with your doing so.]

D

On this *Mr. Busby* craved leave to amend, and accordingly,

Rule for the plaintiff to amend on payment of costs.

1828. }
Oct. 28. } SEYMOUR v. FRANCO.

Landlord and Tenant—Title—Estoppel—Pleading.

1. *Although the lessee, when sued in covenant by the lessor, cannot dispute the lessor's title, yet, when sued by the assignee of the lessor, he may deny that the lessor had such a title as could pass the right of action to the assignee.*

Accordingly, where a person, suing as assignee, declared, that A, being seised in fee, demised by deed, and then averred that the lessor devised the reversion to him the plaintiff, —the defendant, (who claimed through the lessee,) was allowed to plead that A was not seised in fee.

2. *A traverse which is too large, is bad upon general demurrer.*

Covenant by the devisee of lessor against the assignee of lessee. The plaintiff claimed through one Salome Turst; and he stated in his declaration, that, at the time of making the demise thereafter mentioned, Elizabeth Mary Ann Turst and Salome Turst were seised in fee of that part of the premises thereafter mentioned, in respect of which the rent was reserved; and were also possessed of a certain parcel of ground (described in the indenture after-mentioned to be leasehold) for a term of years, of which, at the time of the demise, sixty-two years were unexpired; and, being so seised and possessed, they (the Tursts) demised to E. F. The demise was then set out, the parcels being described as "a fiftieth share in all that freehold and leasehold piece of ground, &c. (not distinguishing what was freehold, and what leasehold,) to hold to E. F. for sixty-one years, yielding and paying to the Tursts, their heirs or assigns, for their share in the freehold premises, the rent of 8*l.*; E. F. covenanting for himself, &c. to pay."

(No further notice was taken, in the declaration, of the leasehold.)

It then averred the entry of E. F. under the demise, the reversion in the freehold being in the Tursts; the death of Elizabeth Mary Ann, leaving Salome surviving; and that Salome, being sole seised of the reversion, devised it to the plaintiff, and died seised of the reversion, whereby the plaintiff became seised thereof; that the term passed by assignment from E. F. to the defendant; and that, after the defendant became seised, and after the assignment to the defendant, rent became in arrear; and so the defendant had broken the covenant.

The defendant pleaded, that the Tursts were not seised in fee, as mentioned in the declaration.

[Had the plea stopped here, it would have been good; but it went on—]

And were not possessed of the premises for the remainder of the term mentioned in the declaration.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

The points advanced by the plaintiff, for special cause of demurrer, were, that the demise mentioned in the declaration was made by deed, and was accepted by E. F.; and the defendant being his assignee, and sued upon his covenant with the Tursts, was estopped from denying that they were seised in fee; that the plea amounted to a special plea of *nil habuerunt in tenementis*, which was a void plea in law; and that it amounted to a denial of the right of the lessors to make the demise.

Mr. Chitty, for the plaintiff. — The other side rely upon the case of *Carvick v. Blagrove* (1), and the plaintiff relies upon that of *Palmer v. Ekins* (2). The latter case was attacked in the Common Pleas in the case of *Carvick v. Blagrove*, but it nevertheless is sound law, as stated in *Strange*. The rule is, that the lessee is estopped from traversing the title of the lessor, though he may shew by special plea, that the lessor had a less estate than he claims. Here, he denies the title altogether.

[*Mr. Justice Bayley*. — But you sue as devisee; and, unless there was an interest in fee, it would not pass to a devisee.]

(1) 4 Moore, 303; 1 B. & B. 531.

(2) 2 Stra. 817; 2 Lord Raym. 1550; 4 Barnardiston, 113.

The case of *Palmer v. Ekins* was held to be good in that of *Taylor v. Needham* (3).

[*Mr. Justice Bayley*.—The defendant there pleaded that there was no demise to his assignor; that was quite different. Here, the defendant does not impeach the demise to his assignor. That was the distinction taken in *Carvick v. Blgrave*.]

Then, the defendant's plea is bad, inasmuch as his traverse was too large. He had no right to make the possession of the leasehold a part of the issue. The rent was reserved out of the freehold portion, and there is no breach assigned in respect of the leasehold.

Mr. Parke, contra, [was informed by the Court, that he might confine himself to the last point.]—The plea undoubtedly is wrong in making this traverse too large; but this is not an objection which can be taken advantage of upon general demurrer. The special causes of demurrer relied on by the plaintiffs, are silent on this point. It is an immaterial traverse, and is aided upon general demurrer by the statute of 4 and 5 Ann. c. 16.

[*Mr. Justice Bayley*.—It is not an immaterial traverse; the traverse is good in part. The Court would be obliged after verdict to award a repleader.]

In *Comyns's Digest*, "Pleader, G. 22," speaking of the matters which are good upon general demurrer, it is said, "so, a traverse too large (4)." However, there is an objection to the plaintiff's declaration; it does not shew that *all* the rent became due since the plaintiff was assignee.

[*Mr. Justice Bayley*.—But the breach is well assigned for a part.]

Mr. Parke then craved leave to amend as to this. On the other point—

Mr. Justice Bayley.—I quite approve of the decision in the case of *Carvick v. Blgrave*. You, when sued by the assignee of a lessor, are at liberty to say, that he had not such an interest, as could pass to his assignee. In that very case, the assignment would not have conveyed a freehold interest.

Mr. Justice Holroyd.—I also concur in the judgment of the Common Pleas, in the

case of *Carvick v. Blgrave*, which appears to be in point with the present. The plea does not amount to *nil habuerunt in tenebris*: it is only a denial of the title, which the plaintiff avers has passed to him as assignee.

Mr. Justice Littledale.—I am of the same opinion. This is an action, not by the lessor, but by a stranger. He, therefore, should shew a title in the person, as whose devisee he sues. The lessee may say, "the lessor had not such an interest as he could transmit to you."

Leave for the defendant to amend his plea on payment of costs.

1828. } BAILEY, SURVIVING ASSIGNEE, v.
Nov. 1. } CULVERWELL AND OTHERS.

Vendor and Purchaser—Stoppage in Transitu—Lien.

An agent sold goods to be paid for by bills. The purchaser gave the bills, and directed the agent to hold the goods for him, unless he could sell them at a certain profit. While the goods thus remained, the acceptors of the bills stopped payment. The agent thereupon applied to the purchaser for further security. The purchaser then gave the agent an order to sell the goods, and pay the bills. Subsequently, and before any sale, the purchaser became bankrupt: his assignees claimed, and brought trover for the goods:—Held, that they were not entitled; that the application by the agent for security must be considered as an application on behalf of the vendor, whose assent to the arrangement might be presumed, it being for his benefit; and whose subsequent assent would relate back to the transaction which required the assent.

This was an action of trover, brought by the plaintiff, and Richard Emett, since deceased, as assignees of William Halliwell, a bankrupt, to recover four hundred and twenty-four beaver skins. The defendants pleaded not guilty; and the cause was tried, at the Sittings after last Hilary term, at the Guildhall in the city of London, when a verdict was found for the plaintiff for 1000*l.* subject to the following

(3) 2 Taunt. 278.

(4) But to this is added, "Contra by three Judges, two sec. Yelv. 122," and see s. c. Cro. Jac. 204.

CASE.

The defendant, Carroll, in December 1823, sold a quantity of beaver skins, by a contract in writing to the bankrupt, through the agency of the other defendants, Culverwell and Brooks, brokers, (who had the skins in their possession) for 427*l.* 5*s.* 6*d.*; to be paid for by the bankrupt's bill, on Messrs. Walduck and Hancock, payable at four months after date. The bankrupt's bill, on Walduck and Hancock, was sent to the defendants, Culverwell and Brooks, according to the terms of the contract, inclosed in a letter, of which the following is a copy.

"Gentlemen,—Inclosed you will find a bill accepted by Walducks & Co. for 429*l.* 13*s.* 4*d.*, to balance for the beaver, and if you can obtain 2*s.* per lb. profit, sell them; at present let them remain with you on that principle.

"I am,
"Your obedient servant,
"William Halliwell."

"January 14, 1824."

(Addressed)

"Messrs. Culverwell and Brooks."

This bill was immediately handed over by the defendants, Culverwell and Brooks, to the defendant Carroll.

In consequence of the above letter, the goods remained with the brokers for sale. On the 16th of March, before the bill became due, Walducks & Co., the acceptors of the bill, stopped payment; and the defendant, Culverwell, in consequence thereof, applied to the bankrupt for a further security, when he obtained from him a letter, of which the following is a copy.

"Messrs. Culverwell and Brooks.

"Please sell the beaver you hold of mine, and take the proceeds to pay my bill on Walducks and Hancock. Any profit arising from it, pay over to me, which will truly oblige,

"Your's, &c.

"March 16.

"Wm. Halliwell."

The goods were not sold in pursuance of this letter, but remained with the defendants, Culverwell and Brooks, until they were delivered, under an order of the defendant Carroll, as after mentioned.

The bill of exchange was dishonoured on arriving at maturity, and notice thereof was duly given to the bankrupt, on the 17th of May, and the defendant Culverwell, when examined before the commissioners, stated, that on the said 17th day of May, they were attached at the suit of Edward Carroll, by process out of the court of the Lord Mayor of the city of London.

A commission of bankrupt issued against the bankrupt on the 4th of June 1824, which was opened on the 11th of June, on an act of bankruptcy committed on the 21st of May preceding; and the plaintiff, and Richard Emmett, who died since the commencement of this action, were duly chosen assignees, and the usual assignment made to them by the commissioners previous to the making of the demand hereinafter mentioned.

On the 14th day of July 1824, the defendant, Carroll, gave an order to the other defendants to deliver the skins to a porter, who brought the order on his account, which was accordingly done.

On the 5th of November 1824, the defendant, Carroll, gave an order to the other defendants to receive back the skins; and such defendants, on the same day, received them again into their possession, where they remained until after the trial.

On the 8th of November 1824, an offer was made, on behalf of the defendants, in the following letter.

"Gentlemen,—We have again seen Mr. Culverwell, relative to the claim made by you on his firm for the beaver skins, on the behalf of the assignees of W. Halliwell; and we are requested to state to you that, if the assignees so require, the beaver skins shall be immediately sold; but they are not now, and never have been, since Mr. Halliwell's order was delivered to Messrs. Culverwell and Brooks in March last, (authorising them to sell the skins, and pay the proceeds in discharge of the bill given for payment of them,) of sufficient value to discharge the bill, and the sale has not been effected; or the assignees may, if they think proper, take the skins on paying the bill. We repeat our former request to have a copy of Mr. Culverwell's examination; he having attended it at so short a notice, that he had neither time to get the order given in March to take with him, or to obtain the

attendance of professional assistance on the examination.

"Your's &c.

"Lavie, Oliverson and Denby.

"Frederick's Place, Nov. 8, 1824."

"To Messrs. Adlington,
Gregory & Faulkner."

To which the following answer was returned :—

Re Halliwell.

"Gentlemen,—The assignees claim to have the beaver skins delivered up without any condition, or, payment of the value of them when they were first applied for ; and they will not now consent to any sale.

"As you are aware, you could not have been allowed a copy of Mr. Culverwell's examination, if you had attended with him ; and, as he produced documents in support of his evidence, we are satisfied the statement he has given is the correct one, and he can have no difficulty in repeating it to you.

"Yours, &c.

"Adlington, Gregory & Faulkner.

"November 9, 1824."

"To Messrs. Lavie,
Oliverson & Denby."

On the 15th of November 1824, the plaintiffs caused a demand of the skins to be made on the defendants, Culverwell and Brooks ; and at the same time offered to pay the charges for warehousing the same, when the defendants referred the plaintiff to their attorneys, and refused to deliver them up.

It was agreed, upon the trial, that the skins should be sold ; and they have since been sold for 311*l.* 14*s.*

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover : and if they were,—whether, the full value of the skins,—or nominal damages only.

If the plaintiffs were entitled to recover the full value of the skins, then the verdict was to be reduced to 311*l.* 14*s.*

If nominal damages, then a verdict was to entered for 1*s.* ; and,

If they were not entitled to recover, then a nonsuit was to be entered.

Mr. Parke for the plaintiffs.—The assignees are entitled to recover, and to have the full value of the skins. The property in

them was clearly in the bankrupt, who had bought and paid for them according to the mode of payment agreed upon. From the time of the sale, they remained in the hands of Culverwell and Brooks as his agents. The sole question remaining is, whether the defendants, by reason of the facts which subsequently occurred, acquired any special property. For two reasons, the assignees submit that they did not. First, it may be admitted for the sake of argument, that the letter of the 16th of March amounted to an order for the goods themselves. That is stating the case as unfavourably for the assignees as possible. It gave the defendants no lien ; it was nothing more than a direction to Culverwell and Brooks to sell and pay over. But, secondly, it is submitted, that the letter gave no interest whatever in the goods.

To the first point. Suppose this letter were an order for the goods themselves ; it transferred no interest in them to the seller. There had been no request by him ; no communication on his part ; no additional credit ; it was merely an order made by a man upon his own agent unexecuted ; revocable at any time, and it became revoked by the bankruptcy. It was only equivalent to an order made by a man upon his banker, to pay a particular creditor. Such an order might be revoked ; or, if the man who gave it became bankrupt, it would, like all unexecuted orders, be revoked by the bankruptcy. Under such an order, the creditor takes no interest, unless some communication has been made to him, on the faith of which he has altered his situation. This appears to be clearly laid down by the case of *Scott v. Porcher* (1), which accords with the cases in this court. The case was this—Harrington & Co. of Madras, made a consignment of pearls to Burnié & Co., with directions to sell, and pay the proceeds to Porcher, to whom Harrington & Co. at that time were indebted. Burnié & Co. acknowledged the receipt of the consignment, and undertook to perform the directions ; no notice was given by either party to Porcher. Afterwards, Harrington & Co. wrote to Burnié & Co. desiring the pearls to be sent to America ; and subsequently, becoming insolvent, they made

an assignment of their property for the benefit of their creditors. Upon these facts, the then Master of the Rolls, Sir William Grant, held, that the directions accompanying the consignment did not constitute an appropriation, but amounted to no more than a mere mandate, revocable at the pleasure of the consignor, and which was actually revoked by the subsequent disposition of the property ; and that Porcher, (who had no express notice of the consignment, but on receiving information of it, after he knew of the failure of Harrington & Co., had laid an attachment on the pearls in the hands of Burnié & Co., on which he had proceeded to judgment, and sold the pearls under it,) was bound to account with the trustees for the creditors for the proceeds.

The directions there given were similar to the present.

[*Mr. Justice Bayley.*—In that case Burnié & Co. were not agents for Porcher.]

They were not, certainly ; it appears, however, from the judgment in the case, that before such an order as the present could be made available for the benefit of the person whose benefit was intended, three things must have concurred. First, a specific direction to apply the produce ; secondly, an acceptance of the direction by the consignee ; and thirdly, the assent of the party, for whose benefit the direction is given. Sir William Grant, on those points, delivered judgment, which was the last he ever delivered. It was in these terms :—

" This case is stripped of almost every circumstance that has ever been relied upon as constituting an irrevocable appropriation. Harrington & Co., who made the consignment, never informed Porcher & Co. that any remittance was made, or intended to be made, on account of the debt due to the latter. The consignees, who were mere factors for the consignors, had no directions to apply the produce of the consignment in payment of any specific debt, or in taking up any particular bill of exchange. The only order they received was, that, when the sale should be effected, they should pay over the proceeds to Porcher & Co. They informed their principals, that they would act in conformity to the directions received ; but they had no communication whatever with Porcher & Co. on the subject. This amounts to no more than a mandate from a principal

to his agent, which can give no right or interest to a third person in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit ; and it will be revoked by any disposition of the property inconsistent with the execution of it.

" The assignment of it for the benefit of the creditors was such a disposition. Under that assignment, the general creditors of Harrington & Co. became entitled to the benefit of every description of property, over which they had a disposing power. There was no third person who had then acquired any interest, legal or equitable, in the goods in question ; and, therefore, Harrington & Co. could dispose of them, and they have disposed of them to the present plaintiffs, who are consequently entitled to a decree."

The cases in this Court proceeded on the same principle ; they were those of *Williams v. Everett* (2), and *De Bernales v. Fuller and others* (3), (which were referred to in argument in the case of *Scott v. Porcher*,) and *Yates v. Bell* (4). The principle to be deduced from them is, that, without the concurrence of the three before-mentioned propositions, the persons for whose benefit the direction is intended can maintain no action against the party to whom it is given. It follows, as a consequence, that the defendant, Carroll, could not have maintained any action against Culverwell and Brooks, even had there been a sale in pursuance of the direction. Then, applying the principle to this case, where is the assent given by Carroll before the bankruptcy ?

[*Mr. Justice Bayley.*—Culverwell and Brooks gave the assent.]

Not as agents for Carroll ; they were *functus officio* as to him. They were not his servants, or his general agents ; and the particular transaction in which they were engaged on his behalf, had been wound up. The goods had been completely parted with by Carroll, as to property, as well as with regard to possession. Culverwell and Brooks were middle-men : the transitus was at an end. The terms of the sale to Hal-

(2) 14 East, 597.

(3) 3 Campb. 436.

(4) 3 B. & A. 644.

liwell were, that the goods were to be paid for by bills upon Walduck and Hancock; and when those bills were sent, in the letter of the 14th of January, there was a performance of the contract, as between the vendor and the purchaser. If the transitus had not been at an end, when the bills became due, and were dishonoured, an unpaid vendor might stop them; but here they were not in the hands, or under the controul of the vendor. They were as completely divested, as if they had been taken away by Halliwell, and by him sent back again to Culverwell and Brooks. The case, it is admitted, is one of hardship on Carroll; but there are many such cases occurring in our mercantile law, the rules of which, however, are found to be of general public benefit. The property then being completely divested out of Carroll, did any thing occur afterwards to alter the situation of the parties, or to give Carroll any new right? Three months afterwards, the acceptors of the bill stop payment, and Culverwell thereupon applies to the bankrupt for security. In thus applying, he was a mere volunteer. The application led to the letter in question, of the 16th of March; but the application was not made by Culverwell, as the agent of Carroll. This is abundantly proved by the subsequent fact, that Carroll actually attached the goods in the Lord Mayor's Court, in the hands of Culverwell and Brooks, as the property of the bankrupt.

[*Mr. Justice Bayley*.—What became of those proceedings we do not know.]

No, but the step itself was adverse to the fact of the goods being his own. It is clear, that from the completion of the sale, Culverwell and Brooks acted as the agents of the bankrupt; the act done by him was only in favour of the particular creditor, Carroll, and without pressure by him. The rights of the assignees intervene to prevent the giving effect to such a mere direction as this. The property should be brought into the common fund, and Carroll should share with the rest of the creditors. Suppose these goods, as was said in the case of *Scott v. Porcher*, had been destroyed by fire in the interim, would not Carroll be a creditor of the bankrupt for the price? Undoubtedly he would, for his debt remained. There had been, at the most, but

an inchoate disposition of the goods, and the right of the creditor remained unsatisfied. Hitherto, the argument has conceded that the order of the 16th of March was an order for the goods themselves; but it is contended, that, in point of law, that order passed no interest whatever in the goods. The bankrupt placed in these brokers a special confidence: he gave them an order to sell, and apply the proceeds. The goods remained with them until the time of the bankruptcy, when the right of property became vested in the assignees. Carroll's interest would not arise until after the sale; yet the brokers delivered back the goods to Carroll, before any sale took place. If the case stopped here, the plaintiffs would be entitled at least to nominal damages. The case of *Solly v. Rathbone* (5) shews, that in such a case the agents violated their duty by depositing the goods with third persons, although they had a power to sell. On the second ground, therefore, it is submitted, that Carroll had no interest in the goods.

Mr. F. Pollock, contra, was stopped.

Mr. Justice Bayley.—The assignees of the bankrupt in this case take the property of the bankrupt, subject to every equitable right to which he was subject himself. The first question is, what was the effect of the letter of the 16th of March? If Halliwell was bound by it, so as to give Carroll, if he acceded, a right to the produce of the goods when sold, the assignees were subject to this right. No doubt the right of property in the goods had been previously vested in Halliwell; and Culverwell and Brooks were agents for him; and if nothing had been done by him, after the original purchase, the goods would have been his property without any controul, and his assignees would be entitled to them. But, on the 16th of March, it turned out, that the bills given for the payment of the goods were likely to be unproductive, and Culverwell applies to Halliwell for security. But in what character does he apply? Surely as the agent of Carroll; and it was so treated,—seeing that the produce of the sale was to go to Carroll. In what other character could Culverwell have applied to Halliwell for security? Not on his own account, and

certainly not on that of Halliwell himself. It is said, that there had been no prior authority from Carroll for this. Granted,—but the principal may ratify the act done; and where an act is done for your benefit, the law will even presume your acquiescence. This act was, of necessity, for the benefit of Carroll. The principle is in favour of the presumption, that such an act will be adopted; and the adoption refers back in point of date to the act done. On the 16th of March, then, Halliwell gives direction to sell, and to pay Carroll. This was at a time when Halliwell was a free man; and it was an act which, as an honest man, he was bound to do. Carroll's consent relates back to the day when the act was binding upon Halliwell. The case of *Scott v. Porcher* is quite different; there Burnié & Co. were agents for the consignors only. Here, Culverwell, when he applied, filled a distinct character for Carroll only. It has been said by Mr. Parke, "Suppose these goods were to be consumed by fire; would not Carroll be a creditor?" I have no difficulty in answering that question. The debt *would* remain: the goods being but a collateral security. The lien on the goods in some cases is gone, though the debt remains. Then, this being the act done for the benefit of Carroll, has he done anything to repudiate it? It appears, from the statement of Culverwell, that an attachment was taken out by Carroll in the Lord Mayor's Court. What became of this we do not know; nor do we know when Carroll was apprised of the act done for his benefit. But is that fact to be relied upon, in order to cut down Carroll's right? If it is, it should have been given very clearly and distinctly, with regard to the date of the communication to him, and the result of that proceeding in the Lord Mayor's Court. Then comes the question, what is the operation of the subsequent facts? I agree, that if they amounted to a conversion of the goods, the plaintiff would be entitled to nominal damages. The direction, I admit, was to sell, and to sell only. Yet, does the mere fact of putting the goods into Carroll's possession amount to a conversion? The subsequent return of them placed the parties *in statu quo*; and no damage appears to have been done: and all this took place before they had been de-

manded. Carroll, had an equitable right in them, and he returned them. I think, altogether, it was not such a conversion as is necessary to maintain an action of trover. On the whole, I think the assignees are bound by the bargain made with the bankrupt.

Mr. Justice Littledale.—I am of the same opinion; I agree, that from the time the skins were first ordered to be sold, the property and possession was still in Halliwell. But afterwards, Culverwell, finding the security for payment to Carroll was very doubtful, applied to Halliwell for further security. But in what character did he apply? Not on his *own* account. There is nothing from which to infer, that he had sold *del credere*; we are not here to intend that he did. Halliwell then agreed to give security, according to the terms of the letter of the 16th of March. But, it is said, this was not assented to, and was not afterwards ratified; and that the bankruptcy has intervened. Why, certainly there was no express assent; but that he wanted security is very clear, by his having afterwards attached the goods. It shews he would ratify the act which would improve his security. It is then said, that this act of his shewed that he did not consider the goods as his own. I do not think there is enough to infer this; for it does not appear when he knew that the arrangement of the 16th of March had been made. Then, upon the second point, I think the case of *Solly v. Rathbone* is quite different. Here was an express authority to sell, and to pay Carroll. If the goods had been handed over to any one but Carroll, the case might be different; they found their way back to the custody of Culverwell and Brooks, before any demand was made. There was no damage done by the removal, which was merely a change of place; it is different from the case of larceny, where the slightest removal will be sufficient; but under all the circumstances, I think this was not a removal sufficient to amount, in point of law, to a conversion of the goods.

Postea to the defendant.

1828. }
Nov. 7. } CAVE v. COLEMAN.

Horse Dealing—Warranty—Variance.

1. *Where, in the course of dealing between the buyer and seller of a horse, the seller described him as being "perfectly quiet and free from vice," and afterwards a bargain was struck, nothing being expressly said on either side about warranty:—Held, that the description given by the seller before the purchase was concluded, amounted to a warranty.*

2. *Declaration, stating the consideration of the purchase of a horse to be, "that the buyer would give one hundred guineas": Evidence, that the buyer was to give "one hundred guineas, and 10l. more if the horse suited him:—Held, to be no variance.*

Assumpsit on the warranty of a horse.—The declaration stated the consideration to be "in consideration that the plaintiff, at the special instance, &c. would buy of the defendant a certain horse at a large price, to wit, the sum of 105l." the defendant undertook and faithfully promised, &c.

The evidence was, that the plaintiff was to give one hundred guineas, "and 10l. more if the horse suited him." That was one of the points made by the defendant, on the ground that this was a variance from the consideration alleged.

The declaration stated the warranty to be "that the horse was perfectly quiet, and free from vice." It appeared in evidence, that the defendant in the course of the dealing for the horse, had said that the horse was perfectly quiet and free from vice; that after this had been said, the bargain was concluded, nothing having been said on either side as to any express warranty. The plaintiff having, upon these facts, and proof of the unsoundness of the horse, obtained a verdict,—

Mr. Brodrick now moved to set it aside. First, the consideration was not correctly stated in the plaintiff's declaration. The evidence was, that the plaintiff was to give one hundred guineas, and 10l. more if the horse suited him.

[*Mr. Justice Bayley*.—Either way it would be a large price; the rest is stated under a *videlicet*, and may be rejected.]

Vol. VII. K.B.

The case is precisely the same as that of *Blythe v. Bampton*(1). There, as in the present case, it was stated in the declaration, that, in consideration that the plaintiff would purchase of the defendant a horse at a certain price or sum, to wit, the sum of 55l., the defendant undertook and promised, &c. The evidence was, that the defendant was to have 55l.; but the defendant was to return 1l. if the plaintiff did not gain 4l. or 5l. by the horse: and the Court held this to be a variance.

Secondly, there was no evidence of warranty; there must be an express warranty in a contract like the present; a mere representation is not sufficient, it is a mere collection of phrases used by a seller towards a buyer in the ordinary course.

[*Mr. Justice Bayley*.—But that amounts to a warranty if made before the bargain takes place. The term "warrant" or "warranty" is not necessary; I am sure I have so ruled it a great number of times.]

[*Lord Tenterden*.—Surely the price is agreed upon, with reference to what has been previously said about the character of the horse.]

Lord Tenterden.—Upon the first point, I am of opinion, that there was no variance between the contract as laid in the declaration, and as proved in evidence. It only comes to this:—if the buyer *likes* to do so, he may give the seller 10l. more. I do not see how the latter could bring any action for the 10l., though the buyer kept the horse. He might say, "I don't like the horse, but I'll keep him." There seems to be no available condition about the 10l.

Mr. Justice Bayley.—I am clearly of opinion that there was no variance.

Rule refused.

(1) 3 Bing. 472; 4 Law Journ. C.P. 157. But in that case it will be seen that *Mr. Justice Gaselee* differed from the rest of the Court, and thought that the actual sum, being laid under a *videlicet*, was immaterial, as had just been suggested by *Mr. Justice Bayley* in the present case.

1828. }
Nov. 10. } HOWSON v. HOUSEMAN.

Illegal Wager—Liability of Stakeholder.

Money deposited in the hands of a stakeholder on an illegal wager, may be recovered by the party making the deposit as money had and received, although the stakeholder has paid it over, if such payment over has been made under an indemnity.

Assumpsit for money had and received.

At the trial, before Mr. Justice Bayley, at the York Summer Assizes, it appeared, that the sum sought to be recovered was the amount of the plaintiff's deposit upon a trotting match for 20*l.*, which had been made between the plaintiff and another party, and in respect of which the defendant acted as stakeholder. The match was to be run on York race-course, on a day named; but the plaintiff did not then attend, and the defendant subsequently paid over the whole amount in his hands to the other party, from whom he received an indemnity. On the part of the defendant, evidence was tendered to shew, that, according to the laws of the turf, the match having been play or pay, the defendant had lost the wager; but the learned Judge refused to admit that evidence, and a verdict was found for the plaintiff.

Mr. J. Parke now moved for a new trial, contending, that the money having been paid over, the case was within the distinction taken in *Cotton v. Thurland* (1), and, therefore the defendant was not answerable. The circumstance of the payment over having been made under an indemnity, did not alter the nature of the act, as the plaintiff was no party to it.

Lord Tenterden.—Payment of money over, under an indemnity, is the same thing as if the stakeholder had retained it. I regret that this case was ever tried. Courts of justice ought not to be occupied in the trial of questions of such a nature.

Mr. Justice Bayley.—I also think, that money paid over under an indemnity, must be considered to be still in the hands of the party who makes the payment.

Rule refused. (2)

(1) 5 Term Rep. 405.

(2) See *Hastelow v. Jackson*, 8 B. & C. 221; 6 Law Journ. K.B. p. 318.

1828. }
Nov. 11. } PATTERSON v. JONES, ESQ.

Libel—Privileged Communication—Servant—Evidence.

1. Where a gentleman, voluntarily and unsolicited, writes a letter to another, touching the character of a person who has lived with the writer as a servant, and is about to be, or is, engaged with the person to whom the letter is addressed, the mere circumstance of its having been voluntarily written, will not deprive it of the protection given to a privileged communication, although it may reflect on the character of the servant.

2. But such a letter, to be entitled to the protection given to a privileged communication, must have been written fairly and bonâ fide; and whether it has been so written is a question for the jury.

3. Semble—that the defendant who is sued by the servant, in an action of libel for the writing of such a letter, may, under the general issue, (and without pleading a justification,) give evidence of facts, tending to shew that the letter was written bonâ fide, although the facts themselves, in an ordinary case, would amount to a justification.

This was an action to recover damages for certain libels, charged to have been published by the defendant, to the injury of the plaintiff's character.

The declaration stated, that the plaintiff had been in the service of the defendant as butler; and in that capacity had behaved with good temper, civility, honesty, &c. (and so on, negating the charges which might be inferred from the defendant's first letter to Mr. Mornay); that the plaintiff had left the service of the defendant, and had applied to be employed by one Aristides Franklin Mornay, as butler; that the defendant, knowing the premises, and contriving to injure him, and particularly with Mornay, and to cause it to be believed that the plaintiff was not fit to be trusted as a servant, and that he had been guilty of drunkenness, absence from duty, and misconduct, and that he had made free with, and stolen, and purloined the wines of defendant, his master, while he was in his service, &c., wrote and published, &c. (Then came the first of the letters to Mr. Mornay, hereafter given.)

The second count, charging a similar intent, set out the second letter to Mr. Mornay.

The third count slightly varied from the others; and nothing turned upon it.

The plaintiff charged as special damage, that, in consequence of the publication of these libels, Mornay had refused to engage him in his service as he otherwise would have done. It also, in the usual form, charged general damage.

The defendant pleaded the general issue.

The cause was tried at the Middlesex Sittings before this term, before Lord Tenterden, when the following appeared to be the principal facts.

The defendant on the 25th of April 1826, wrote the following letter to Mr. Mornay.

"Putney, April 25, 1826.

"Sir,—Having been informed that you had an intention of taking my butler into your service, I feel it incumbent upon me as a neighbour to inform you, that I have just discharged him for misconduct, and that I cannot feel myself justified in recommending it to you to engage him; I have been rather surprised that you have not applied to me for his character, but I shall not think any more about it.

"I am, sir,

"Your obedient servant,

"William Jones."

"A. F. Mornay, esq."

Mr. Mornay, immediately on the receipt of this letter, addressed a letter to the defendant, as follows:—

"Putney Heath, April 20, 1826.

"Sir,—It is necessary that you should state the particulars of the misconduct of your steward, to determine me to deprive him of the situation for which he applied to me. Is he sober and honest? You will of course consider that there ought to be strong grounds for depriving a man of his character and his bread. I will only add, to avoid any misunderstanding on this point, that I did not seek to take him from your service, but that he asked for the situation in my house, in consequence, he said, of your intention to part with him.

"I am, sir,

"Your obedient servant,

"A. H. Mornay."

"W. Jones, esq."

The defendant on the following day addressed the following letter to Mr. Mornay.

"Sir,—I am sorry that I could not send an answer to your letter by your servant this morning, because I was in a great hurry to get to town upon particular business. I have no hesitation in informing you that I discharged my butler, not only on account of drunkenness and absence from his duty in my house, but on account of my having great reason to believe that he had made free with a great deal of my wine, &c., in which I found a very great deficiency upon an examination of the cellarman, who packed it up to be brought down to Putney, who took a regular account of it, which I have got. Patterson had the audacity to open all those packages without any authority from me; and he acknowledged that fact yesterday before witnesses, when he was so conscious of his misconduct, that he said he would not take any situation in the neighbourhood of Putney.

"Under these circumstances, I thought it right and neighbourly to put you on your guard about him, which Mr. Read and I ought to do.

"I intended to have furnished you with more information, not merely about him, but about another person, but as you have not treated the information I have given you in the way I took it for granted you would have done, I shall decline to do so; particularly as I am quite sure that you will in time be convinced of the rectitude and propriety of my conduct.

"After what I told Patterson yesterday about the wine, I do not think he will like to live in the neighbourhood of Putney; but I have no objection to your taking him into your service, provided you think you can with propriety do so, after what has passed.

"I am, sir,

"Your obedient servant,

"William Jones."

"A. H. Mornay, esq."

Mr. Mornay was not called, on the part of the plaintiff, to prove the special damage,—upon which Sir James Scarlett, for the defendant, urged, that the plaintiff ought to be nonsuited.

Mr. Denman, for the plaintiff, then declared that he would go on with the case, as one of libel, in the ordinary course, and independent of the special damage. But to this Sir James Scarlett objected, contending, that as the special damage was not proved, the letters were privileged communications from one gentleman to another, touching the character of a servant.

Lord Tenterden said, that as the matter of communication had originated with Mr. Jones, he would not nonsuit the plaintiff; but would reserve the benefit of the objection for the defendant.

The defendant's counsel then addressed the jury, for the purpose of shewing that the letters were not written in malice, but in the proper and ordinary course of a communication made from one gentleman to another, touching the character of a servant who had lived with the writer; and which it might often be the duty of a gentleman to make, even unasked. In support of this line of defence, he called witnesses to prove, that wine entrusted to the care of the plaintiff had been missing, and to establish the charge of drunkenness against the plaintiff. —Lord Tenterden at the time entertained doubts, whether he ought to have received this evidence, there being no justification pleaded; but he received it subject to any objection to be made afterwards on that ground, if necessary on the part of the plaintiff.

Lord Tenterden, in his charge to the jury, told them, that the special damage was not proved; that they were to lay it out of their consideration altogether; and that they were not at liberty to infer from the facts, that Mr. Mornay had declined to engage the plaintiff in his service, in consequence of the writing of the letters in question; that where letters and representations were written, or made in answer to applications to a former master of a servant, they were in general privileged, unless malice could be shewn to have actuated the person who wrote the letters, or made the representations: that was the general rule. But in this case Mr. Jones was a volunteer; he began the communication on the subject of the plaintiff's conduct; and his Lordship, therefore, said he was not clear that the same proof was necessary on the part of the plaintiff, as there would have been, had the case been

within the general rule. That, from the whole of the facts in evidence, they (the jury) were to decide whether the letters were written fairly and honestly, or maliciously; that, if they thought they had been written fairly and honestly, and according to the best of the judgment of Mr. Jones, they would find a verdict for the defendant: but if they thought that the letters had been written maliciously, and with an intention to injure the plaintiff's character, they would find a verdict for the plaintiff, with reasonable damages. The jury found a verdict for the plaintiff—damages, 80*l*.

Sir James Scarlett now moved for a rule to shew cause why the verdict should not be set aside and a new trial granted. The letters were written within the protection given to what are called privileged communications. If the plaintiff had not been a servant of the defendant, they never could have been written. The plaintiff had therefore no right to treat the question as one of libel generally.

[*Lord Tenterden*.—But the jury have by their verdict found that there was malice.]

The evidence to shew malice was insufficient. To rebut the charge of malice, in a case like the present, it is not necessary to prove the minutest particular of every fact. It is sufficient if enough be shewn to warrant the inference, that the matter asserted, was not asserted with the knowledge and under the belief that it was entirely without foundation. The examination of the evidence on this point is unnecessary with reference to the legal question.

Lord Tenterden.—I thought, that as Mr. Mornay was not called, there was an end of the special damage; and I so told the jury. The plaintiff, then chose to go on, treating the case as an action for libel in the usual course. Then Sir James Scarlett said, "This is a privileged communication." I said, "No, it originated in the letter voluntarily written by Mr. Jones; he begins the communication." Then Sir James went to the jury, and he called witnesses, whose evidence was pointed to the establishing of the charges contained in the letters. As the defendant had not pleaded any justification, but had rested on the general issue, I had doubts as to the legal admissibility of this evidence;

but I did receive it. I left the question to the jury, whether Mr. Jones had written these letters honestly and *bonâ fide*, or maliciously, with an intention to injure the plaintiff. I told them that it was not necessary for the defendant, in order to relieve himself from the charge of malice, to prove his charge against the plaintiff with all the strictness which would be necessary if that charge were made in a criminal proceeding. I said, that if they believed the defendant, in writing the letter, fairly wished to convey information to Mr. Mornay, and had not an intention to injure the plaintiff, they must find that the charge of malice in the defendant was not proved, and must find a verdict in his favour. I think I even adopted an argument used by Sir James Scarlett in his address to the jury for the defendant, that it was the duty of a gentleman, voluntarily and unasked, to make a communication; and that the sole question was as to the intention—the *bona fides*.

Mr. Justice Bayley.—I think this case was properly left to the jury. The question is, was this a privileged communication? If it were not made *bonâ fide*, it was not within the protection given to communications of that nature. I think a person may properly, of his own motion, desire a gentleman to put questions to him, as to the conduct of a man who has been his servant. But, the jury are to judge of the intention with which this is done; and more is to be expected in proof from him who puts himself into motion, and seeks for the communication. The defendant, in his first letter, said the same as if he had said, "I desire you to ask me some questions about that man." He was asked; then came the second letter, and the jury had to consider the motive with which that was written.

Mr. Justice Littledale.—I think that if this were a privileged communication, no plea of justification was necessary, in order to let in the evidence. But the question, whether a communication is privileged, depends on the question, whether it is made honestly and *bonâ fide*. There is a difference in the two cases, where a gentleman is applied to for the character of a servant, and that wherein the gentleman volunteers unsolicited, as the defendant did in the present case. In both cases, the jury are to decide upon the motive; and where such a

communication is voluntary, they may fairly expect more evidence to satisfy them that the defendant acted *bonâ fide*, than they would, if he had waited until application had been made to him.

Rule refused.

For cases of privileged communication, see *Pasley v. Freeman*, 3 Term Rep. 61.

Bromage v. Prosser, 4 B. & C. 247; 6 D. & R. 296; and fully in 3 Law Journ. K.B. 203.

M'Dougal v. Claridge, 1 Camp. 267.

As to the privilege of a counsel, see *Hodgson v. Scarlett*, 1 B. & A. 232; and the cases there cited.

1828. } COLES, ADMINISTRATOR, v.
Nov. 11. } HULME.

Variance—Bond—Intendment.

Declaration, in an action of debt on bond, stated, that the defendant acknowledged himself to be bound in the sum of 7,700 pounds.

Plea—Non est factum.

On the trial, it appeared, that in the bond the word "pounds" was omitted. The condition was for the payment of several sums amounting to 4,859l. 1s. 3½d.

Held, by Lord Tenterden and Mr. Justice Bayley, that the declaration was well proved by the bond; and that the word "pounds," by necessary intendment, might be supplied. Dissentiente, Mr. Justice Littledale.

Debt on bond. The declaration stated, that the defendant, by his writing obligatory, sealed, &c., acknowledged himself to be bound to the plaintiff's intestate in the sum of 7,700 pounds of lawful money, &c. The defendant pleaded *non est factum*, and other pleas not necessary to be here noticed.

The cause was tried at the Middlesex Sittings before the present term, when the plaintiff obtained a verdict; subject to a question arising out of the following facts.

The bond in question ran in the usual form; but by accident, the word "Pounds" had been omitted; so that the defendant became bound to the intestate in the sum of 7,700 of lawful money, &c. The condition shewed that the bond was given for securing payment of several sums, amounting in

the whole to 4,859*l.* 1*s.* 3½*d.* Lord Tenterden thought, that under these circumstances, the word "Pounds" in the bond might be fairly supplied by intendment.

Sir James Scarlett now moved to set aside the verdict. No case has gone so far as to authorize the intendment of a word so material in the deed, as that which is to express the whole form of the obligation. It has been decided, that you may correct a wrong word, but you cannot supply a material word. Suppose this bond were without any condition at all; it could never be intended that the obligor meant any given coin, inasmuch as all the coins in circulation are "lawful money;" and without resorting to the extreme supposition that the obligor meant shillings, sixpences, pence or farthings, yet it must be borne in mind, that the common form of these obligations has often used the term "guineas," "marks," and "nobles." The use of the two latter has become almost obsolete, on account of the disuse of the coins which represent those sums; but the use of the word "guineas," is not so obsolete; and if the obligor intended "guineas," the deed declared upon, as expressing "pounds," is equally not his deed. Some reliance has been placed on the words of the condition as leading to a necessary inference, that the word "pounds" was intended; but the condition leads to no such inference. The sum secured is 4,859*l.* 1*s.* 3½*d.* Supposing that it be taken, as usual, to make the bond for a sum double the amount to be secured, the sum here does not tally, so as to admit of this intendment. Even if it should be said, that the bond must be taken to mean a sum sufficient to cover the amount in the condition, this would not, of necessity, lead to the supplying of the word "pounds," for the word "guineas" would equally answer the purpose. To intend that the word "pounds" was meant, would be carrying intendment very far indeed. Suppose the omission were of a different character, and that the word "pounds" was mentioned, and the number was omitted. Could the Court intend an arbitrary number sufficient to cover the condition, and adopt an arbitrary number selected by the plaintiffs? It is difficult to distinguish such a case from the present; and the Court, after laying down such a precedent as they are called

upon by the plaintiff to do, may next be called upon to supply, not only the coin intended by the obligor, but also the number of coins. There is here nothing to lead to a certainty; all is conjecture, or at the most is but probability; and mere probability, however strong, is not sufficient to warrant such an intendment as the present.

Lord Tenterden.—I agree that conjecture, nay, that probability, would not be sufficient to justify us in making an intendment like that which is required to connect this bond with the plaintiff's declaration. I think there should be a moral certainty as to what was the intention of the obligor; but I think there is enough in the bond, taken with the condition, to lead to that certainty. The bond alone speaks of 7,700; without saying of what. But, it is said, this might mean guineas, marks, shillings, and so on. It might; let us then look at the condition,—what says the condition? Why, it speaks of various sums, amounting in the whole to 4,859 pounds. Surely then, the bond, which is for a penal sum, must be for a sum larger than that mentioned in the condition. But what description of sum—guineas, pounds, or marks? I have not calculated whether 7,700 marks would satisfy 4,859 pounds; and I think it is immaterial. What is the language used by the parties throughout, when speaking of a sum intended to represent the aggregate of the fractional parts? Why it is *pounds*—so many pounds. So many pounds, shillings, and pence; there is nothing said about guineas, or marks; or about any other coin, but pounds, shillings, and pence. Then, when I look at this bond, and see 7,700 mentioned, I think it is morally certain that the word was left out by mistake—for some word has undoubtedly been left out, and a word representing money, which is to cover 4,859 pounds—my mind arrives at the moral certainty, that it is the word "pounds" which is omitted.

Mr. Justice Bayley.—There are authorities to shew that you may supply a blank in a deed like the present, if you can clearly ascertain the intention of the parties. I am quite satisfied that the word "pounds" was intended.

Mr. Justice Littledale.—I have no doubt in my own mind that the word "pounds" was intended; but I am not prepared to

say that it is a necessary consequence that we should supply so very material a word. I entertain strong doubts upon the point; and I should rather say that we ought not to supply the word.

(There was no other Judge in court.)

Rule refused.

[For authorities and opinions on this subject, see—*Dodson v. Kayes*, Yelv. 193. "False Latin aided; for this singular reason, that 'false Latin' abates a writ, because the plaintiff may purchase a new writ;—but will not destroy a bond, for the party cannot have a new bond when he will."

Loggins v. Titheton, Yelv. 225, and *Cro. Jac.* 309. There false Latin was held to be fatal to the plaintiff, according to the report in Yelverton; for the word in the bond was said to be *trigintate* instead of *triginta*; "and forasmuch as there is no such word as *trigintate*, *per consequens* the party was bound in no such sum; and if a man is bound in a bond *in (libris)* without saying *how many*, it is a void bond."

But this case is differently reported in *Cro. Jac.*, where it is said, that "it was afterwards adjudged for the plaintiff."

Hills v. Cooper, *Cro. Jac.*—False Latin in the words expressive of the sum, held to avoid the bond.

Comyns's Digest, tit. "Obligation,"—in which most of the cases are collected.]

1828. } JARDINE AND OTHERS v. WIL-
Nov. 14. } LIAMS AND OTHERS.

Practice—Bill of Exchange—Rule to compute.

After judgment by default, in an action on a bill of exchange, if the Court be satisfied by the defendant upon affidavit, that there is a fair question for a jury as to the amount really due, they will leave the plaintiff to his writ of inquiry, and will not send the matter to the Master by the usual rule to compute.

Action on a bill of exchange. Judgment by default. The plaintiffs having obtained the ordinary rule for sending it to the Master to compute the principal and interest, instead of executing a writ of inquiry—

Mr. Chilton shewed cause, upon an affidavit of one of the defendants, that he had given a check to the bankrupt, whose assignees were the plaintiffs, for a sum which ought to have been placed to the credit of the bill in question. That he could prove this fact by the evidence of a *Mr. Gilby*, if the Court (by leaving the plaintiffs to the ordinary course of proceeding,) enabled him to compel the attendance of that gentleman before a jury; but which evidence he had refused to give, unless he were compelled. And that, in case a writ of inquiry were ordered, he, the defendant, believed he should be able materially to reduce the damages, which, under the circumstances, could not be done by means of a rule, referring the case to the Master. Upon these facts, *Mr. Chilton* contended, that the plaintiffs were not entitled to call upon the Court to dispense with the executing of a writ of inquiry. The practice of referring these matters to the Master is comparatively modern; and, in the case of *Langman v. Fenn* (1), wherein the practice was discussed, the Court said, that, "if there was any fact which it was necessary for a jury to determine, it ought to have been stated by affidavit." That has been done in the present case. And without the means of compelling the attendance of the witness, the defendants will have no opportunity of establishing the fact necessary to reduce the damages.

Mr. Evans (contrà) contended, that the affidavit was flimsy and insufficient; especially as it did not state, in terms, that application had been made to the alleged witness to make an affidavit.

Mr. Chilton, to shew that his opposition was not made for delay, offered to take short notice of executing the writ of inquiry: but *Mr. Evans* refused to accede to this offer.

Mr. Evans, in continuation.—The sole question before the Master is, whether the bill, upon the face of it, shews that any part, either of principal or interest, has been paid. Indeed, in the case of *Green v. Heame* (2) Lord Kenyon said, that, "by suffering judgment to go by default, the defendant had admitted the cause of action to the amount of the bill."

(1) 1 H. Bl. 542.

(2) 3 Term Rep. 302.

Lord Tenterden.—The practice of sending these matters to the Master is modern. Where there is no question as to the amount, and the whole is but a matter of calculation of figures, it is a convenient practice. But in the present case, it is represented to us to be a matter at least of considerable doubt; and we do not, therefore, think that this is a fit case to send to the Master. The plaintiffs must execute their writ of inquiry in the ordinary course.

Mr. Evans now applied to have the defendants put under terms to take short notice of executing the writ of inquiry.

Lord Tenterden.—No. You refused that when it was offered to you. You preferred the law, and you have it.

Rule discharged.

[See also *Eyre v. the Bank of England*, 1 *Bligh's "Cases in Parliament,"* 582.]

1828. }
Nov. 15. } *JAY v. COAKS.*

Attorney's Bill—Taxation.

1. *If an attorney, after the expiration of the month, commence an action against his client for the amount of his bill, and the client afterwards apply to have it taxed, though on taxation more than a sixth be taken off, the attorney will not be liable to the costs of the taxation.*

2. *But if the client obtain an order for taxation, before the commencement of the action by the attorney, the latter will be liable to the costs of taxation, if the bill be reduced by a sixth.*

The plaintiff sued for the amount of his bill as an attorney.—After the commencement of the action, the defendant obtained an order for the taxation of the bill; and in the result, more than a sixth was taken off: indeed, in point of fact, more than a third was taken off. Whereupon, a question was raised, whether the attorney, under the provisions of the 2 Geo. 2. c. 23. s. 23, was liable to pay the costs of the taxation.

The case was argued in Trinity term by *Mr. Kelly* for the client, and by *Mr. Parke* for the attorney.

For the client, it was contended, that the statute, when it spoke of charging the attorney with the costs, made no distinction between the fact of an action having been brought, or that of one not having been brought upon the bill. But, even if the statute should be held not to apply, the Court had a jurisdiction over the attorney as one of its own officers; and in a case where so much as a third has been taken off, they will order the attorney to pay the costs.

For the attorney, it was contended, that the statute in question authorized the Court to do that which it had been considered they had not the power to do before; namely, to send a bill for taxation, although no action had been brought upon it. And it was to prevent an attorney loading his client with the costs of an action before that client could cause the bill to be taxed, that the statute was passed. Hence the provisions that the bill may be rendered subject to taxation, "although no action be brought for the same;" that the bill shall be delivered a month before action, to give the defendant an opportunity of taxing it; and, that if upon "such taxation" (that is, a taxation ordered before action), the bill be reduced a sixth, the attorney shall be liable to pay the costs. If the client does not avail himself of the month given him by the statute, he loses the right given him of fixing the costs of taxation upon the attorney.

The Court took time to consider, and on the 15th of November their opinion was thus delivered by—

Lord Tenterden.—We have considered this case, and have looked into the act of parliament; and, on the authority of a case in the Court of Common Pleas, to which we have been referred, *Benton v. Bullard* (1), we are of opinion that the client is not entitled to charge the attorney with the costs of the taxation.

Rule accordingly.

(1) 4 Bing. 561; 6 Law Journ. C.P. 115.

1828. } SAMUEL CARRIDGE V. LAUTOUR
Nov. 1. } AND ANOTHER.

Sheriff—Misnomer—Pleading.

1. *An action for false imprisonment can be maintained against a sheriff for arresting a person who is wrongly named in the process, though he be the person against whom it is issued.*

2. *But the sheriff is entitled, and is bound to arrest the person, if he be as well known by the name in the process, as by his real name.*

3. *A person named Samuel, declared against the sheriff for false imprisonment; the defendant justified under a writ against the plaintiff by the name of John, averring that the plaintiff was as well known by one name as the other;—the plaintiff thereupon replied,—traversing that he was so known; but adding, by way of new assignment, that he brought his action for a false imprisonment different from that justified, being a false imprisonment made after the sheriff had notice, and was satisfied, that the plaintiff was not so known;—the defendant thereupon pleaded to the new assignment a justification as before, under a writ against the plaintiff by the name of John, averring that he was as well known by one name as the other; to which the plaintiff demurred:—Held, that the part of the new assignment which went to the averring notice, &c. to the sheriff was immaterial, and that the plea to the new assignment, which passed it by, and was confined to the question, whether the plaintiff was so known, was a good plea.*

4. *Where a plea justifies a trespass, it need not expressly aver the identity of the trespass justified, with that declared for, provided the identity be manifest from the whole subject matter.*

This was an action of trespass, assault, and false imprisonment against the sheriff of the county of Hertford, and one of his officers.

The declaration consisted of three counts. The first was for assaulting and imprisoning the plaintiff; bringing him along divers public streets to a common gaol, and there imprisoning him. The second was for assaulting and falsely imprisoning the plaintiff; and the third was for a common assault.

The defendants pleaded—

First, the general issue to the whole.

Vol. VII. K.B.

Secondly, (to the first count,) a justification under a writ against the plaintiff by the name of John Carridge, directed to the defendant the sheriff; the plea averring that the plaintiff was as well known by the name of John Carridge as by that of Samuel Carridge.

Thirdly and Fourthly, similar pleas to the second and third counts.

The plaintiff replied—

To the second and fourth pleas; taking issue on the averment, that he was as well known by one name as by the other.

To the third plea; traversing the averment that he was as well known by one name as by the other. The traverse, however, did not conclude to the country, but had the following statement after it:—
“That he brought his action, and declared therein by the second count, not for the assault and imprisonment mentioned in the third plea; but for that the defendants, after the plaintiff had been assaulted and imprisoned, and kept and detained in prison, as he had in the first count complained, had notice, and were satisfied that the plaintiff was never called or known, as well by the christian name of John, as by that of Samuel, and that the said arrest and imprisonment were unlawful; and that after they had such notice and were so satisfied, they assaulted and imprisoned the plaintiff for a long space of time, to wit, &c., as plaintiff had complained in the second count; and which assaults and trespasses newly assigned, were other and different trespasses from those mentioned in the third plea.”

To the new assignment, the defendants (after the general issue) pleaded, that as to the trespasses newly assigned, a certain writ, &c.; and so went on to justify under a writ against the plaintiff by the name of John Carridge; and averring that the plaintiff was as well known by one name as the other.

To this the plaintiff demurred; assigning for special cause, that the defendants had not traversed or denied the material averment in the new assignment, that they had notice, and were satisfied that the plaintiff was not as well known by one name as the other.

And that they had not averred that the trespasses attempted to be covered by the last

plea, were the same as those mentioned in the new assignment.

(This last went merely to the omission of the formal words at the end of the plea—thus, “which said trespasses are the same as those in the introductory part of this plea, and in the said new assignment mentioned.”)

The case was argued on a former day.

Mr. Brodrick for the plaintiff. — The plaintiff's new assignment may be informal, but it is sufficient in substance.

[*Mr. Justice Bayley*.—What would be the issue upon it?]

Whether he was as well known by one name as the other.

[*Mr. Justice Bayley*.—Then you do by new assignment, that which you ought to do by traverse.]

If this were unnecessarily done in a declaration, it would not be bad in substance. A new assignment is in the nature of a new declaration. Supposing that the defendants knew that the plaintiff had been arrested by a wrong name, the case of *Morgans v. Bridges* (1) decided, that the sheriff in such a case may not detain a defendant.

[*Mr. Justice Bayley*.—No, it only decided that the sheriff was not liable to an action at the suit of a plaintiff for *not* detaining him; and the case was decided upon that express ground.]

The plea to the new assignment is bad, for the special causes of demurrer. The charge in the new assignment is, that the defendants detained the plaintiff after they knew and were satisfied that the plaintiff was not as well known by one name as the other. The plea merely sets out a writ, and affirms that the plaintiff was as well known by one name as the other. There might have been two writs, and two different arrests: under the first, the sheriff may not have had notice; under the second he might; or if the writ were the same, the plaintiff would have a right to apply the imprisonment in the count which is justified by the plea to the original taking, and might apply the new assignment to the time which occurred after the sheriff had notice of the name being wrong. The plea to the new assignment is also clearly bad, in not averring that the trespass justified is the same as that which is mentioned in the new as-

signment. It only states, in the outset, “as to” the matter newly assigned; and at the close it states, that the plaintiff was detained in the gaol for the time in the second count and in the new assignment mentioned; but it omits the formal and indispensable averment, that the trespasses are the same.

Mr. R. V. Richards, *contra*.—The new assignment is inconsistent with the defendants' plea to the count. It avers notice to the sheriff; but notice to him makes no difference in respect of his legal liability, though it may as to the damages. The new assignment probably means that the original detention might be lawful; but that the continuance of it after notice was not justifiable. But a new assignment is *not* in the nature of a new declaration; nor can it be applied to any trespasses but those which are mentioned in the declaration, although it may give a more specific description. Then, what is the main question in issue upon the plea to the new assignment? It is, whether the plaintiff was as well known by one name as by the other. The notice to the sheriff is nothing; the fact of the sheriff being satisfied is nothing. If, in point of fact, the plaintiff was as well known by one name as the other, the sheriff was bound to arrest him. The new assignment, however, is bad; for it contains matter of traverse, and also of new averment. The defendants were therefore bound to repeat their justification; and if the plaintiff chooses to say that there were two arrests, the defendants have a right to say that there were two writs. As to the special cause of demurrer, respecting the not averring the identity of the trespass, such an averment is not indispensably necessary. It is sufficient, if from the whole context the identity, of necessity, appears.

The Court took time to consider, and this day judgment was delivered by

Mr. Justice Bayley.—After stating the pleadings to the declaration, the learned Judge observed—To the second justification the plaintiff put in what was called a new assignment; but it went beyond the legal powers of a new assignment, and introduced matter which was never before allowed in a new assignment.—[Here the learned Judge read it.]

(1) 1 Barn. & Ald. 647.

7 The first part of the traverse might be a proper answer to the justification. But it did not propose any issue on that point. It went on stating, that after the plaintiff had been imprisoned, as was stated in the *first* count, the defendants had *notice* and were *satisfied* that the plaintiff was not as well known by one name as the other; and that notwithstanding this, they afterwards imprisoned him as he had complained in his second count; and that it was for this he brought his action; and that this was a different trespass from that which was justified by the plea. Therefore, this new assignment takes upon itself not merely to affirm that the second count was for another and a different trespass; but it also gives the trespass this new character—that it was committed after the defendants had *notice* and were *satisfied* that the plaintiff was not as well known by one name as the other. We shall presently see how far this goes beyond the proper powers of a new assignment. To this, the defendants pleaded, in justification, a writ against the plaintiff by the name of John, and set out the justification in terms similar to those used in the former plea, affirming as before, that the plaintiff was as well known by one name as the other. There was not, at the end of this plea, the usual allegation, that this was the same trespass mentioned in the new assignment, or mentioned in the introductory part of the plea; but as it professes, in the introductory part, to justify the trespass mentioned in the new assignment, and states a writ, under which the plaintiff was taken and detained *for the time* mentioned in the new assignment, we think the identity of the trespass is sufficiently clear.—Then comes the main question upon these pleadings. In the discussion of that question it becomes necessary to consider what are the powers of a new assignment. When a party confesses and avoids, you cannot *both* reply and new-assign upon him. You may reply; and may yourself confess and avoid; or you may traverse; and you can only new-assign by omitting to traverse. You may new-assign, by shewing that your action is brought for a trespass different from that which is justified by the plea, and you may then point out more particularly the subject matter of your complaint. But this new assignment alleges, first, that the

plaintiff was not as well known by the name of John as by that of Samuel. This is foreign from the purpose of a new assignment, and is totally out of place in a new assignment. It then goes on to aver another fact—that the assault and false imprisonment was after the defendants had had *notice*, and were *satisfied* that the plaintiff was not as well known by one name as by the other. But how is that part of a new assignment? or how can the Court act upon it? It is totally out of place. The arrest was good or was bad, according to the *fact* whether the man *was* as well known by one name as the other; but, says the allegation in this pleading, “you arrested me after you had had *notice* and were *satisfied* that I was not as well known by one name as the other.” What a loose allegation is this! and how likely to destroy the very object of pleading, which is to arrive with certainty at the point in dispute. You may convince the sheriff, you may give *notice* to him, and may satisfy *him* that you are *not* as well known by the name of John as by that of Samuel; but yet the fact may be that you *are* so known, and may have been called by the name of John, and have answered to it, over and over again. But what would be the consequence if the sheriff, thus convinced and thus satisfied, were to discharge you out of custody?—why, that he would be liable in an action for damages at the suit of the plaintiff in the writ. Therefore the whole of this is immaterial and useless. Then, the only material part left is, that the plaintiff brought his action for another and a different trespass.—If that is so, it is competent again for the defendants to insist that they had a writ and were warranted to make the arrest. Mr. Brodrick, for the plaintiff, put it two ways: first, supposing that it was the same writ under which the defendants justified in both pleas; and, secondly, supposing that there were different writs. But unless there were two arrests the plaintiff ought not to have new-assigned, and if there were, the sheriff has a right to meet one fact by another. He says “if there were two arrests, there were two writs;” but either way the plea has well answered the new assignment. The plea says, that at the time of the arrest mentioned in the new assignment, the plaintiff was as well known by the name of John

as by that of Samuel, and that he was arrested under the authority of a writ against him by the name of John; upon that plea, the plaintiff might and ought to have taken issue. Instead of so doing he has sought to maintain a departure from that certainty and simplicity in pleading, which formerly was properly attended to. But it was also suggested by Mr. Brodrick, that there might be but one arrest; and that the defendants would be entitled to split the time; and if the original taking was lawful, and the subsequent detainer was unlawful, to apply one count to the arrest, and the other to the detainer. Upon this I give no decided opinion;—I am sure you cannot split it, so as to be entitled to give one answer to one justification, and another to the other justification, in respect of one transaction. Here, it is sought to do so, by forcing on the defendants the fact of the sheriff having notice and being satisfied &c.—I am authorized to say, that my Brother Holroyd agrees with us, in this our judgment (1). We are therefore of opinion that, if the new assignment can be supported at all, the plea is a good answer to it; and consequently there must be

Judgment for the defendant.

1828. }
Nov. 13. } HEAD v. DIGGON.

Buyer and Seller.

An offer made by one party to an intended contract, allowing a given time to the other to accept or refuse it, does not bind the person who offers, until it has been accepted; and he may therefore withdraw his offer within the limited time.

And semble, that if the acceptance of such an offer, and the withdrawing of it, be simultaneous, the withdrawing shall be preferred; and neither party will be bound.

This was an action of assumpsit, to recover damages for the breach of a contract for the sale of a quantity of wools by the defendant to the plaintiff. The declaration

(1) Mr. Justice Holroyd had retired from the bench between the time of the argument and that of the judgment.

contained three special counts, stating, a contract for the purchase by the plaintiff of the wools; an undertaking by the defendant to deliver them within a given time; the readiness of the plaintiff to accept and pay for them; and failure of performance of the contract in the defendant, by his not delivering them.

Plea—The general issue.

The cause being tried, at the last Assizes for the county of Suffolk, before Mr. Justice Holroyd, the following appeared to be the material facts.

On the 17th of April 1828, the plaintiff and defendant were in treaty for the sale of the wools in question; but there was a difficulty as to the price. The defendant put down the prices which he would take; and it was agreed that the plaintiff should have a given time to consider whether he would accept the offer or not. There was a dispute as to the time which the plaintiff was to have; but this did not become material. The following is a copy of the paper delivered on the day in question by the defendant to the plaintiff.

Thetford, April 17, 1828.

Offered Mr. Head, of Bury, the under wools, with three days grace, from the above date.

40 Super Head and Lamb	} 9l. 10s.
40 Head, ditto	
17 Broad Head	

As per sample; delivered in good dition (meaning condition).

Fras. Diggon.

Subsequently, (and, as the plaintiff contended, in this the three days grace) the plaintiff called on the defendant, accepted the offer, and desired the defendant to deliver the wools. The defendant contended, that the plaintiff was out of time; and said, he had disposed of them to another person. Independent of the question of time, the defendant's counsel contended, that on the 17th of April there was no binding contract between the parties, inasmuch as it was sought by the plaintiff to reserve an option to himself, and leave none to the defendant; and to shew that this was not binding, they relied on the case of *Cooke v. Oxley* (1). The learned Judge thought

(1) 3 Term. Rep. 653.

this objection was well founded; and, he therefore nonsuited the plaintiff.

Mr. Serjeant Storks now moved to set aside the nonsuit.—The case of *Adams v. Lindsell* (2) has decided that there is no objection, in principle, to an offer made by the seller to be accepted in a given time by the buyer. In that case, an offer sent in a letter by the post, to be accepted by the return of post, was held to be binding; the Court observing, that, if it were not so, no contract could ever be completed by the post; that the defendant must be considered in law, as making, during every instant of the time the letter was travelling, the same identical offer to the plaintiff; and then the contract is completed by the acceptance of it by the latter. How is it possible to distinguish the reasoning of that case from that which must apply to the present? The defendant must, in law, be considered as making, during every instant of the time that was allowed to the plaintiff as grace, the same identical offer; and the contract became completed by the plaintiff's accepting it within the limited time.

[*Lord Tenterden*.—The question really comes to this single point: Must both parties be bound, or will the binding of one be sufficient? You say that you were to be free for the given time, and that the defendant was to be bound.]

Just so.

[*Lord Tenterden*.—What is the form of your declaration? Why, it treats of a bargain, a complete contract; an absolute and unconditional bargain. You have not proved it to be so; those counts will not do. Whether a declaration could be framed so as to be sustainable, we need not at present say.]

The declaration applies to the contract when accepted; it was then a complete bargain.

Lord Tenterden.—That will not do; if the contract is to be taken as made only when you accepted, you must remember that the defendant did not then agree.

Mr. Justice Bayley.—And, upon the main question, you will find that in the case of *Routledge v. Grant* (3), it was decided,

(2) 1 Barn. & Ald. 681.

(3) 4 Bing. 643; 1 Moore & P. 717; 6 Law Journ. C. P.

that unless both parties are bound, neither is to be bound.

Rule refused.

[*Note*.—In the case of *Routledge v. Grant*, as reported in 1 *Moore & Payne*, at p. 733, will be found some observations of the Lord Chief Justice Best, which seem not perhaps to question the authority of the case of *Adams v. Lindsell*, but to treat it as a case which was decided upon very particular grounds, and from which a general rule cannot safely be deduced; and in the case of *Kennedy v. Lee*, 3 *Merivale* 454, Lord Eldon, speaking of a contract by letter, is reported to have said: "I have always understood the law of the Court to be, with reference to this sort of contract, that, if a person communicates his acceptance of an offer within a reasonable time of the offer being made; and if, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer, and both together as constituting such an agreement, as the Court will execute." So that Lord Eldon seems to have thought that a reasonable time should be allowed to the person who has made the offer, after he has received notice that it has been accepted. From the report of the case of *Adams v. Lindsell*, it would appear also, that the declaration was open to the same objection as that which Lord Tenterden pointed out in the present case of *Head v. Diggon*.]

1828. }
Nov. 28. } GIBBS v. STEAD AND ANOTHER.

Costs—Joint Defence.

Two defendants, sued in trespass, defended jointly throughout the cause. On the trial, the plaintiff obtained a verdict against one of the defendants, and a verdict was returned for the other. The Master, on taxation, taking into consideration that the defence was joint, allowed to the defendant, who obtained a verdict, only 40s. costs. And held, by the Court, to be sufficient.

In this case, reported in 6 Law Journ.

K.B. Trin. It will be seen that the plaintiff recovered a verdict against one of the defendants; and failed as to the other, who thereupon obtained a verdict.

The case arose out of the statute, which declares that a person who shall be sued for anything done in pursuance of that act, and who shall obtain judgment in his favour, shall be entitled to treble costs. Both defendants in this cause appeared, and defended by the same attorney, and there was but one defence on the trial. The Master, on taxing costs in the cause, taking into consideration that the plaintiff had obtained a verdict against one of two defendants in a joint defence, allowed but 40s. costs to the defendant who had gained the verdict: and in giving treble costs, he took the usual course of allowing half the single costs, and then half the latter; making in all 70s.

A rule having been obtained by this defendant calling on the plaintiff to shew cause, why the Master should not be directed to review his taxation, on the ground that he should have allowed full costs,—

Mr. Brodrick shewed cause.—The case of *Holroyd v. Brear* (1) decided, that, under similar circumstances, the defendant was not entitled to costs.

Mr. Hutchinson, contra.—The case cited is distinguishable. There were several pleadings; and the plaintiff succeeded on the general issue: here, the plaintiff entirely failed as to this defendant.

Lord Tenterden.—I think the Master has made a proper allowance; and, seeing that it was a joint defence by the same attorney, I have no doubt, that as much has been allowed, as could have been incurred by this defendant, separately from the joint defence.

Rule discharged.

[See *Hullock on Costs*, 2nd edit. sec. 3. p. 140, wherein the statutes and earlier cases are given.]

(1) 4 Barn. & Ald. 43.



1828. }
Nov. 28. } STARLING V. PAIN.

Practice—Sham Plea.

Where a sham plea is so framed as to lead to two modes of trial, OR, is otherwise so out of the usual course, as to put the plaintiff's attorney to unusual delay, or to the necessity of consulting counsel, before he can reply,—the Court will set aside the plea, give leave to the plaintiff to sign judgment, and order the defendant's attorney to pay the costs of the application.

Assumpsit on a promissory note.—The defendant pleaded a sham plea, similar in terms to that in *Jones v. Studd* (1). The plaintiff therefore obtained a rule to shew cause why the plaintiff should not be at liberty to sign judgment for want of a plea, and why the defendant or his attorney should not pay the costs of that application; this had been obtained on an affidavit that the plea was false.

Mr. R. V. Richards now appeared to shew cause.—He had no affidavit to verify the plea; but as the plea did not raise two modes of trial, he submitted, on the authority of the case of *Merington v. Beckett*, (which, with other cases, will be found in the note,) that the Court would not interfere. He submitted also, that the case of *Smith v. Backwell*, in the Court of Common Pleas, was in his favour, and against the interference of the Court upon motion.

[*Mr. Justice Bayley*.—There is a later case, in the Court of Common Pleas, against you: the case of *Jones v. Studd*. You put the plaintiff to trouble and delay, by pleading this out of the common course.]

Mr. Gunning, for the plaintiff, prayed that the defendant's attorney might be ordered to pay the costs. The Court had so ordered in the case of *Vincent v. Groome*,

Lord Tenterden.—Let the rule be absolute, and that the defendant's attorney pay the costs of this application.

Rule absolute.

[*Note*.—The several cases which have been decided on this subject do not appear

(1) 4 Bing. 663; 1 Moore & P. 643; 6 Law Journ. C.P. 153, Easter Term.

to be very consistent; but, on the whole, it appears that the rule may probably be laid down, as we have endeavoured to shape it at the head of this case. The following is the substance of the principal cases which occurred prior to the above case of *Starling v. Pain*.

1818.—*Thomas v. Vandermoolen*, 2 B. & A. 197.—“Where a sham plea was pleaded, calculated to raise issues requiring different modes of trial, the Court suffered the plaintiff to sign judgment, as for want of a plea, and made defendant or his attorney pay the costs occasioned by the plea, and the costs of the rule for correcting the proceeding.”

[The action was assumpsit.—*Pleas*, to goods sold, payment. To the other counts, judgment recovered.]

Mr. Justice Bayley.—It is true, that in this case there has been a rule to abide by the plea; but that makes no difference: in fact, it puts the defendant on his guard, for the rule leaves it to the party to abide by his plea or not, as he chooses; and if he abides by it, he must do so, subject to all its consequences.

1818.—*Bartley v. Godslake*, 2 B. & A. 199.—“Where a sham plea was such as to make it necessary for the plaintiff’s attorney to consult counsel, and therefore cause delay and expense, the Court suffered the plaintiff to sign judgment, and made the [defendant’s] attorney pay the costs.”

[Action on bill of exchange.—*Plea*—That the parties had accounted; that the defendant indorsed the plaintiff a bill of exchange for part of the sum found due, and in satisfaction of the remainder, assigned to plaintiff a judgment obtained by defendant in the Court of Exchequer in Ireland; that the bill was outstanding in the hands of a third person, and that the judgment remained in full force.]

The Court said, that this being an ingenious plea, which the plaintiff’s attorney could not be expected to understand, would put him to the expense of consulting counsel, and thereby occasion delay and expense. It was an improper plea to be put upon the files of the court; upon this ground, they made the rule absolute. And, to prevent

such pleas being pleaded in future, they directed that the defendant’s attorney should pay the costs of the application.

1819.—*Bones v. Punter*, 2 B. & A. 777.—“Defendant pleaded two pleas, requiring different modes of trial:—Held, that on producing an affidavit of the falsehood of the pleas, the plaintiff was entitled to sign judgment.”

1822.—*Shadwell v. Berthoud*, 5 B. & A. 750.—“Where a plea is so framed, as that it may reasonably induce the plaintiff to consult counsel, in order to know how to deal with it, the Court will, on affidavit, that such plea is wholly false, permit the plaintiff to sign judgment as for want of a plea.”

Per Curiam.—This rule must be made absolute, for the plea was obviously for the purpose of gaining time, and would naturally induce the attorney for the plaintiff to consult counsel upon it; and in such cases, if the plea be false, the Court will permit judgment to be signed. If these pleas are to be tolerated, the defendants ought, at least, to adopt old and well-known forms.

1822.—*Body v. Johnson*, 5 B. & A. 751, note (a).

1822.—*Corbett v. Powell*, *Ibid*.

1823.—*Richley v. Proone*, 1 B. & C. 286; 2 D. & R. 661.—“Declaration in assumpsit for use and occupation.—*Plea*—That after the cause of action accrued, and before the exhibiting of the plaintiff’s bill, the defendant delivered to the plaintiff certain goods in satisfaction of the promises in the declaration, which the latter accepted in satisfaction. This plea being in every respect false, the Court permitted the plaintiff to sign judgment as for want of a plea.”

1823.—*Young v. Gadderer*, 1 Bing. 380.—“Where a defendant, after delaying and deluding a plaintiff with promises to pay,

pleaded a judgment recovered, the Court refused to set aside the plea, and permit the plaintiff to sign judgment."

Mr. Justice Park.—The principle which has generally been acted on in the Court of King's Bench, is, that if the plea, being false, be also such as to demand different modes of trial, or so ingenious as to occasion perplexity and expense to the plaintiff, the Court will allow him to sign judgment. In the present case, only one issue has been raised; the plea is one of the most usual, and the affidavit does not allege, as it ought to have done, that the plea is false.

1823.—*Merington v. Beckett*, 2 B. & C. 81; 3 D. & R. 81.—"The Court will not compel a defendant to verify his plea."

Assumpsit for goods sold.—Defendant pleaded a plea precisely similar to the one in *Richley v. Proone*.

[*Note.*—This plea is very different from those in the cases where the Courts have allowed plaintiffs to sign judgment as for want of a plea. In *Richley v. Proone*, in this case, and in all where the Courts have refused to allow this, the plea has been simple, usual, and requiring no special proof, and creating no delay, by making it necessary for the plaintiff to consult counsel. But all the cases in which these inconveniences have prevailed, say, that there the Courts will permit judgment to be signed.]

1828, Hil. Term.—*Smith v. Backwell*, 4 Bing. 512; 6 Law J. C.P. 89.—"Where the defendant pleaded a delivery of a pipe of wine, in satisfaction of the plaintiff's demand, the Court refused to permit the plaintiff to sign judgment as for want of a plea."

Mr. Justice Park.—"There is nothing on the face of a plea absurd, or inconsistent with the allegation, that wine has been given in satisfaction of a demand. There is only a single plea."

Mr. Justice Gaselee.—"Where the plea has raised different issues, has been exceedingly intricate, or has been a mockery of the proceedings of the Court, a discretionary power has sometimes been exercised by the Judges: but that cannot be done with respect to a single plea, which has nothing improper on the face of it."

1828.—*Jones v. Studd*, 4 Bing. 663; s. c. 1 Moo. & P. 643; 6 Law Journ. C.P. 153.

"Where, to an action on a bill of exchange, the defendant pleaded a rambling demurrable plea, which appeared to be a trick on the face of it, the Court ordered it to be struck out, on an affidavit of its falsehood, giving the defendant leave to plead *de novo*, and requiring him to try at the next sittings."

[In this case, the pleas were the same as those in *Starling v. Pain*—*in totidem verbis*. *Mr. Serjeant Jones*, who shewed cause, contended, that if the pleas were struck out, a part of the declaration would remain unanswered; and relied on *Smith v. Backwell*, where the Court resolved not to interfere with pleas on motion, unless they were a mockery of the Court, or required different modes of trial, or were likely to perplex the plaintiff unnecessarily with nice points of law.]

The Court thought this a plea of the latter description, clearly demurrable, and a mere trick on the face of it.

Mr. Justice Gaselee.—"I think this is a proper and merciful application, and that the rule ought to be made absolute, with leave for the defendant to plead *de novo*, upon his undertaking to try after term. *Smith v. Backwell* was decided with reference to the particular plea pleaded in that case; but the present case falls within the principle laid down in *Blenitt v. Marsden* (2), where the Court said, "there might be occasions, where they would not enter into any question as to the truth of the judgment recovered, pleaded in the usual form, upon motion, but would await the time for producing the roll, when such a plea would be regularly disproved;" but they expressed great indignation against the abuse which had grown up of late, and was continually increasing, of loading and degrading the rolls of the Court with sham pleas of this nonsensical nature, making them the vehicles of indecorous jesting; by which it sometimes happened, that the time of the Court, which ought to be better employed, and was sufficiently engaged with the real business of the suitors, was taken up in futile investigations of nice points, which might arise on demurrers to sham pleas. And, in order effectually to put a stop to

this practice in future, they made the rules absolute, in this and several other cases, wherein the same form of plea had been filed.

Vincent v. Groome, 1 Chit. Rep. 182.—“Sham pleas, which required different modes of trial, and pleaded so as to entrap the plaintiff, were set aside, with costs to be paid by the attorney, although he was expressly instructed by the defendant to plead a dilatory plea.”

Mr. D. Pollock, for the defendant, admitted that the pleas could not be supported, but produced an affidavit of the defendant, which stated, that his attorney had on former occasions pleaded dilatory pleas for him, and that he desired him to adopt the same course in the present case. It was contended that the attorney having framed the plea according to his client's instructions, ought not to be made partially liable for the costs, and so much of the rule as related to him ought to be discharged.—But,

The Court said, this was a very improper plea and the attorney ought to pay the costs.

Rule absolute.

1828. } WOOLLEY v. SCOVELL AND
Nov. 11. } ANOTHER.

Tort—Justification.

Where a party, by his own negligent or wrongful act, deprives another of sufficient presence of mind to take advantage of a warning given to avoid any danger or accident that may happen to him from that act; such warning will not discharge the wrongdoer from liability.

Case, for the negligence of the defendants' servants in throwing a quantity of wool from a warehouse, whereby the plaintiff was greatly injured, &c. It appeared in evidence, that before the wool was thrown down, the defendants' servants had called out to warn the passengers; but that the plaintiff, notwithstanding the caution, conceiving he could escape, ran on and received

the injury, which was the subject of the action, by the wool falling upon him. It was also in evidence, that had the plaintiff stood still, or gone back, on hearing the warning, he would have been in safety. Lord Tenterden directed the jury, that if the plaintiff by his own negligence had incurred the danger, and received the injury complained of, the defendant was entitled to a verdict; but, advised them, if they were of opinion, that, in the confusion of the moment, he lost his presence of mind, and thus, by running forward, met with the accident he intended to avoid, they would then find a verdict in his favour. The jury, accordingly, under this direction, found a verdict for the plaintiff, and now

Sir J. Scarlett (with whom was *Mr. F. Kelly*) moved for a new trial, on the ground of a misdirection; contending, that the plaintiff alone was to blame, and that having heard the warning, which had he attended to he would not have received the injury, he could not maintain the action:—But,

Lord Tenterden.—The first fault was, that of the defendants' servants in throwing the wool down, instead of lowering it by means of a crane. The defendant, as he himself confessed, on being remonstrated with when the accident happened, did this to avoid expense; and it is no injustice that he should be obliged to pay for the mischief, which his negligence, and want of common care originated.

Mr. Justice Bayley.—I think the direction was perfectly right. If the defendant, by his own wrongful act, deprived the plaintiff of his presence of mind, he is liable for the consequences.

Mr. Justice Littledale.—I have no doubt upon the law having been rightly stated to the jury. Had it not been for the act of the defendant, the plaintiff would have retained his self-possession. It is not surprising that he should have been alarmed; and, as the alarm was created by the defendant, he is properly answerable in this action.

Rule refused.

1828. }
Nov. 18. } GUARMAN v. VEALE.

Attorney's Bill—Taxation.

(*Similar point to that determined in Jay v. Coaks, ante, p. 32.*)

In this case a rule had been obtained by Mr. Rowe on the part of the client, to charge the attorney with the costs of the taxation of his bill, more than a sixth having been taken off.

The client had obtained an order for taxation the day before the action was brought on the bill, but nothing was done under the order, until after the action was so brought.

Mr. Chitty, for the attorney, contended, that the recent decision in *Jay v. Coaks* was in his favour. But by

Lord Tenterden.—The fact of the order being obtained before the action was brought, alters the case. The attorney must pay the costs.

Rule absolute.

1828. }
Nov. 12. } VON LINDENAU v. DESBOROUGH.

Insurance—Suppression of Fact.

1. *Whether a proposed assurance be upon shipping, or lives, or against fire, it is the duty of the assured to communicate every material fact necessary to be known to the assurer.*

2. *And if any such fact be known and not communicated, the policy will be void, although the assured did not, at the time, believe it to be material.*

This was an action against the secretary of the Atlas Insurance Company, on a policy of assurance upon the life of Frederick late Duke of Saxe Gotha. The defence appeared at length upon the pleadings; the substance of them being, that the policy was void, inasmuch as the office, at the time of the effecting of the insurance, had not been truly informed of the state of the Duke's health and constitution. The cause was tried at Guildhall, before Lord Tenterden, at the Sittings before this term, when the following appeared to be the principal facts.

The formal facts were not disputed.

The question between the parties was, as to the representation that had been made by the assured when the policy was effected, and the suppression of certain facts alleged by the assurers to be material.

By the declaration made by the assured, and connected with the policy, it appeared that the assured stated that the Duke had no rupture or cancer, dangerous hemorrhage or fits; that he was not engaged in any occupation, or accustomed to any habits, prejudicial to health; that he was at that time in good health, and not afflicted with any disorder tending to shorten life; and the assured then agreed that that declaration was to be made the basis of the contract between him and the assurers; and that if it should appear that he had made any untrue averment, the policy should be void, and the money paid as premium be forfeited.

With this declaration there was given in the certificate of two physicians, in the form of answers to questions put to them on the part of the office. Among others, the following were put.

Question. In what state of health was he when you saw him last?

Answer. He was in a state of perfect bodily health.

Q. What is his general state of health?

A. The state of health of his Highness is to be called good for the following reasons: because all operations of his body are performed undisturbed; because he is in full vigour, and has the most healthy and lively complexion; thus that he appears to be not older than forty years.

Q. Are you acquainted with his ever having been afflicted with rupture, gout, dropsy, cancer, asthma, vertigo, fits, hemorrhage of any kind, complaint of the liver, or other disease, or with his having any symptoms of disease?

A. His Highness is totally free from all the here-mentioned deficiencies and diseases; except that since 1809, he has had a cataract in the left eye, which can be operated upon, and that since 1819, he is hindered in the faculty of speaking, in consequence of an inflammation in the chest, of which he was cured.

Q. Do you believe he is quite free from any disease, or symptoms of disease, and in perfect health?

A. Quite free from all other diseases,

as also free from all and every symptom of diseases, and can consequently call the state of his health, perfectly good and excellent.

Q. Are you acquainted with any circumstance, having a tendency to the shortening of his life, or which can make an insurance upon his life more than usually hazardous?

A. Such circumstance I do not know, as far as human knowledge may go; and such apprehension may be of less value in the person of his Highness than of any other person, considering the great attention to preserve his health.

Q. Are there any other circumstances *within your knowledge*, which the directors *ought to be acquainted with*?

A. Any other circumstances by which the life of his Highness could be endangered are utterly unknown to me.

Evidence was also given of the certificates, and answers, upon which the Union Insurance office had acted, on occasion of an insurance effected previously by that office upon the same life; and which certificates and answers had been communicated by the Union Insurance office to the Atlas, the defendants' office, when the assurance now in question was in treaty at the latter.

The certificate which had been sent to the Union office, and the contents of which were communicated to the Atlas, was made by Messrs. Bernhardt; and it may here be mentioned, that the cause of the present insurance being proposed to the Atlas was, that the practice of the office of the Union was, not to insure beyond a certain sum upon the life of a foreigner, and that that office had already insured up to the limited sum upon the life of the Duke. This certificate was also in the form of answers to questions put by the Union office, among which were the following.

Q. Is he at present to your knowledge in perfect health?

A. We saw him last night in the opera, where his looks shewed that, agreeable to his circumstances, he was in perfect health.

Q. Is his mode of life temperate and regular?

A. We can give about that, the most satisfactory assurances; as everything is done to preserve his health, and as he strictly follows the advice of his physicians.

In answer to another question, the answer was, that he was "stout, and of a white

complexion, but his white complexion is not to be called unhealthy, so we judge."

[All the questions and answers are given according to the literal translation from the German.]

Q. Do you know of any other circumstance that ought to be communicated to the directors?

A. Agreeably to our information, the Duke has led a dissolute life, by which he has lost the use of his speech, and, according to some information, also that of his mental faculties, which, however, is contradicted by the medical men; and, however little influence we believe this has on his natural life, we find it our duty to mention this.

Q. Do you recommend the insurance to the directors?

A. We believe, that, considering all circumstances, we can fully recommend this insurance.

Then followed these observations:—"We believe that the life of the Prince, on account of the regulated habits which are precisely followed, is sooner to be assured than that of a thoroughly healthy person, who is left entirely to his own regulations. It is the general belief of the public, that the Duke will live many years to come."

Upon the statement disclosed by the above documents, the Atlas office (the defendants) insured the life of the Duke for five years, in the sum of 3208*l*. The premium was at a rate exceeding the ordinary payment; but no great reliance was placed by the plaintiffs upon the rate of payment. The Duke died within eight months from the time of the assurance being effected.

From the evidence now adduced, upon depositions as to the actual state of health of the Duke when the above certificates were given, it appeared that there were many other circumstances respecting his personal situation which had not been disclosed at the time; and whether it was necessary to disclose them, became the question in this case. It seemed, that the "hinderance" of speech, mentioned by the physicians, had become a total loss of speech for nearly two years before the effecting of the policy; the Duke's valet declaring that he had not known him to utter a syllable within that period. It appeared too, that the mode by which he conveyed his sentiments, was in general either by writing or

gesture, though it was also stated by one witness, that, within the time spoken to by the valet, he (the witness) had heard the Duke utter the monosyllable, "Yes," or "No." Upon one occasion, when in the presence of his council, he had been desired to signify his assent, if he should assent to the measure then under discussion, by patting the cheek or touching the arm of one of the individuals then present, and that he had accordingly done so by patting the cheek of that individual, and that he had been in the habit of expressing himself in this mode.

It appeared also, that he had been subject to catarrhal attacks, which came upon him frequently. A Dr. Stark, who knew the Duke, but who was not one of the physicians who had given the certificate, stated, that he had entertained a very strong suspicion that there was some affection in the brain, and he expressed a wish to the Duke of Saxe Weimar, Duke Frederick's successor, that whenever the Duke should die, the skull should be opened; and on his death the doctor came from Jena for the purpose of being present at the opening. When it was opened, there was found a large tumour, not attached, but lying on the brain, towards the region of the right temple. This had occasioned the skull to be thicker in that part than in any other. All the medical men concurred, that this must have been born with the Duke, or have been formed at a very early period of his life, and before the bones of the skull were matured. The immediate cause of the death was water on the brain.

But the most important omission in the certificates, was that which related to the state of the Duke's mental faculties. No mention of this was made in the answers to the questions put by the Atlas office; though it was slightly alluded to by the Bernhards, in their certificate forwarded to the Union office. The fact was, that the mind of the Duke had lost its powers for some years; he was perfectly imbecile, and he was subject to the rude familiarity of servants, and others, who occasionally took advantage of this his helpless situation. These facts were known to the physicians who had certified.

These facts being in evidence, the plaintiff called a Mr. Green, a surgeon, who having heard this evidence, stated his opi-

nion to be that the catarrhal affections in this case were not likely to shorten the life of the patient; that the loss of speech did not appear to be connected with any disease in the brain; that the water had come upon the brain shortly previous to the death, and that the tumour on the brain, considered by itself, was not likely to prevent the patient living for several years longer: but upon cross-examination, this gentleman admitted, that if he, with a knowledge of the facts known to the certifying physicians, had had the same questions put to him, he should have thought it proper to mention the catarrhal complaints, and the loss of intellect.

Upon this answer, Lord Tenterden expressed his opinion that there was an end of the plaintiff's case by reason of the want of a sufficient disclosure.

The plaintiff's counsel submitted that this alone would not deprive the plaintiff of his right to recover; and the examination of the witness was then carried on as follows:—

Q. You say that you would have thought it right to disclose those circumstances. Would that have been, because in your opinion they were material?

A. Whatever importance the state of the intellects might have with regard to the case, the fact of the imperfection of speech would be a still stronger fact, as it related to the state of the brain. But still, if there was any considerable impairment of intellect, in giving my opinion upon the case to an insurance office, I should think it right to mention that fact.

Q. Would that be founded upon an opinion that the fact would influence a man's life?

A. No. But because it might raise a suspicion as to the state of the brain.

Q. Then you would communicate it to the office that they might know it, and form their own judgment?

A. Yes.

Q. Not that it would tend to influence the value of the life, but that it might enable them to make further inquiry?

A. Yes.

Lord Tenterden hereupon said, that he should leave the question to the jury in this form.—"If in your opinion, any fact material for the information of the office, respecting the health of the party, known to

to the party certifying, was not communicated, the policy is void."

The plaintiff's counsel submitted, that the question should be put to the jury, whether the information not communicated was material in the judgment of the party certifying. But his Lordship still believing that the question, as first stated, was the proper one, the plaintiff's counsel elected to be nonsuited; and was nonsuited accordingly.

Mr. Brougham now moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted. The question ought to be, whether there was a fair and *bonâ fide* communication of all which, in the judgment of the party communicating, appeared to be material. The very question put to the physicians was addressed to their judgment. The noble and learned Judge proposed to leave it to the jury as a mere question, whether the fact not communicated was material, without reference to the question as to any fraud.

[*Lord Tenterden*.—To be sure. Why, if there was fraud there could be no claim at all.]

Then, the question as proposed to be left to the jury was not the correct one; the not communicating a given fact, does not vitiate a policy, unless the party who omits to make the communication, believes himself that it is material. Its becoming material, its being afterwards discovered to be material, cannot have this important influence. The assured cannot be expected to guarantee the immateriality of every fact not made known. If it be held that he must, all the assured will be placed in a most hazardous situation. Concealment is a very different thing; this was noticed at great length by Lord Mansfield, in the case of *Carter v. Boehm* (1), and from his judgment it may be collected, that to vitiate the policy, the concealment must be fraudulent. The same was laid down in *Mayne v. Walter* (2). There the fact of an English supercargo being on board a ship, which circumstance became material upon a question of neutrality, was not disclosed; and this materiality was not known, either to the assurer or the assured; and it was held that the policy

was not void by reason of the non-communication; and in that case, Lord Mansfield expressly laid it down, that the concealment, which is to avoid a policy, must be fraudulent.

[*Mr. Justice Bayley*.—There was a case in the Common Pleas, *Huguenin v. Rayley* (3), in which a fact was not communicated by the assured, because he believed the assurer knew it, yet the Court laid down that the question to be submitted to the jury was, whether the fact was material or not. The Court, in that case, thought there was no fraud on the part of the assured; yet, that the materiality of the fact was the question.]

The materiality of the fact, and the belief that it is so, ought to concur. Here, there is no reason to suppose that the materiality of the fact was believed by the physicians; they spoke to the apparent bodily health of the Duke.

[*Lord Tenterden*.—A person who has just recovered from a fit of apoplexy, may be apparently in good bodily health.]

Undoubtedly, cases may be suggested, in which the fact not communicated may be so obviously material, that no one can believe it was not communicated through mere ignorance; and that would be a proper point for the consideration of a jury.

[*Mr. Justice Bayley*.—There was another case in the Common Pleas, in the same volume of *Taunton's Reports*, p. 338: the case of *Buse v. Turner and others*. That was a fire policy. There an insurance was effected, in consequence of there having been a fire at the adjoining shop, which it was believed by the assured was extinguished. He did not communicate the fact, and afterwards the fire at that same shop broke out again from the embers of the former one, and consumed the property insured. Although there was no fraud in the case, the Court held that the fact ought to have been communicated.]

It is merely said, in the report of that case, that Mr. Serjeant Lawes moved for a new trial, and the Court refused the rule; no reason whatever being given: and it is difficult to support the authority of that case, unless it be supposed that the Court thought the concealment was fraudulent.

(1) 3 Burr. 1919.

(2) 1 Sir W. Bl. 312; more fully in Park on Insurance, 531.

(3) 6 Taunt. 186.

The peculiar facts of that case would warrant such a supposition; and in the case of *Haywood v. Rogers* (4), the judgment of Lord Ellenborough adopted the principle, that the concealment must be fraudulent, in order to vitiate the policy. Here, there was no concealment, for the certificate of Bernhardt mentions the report as to the insanity, and this was sufficient to put the assurers to a specific inquiry upon that point.

Lord Tenterden—[after stating the principal facts.]—The only question now before us upon the present motion is, whether such a direction would have been correct or not. If it would not be correct, there ought to be a rule to shew cause, that we may see further what there is in the case, and whether upon other grounds there ought to be a new trial; but at present we have only to consider whether such a direction would have been correct or not. At the time of the trial I had in my recollection, but not very accurately, some cases that I knew some years ago. I had in my recollection also the case of *Morrison v. Muspratt* (5), which had been tried before me at Lincoln, and in which a new trial was directed, upon the ground of my not having done what upon this occasion I thought it right to do. In that case it appears by the report, that I directed the jury to say, whether any misrepresentation had been made to the defendant, but I did not expressly call on them to consider whether the illness of the party insured, in January and February 1823, and the attendance of the medical man, ought to have been communicated before the insurance was effected. The Court of Common Pleas thought that I ought so to have directed the jury, and they granted a new trial; and the Lord Chief Justice says, "Whether or not it was material for the defendants to have been made acquainted with the fact which has been withheld from their knowledge, is a question for the jury. It is probable, however, it would be esteemed material, because all insurance-offices are desirous to consult with the medical man who has been the last in attendance on the life insured. I think, therefore, there should be a new trial on payment of costs, as the attendance

of the medical man on Mrs. Elgie was not disclosed to the insurers." In this opinion the other Judges of the court concurred, and the rule was made absolute.—Now, in this case the insurance was made upon the life of a foreigner. There had been a previous assurance by another office in London (the Union), which had an agent resident abroad, and had effected, through the intervention of that agent, many insurances on the lives of persons abroad. There was a desire to insure a further sum upon the life of this Prince, amounting altogether to a very large sum. The Union office had gone as far as it was disposed; and therefore the secretary of that office handed to the secretary of the defendant's office the certificate which had come from their own agent abroad, together with the medical certificate which had been sent by the party who was desirous of effecting this insurance. Now, the certificate of the agent is not one of the certificates given by the assured; but it is given in answer to an inquiry of their own, which the assurers have thought fit to make; but still, if that did distinctly disclose the fact of the state of his intellect, which is not mentioned in the plaintiffs' certificates, it is a question whether it was necessary for the assured to bring to the knowledge of the assurers a fact of which they had a distinct knowledge in another way. But, upon referring to the evidence, Bernhardt does by no means mention that circumstance. He mentions it as a sort of rumour or report of the state of the Prince's mind. Then, Mr. Brougham contends that they were not bound to do more than answer the questions, unless there was a concealment which would amount to fraud. This cannot be considered as a fraudulent concealment. At least, my intended direction to the jury did not put it on the ground of a fraudulent concealment, but merely upon the omission to mention. But if you look at the question, it seems to be all but a specific question. The office call for every fact which any reasonable man might think material. "Are there any other circumstances within your knowledge which the directors ought to be acquainted with?" One of the physicians says, "Any other circumstances by which the life of his highness would be endangered are utterly unknown to me." The other answers, "I do

(4) 4 East, 590.

(5) 4 Bing. 60.

not know." These are the certificates of the physicians as to the state of the health of this Prince, who appeared at that time to have his intellect "controlled," as one of the witnesses called it; but, from the whole of the evidence, it is clear that the state of his intellect was such that he was really quite in the hands of his attendants and the medical men. He hardly appeared upon any occasion to have exercised a will of his own. He was quite unable to give an answer to a question, and in very few instances indeed was he shewn to be able even to speak. His valet said, he had been with him for some years and had never heard him utter a syllable. Can any one doubt, without adverting to other parts of the case; the consideration, by whom the insurance was effected, and who the persons were that made this communication; that these were circumstances material to be disclosed to the office for them to judge of them? Upon the authority of the case I have mentioned, as well as upon the authority of that mentioned by my Brother Bayley, it appears to me, that I should not have done wrong, in propounding that question to the jury for their consideration; and if they had found in the affirmative, that the policy would have been void.

Mr. Justice Bayley.—Whether the policy be upon ship, or upon life, or against fire, I think the underwriter has a right to expect that every thing material known, to the party making the communication shall be communicated to him, and that it is at the peril of the assured if that communication is not made; and I am of opinion that the question is, whether the thing not communicated is in *fact* material or not; and not whether it be *believed*, by the person who ought to make the communication, to be material or not. The question as to the belief of that party, with regard to the materiality of the fact, would certainly in many instances be very difficult to decide; and it would lead to an encouragement of a suppression of the communication, if that were the issue upon which the question will ultimately turn. If you make communication essential if the fact be material, then it becomes the interest of the assured to take care that he shall communicate everything which he knows; and that

every person who is acting as agent for him shall also make every such communication; but if you are to say that the question is, not whether it was material or not, but whether it was believed by the party who ought to have made the communication to be material or not, then the interest of the assured would not go to anything like the extent which in the other view of the case it does.

There was a case* in which that was discussed, in which non-communication by a party, innocent as to not communicating, was held to vacate the policy, or at least to take away from the assured the right to recover upon the policy on a ship, because one of his agents knew a fact which, at the time when the policy was effected, the party ought to have communicated, but did not. The case was this—the ship met with an accident; the captain afterwards writes to the owner, but conceals the fact that the ship has met with that accident. The owner effects a policy upon the ship, and it afterwards turns out that the accident, which had before happened, terminates in the destruction of the ship. Then, was the underwriter liable or not upon that policy, in respect of that loss? The owner of the ship, when he effected that policy, acted *bonâ fide*; he made every communication of what he himself knew. There was no want of fairness on his part; but the decision of the Court upon that occasion was this—that, inasmuch as that material fact was known to the agent, and as that agent ought to have communicated that fact to his principal, the insurance was effected, under these circumstances, at the peril of the assured, and that the underwriter was not in fact liable. These are the grounds and the authorities for saying, that in all cases the point for the consideration of the jury is, not whether the party believed the fact to be material, but whether the fact was material or not.

Now, in this case, all that my Lord Tenterden proposed to do was, to put it to the jury "whether there had been a concealment of any of those facts which were material for the knowledge of the insurer." Mr. Brougham was not willing that that point should be left to the consideration of

* Probably the learned Judge alluded to Gladstone v. King, 1 M. & S. 34.

the jury, and he declined it; fearing, probably, that he should have a verdict against him, and therefore he withdrew it from the consideration of the jury. I think he was prudent in doing so. I do not think, under these circumstances, the way in which Lord Tenterden was about to put it was wrong; but, on the contrary, was perfectly right.

Mr. Justice Littledale.—I am of the same opinion. I think, that in all cases of policies, whether they are against fire, or upon ships, or lives, the offices ought to be acquainted with all the circumstances of the case, in order that they may form a judgment whether they will effect the insurance or not. Now, in cases of policies upon lives, the usual course is for the office to propound a certain number of questions to which they wish to have answers. Those questions are generally applicable to all descriptions of persons. They consider the general state of disease existing among mankind, and they inquire whether such and such circumstances may not exist; but with regard to particular individuals, there may be particular circumstances attending them which it may be very important for the office to know, but which, from the want of previous knowledge, the office cannot embody in the general questions. But, if the office had been particularly acquainted with those circumstances applicable to particular individuals, they, no doubt, would have embodied those particular circumstances in the queries proposed to be answered either by the party himself, or by medical men, or by other persons of whom the inquiry may be made. Then, the question is, "Is there anything concealed in this case which is material; and which, if the office had known of, they would have made the subject of particular inquiry?" It seems to me that it is not of any consequence whether the person himself who is to be insured, or whether the medical persons think it material or not, if in point of fact it be material. The jury on this, as on all other occasions, are the parties to consider whether a fact in the cause be important or not. One particular individual may think it is important, and another may think it is not important. It is suggested that all this would lead to a great deal of prolixity of statement upon the part of the assured, but I apprehend that is not likely

to be the case. There may be a great many circumstances, apparently trivial, that others may think material. If it turns out that there is anything which the jury do think material, it shews that that ought to have been mentioned; and, though it were to lead to great prolixity, still, if the jury are of opinion that it is material, they are the judges by whom the rights of parties are to be bound. The office do not mean to be bound by the answers of particular individuals, if those answers do not come up to the point. They have a right to consider whether, upon the whole, anything has been withheld which is material.

Now, in this case, it appears that the person was subject to a complaint not communicated. It is said that is not necessary to be communicated, because it does not affect the general health; but if one part of the body is unsound, the same degree of unsoundness may extend to other parts. With regard to the question, whether it is necessary to say that the mind is affected; perhaps it is not; but, if the affliction of the mind be connected with any affection of the body, it is certainly necessary to state it. For these reasons I am of opinion, that in this case the direction which my Lord stated he should have given to the jury was perfectly right.

Rule refused.

See *Maynard v. Rhodes*, 5 D. & R. 266; *Tennant v. Henderson*, 1st Dow's Parl. Rep. 324.

Read v. Harvey, 4 Dow, 97.

And *Chitty's Collection of the Statutes*, Tit. "Insurance," vol. 1. p. 613; and the cases there collected.

1828. } THE KING v. PHILIP WILLIAMS,
Dec. 11. } ESQ.

Churchwarden.

1. *The ecclesiastical officer, the commissary, cannot try the validity of an election of churchwarden, &c. so as to bind the contending parties.*

2. *To a mandamus to such an officer, commanding him to admit and swear in a person "duly elected" as churchwarden; he returned, that the person was "not duly*

dicted." *The return was held to be good, as the applicant had his remedy by action if the return was false; the use of the word "duty" being considered, not as an assumption of a right to decide the validity of the election, but only as the traverse of a material allegation, upon which the mandamus was founded.*

(This case will be found reported among the Magistrates Cases 7 Law Journ. Suppl. p. 46.)

1828. }
Dec. 17. } THOMAS v. COOKE.

Statute of Frauds—Indemnity.

1. *A promise made by one co-surety to another, to indemnify him in consideration of his joining him as a surety, is not a promise within the Statute of Frauds, so as to require a written undertaking.*

2. *Nor, semble, is any promise to indemnify a person in consideration of his becoming surety, a promise within the statute.*

This was an action of assumpsit. The first count of the declaration stated, that, upon the dissolution of a certain partnership between one William Cooke, (since deceased) and one Nathaniel Derry Morris, it was agreed that Cooke should take upon him the payment of the partnership debts, and enter into a bond by himself and two sureties, to pay them, and indemnify Morris; that in consideration that the plaintiff, as one of such sureties, would, together with the defendant and Cooke, enter into such bond, the defendant promised to save the plaintiff harmless; that the plaintiff executed such bond, and under it had been called upon to pay, and had paid, a large sum of money, and that the defendant had not saved the plaintiff harmless. The second and third counts were nearly similar. The fourth and fifth counts were upon similar promises to indemnify, in respect of the plaintiff joining the defendant, as surety for Cooke, in the drawing and indorsing a bill of exchange for 500*l.* at the request of the defendant.

The cause was tried, at the Spring Assizes for the county of Hereford, before Mr. Justice Park. Several points were raised

on the part of the defendant; but in the result it may be taken that the promise made by the defendant to the plaintiff was proved, but that it was not in writing; and the point in the cause became ultimately reduced to the question, whether this promise, made by one person to induce another to become his co-security, was binding, by reason of its not having been reduced to writing. If it was not binding, the defendant was entitled to have the damages reduced from 300*l.* to 150*l.*;—and a rule for that purpose having been obtained by *Mr. Serjeant Russell*,

Mr. Taunton and *Mr. Chilton* shewed cause.—This was not a contract which it became necessary to reduce into writing. It is not the description of engagement mentioned in the Statute of Frauds, 29 Car. 2. c. 3. It is clear that if a man were to become bail, at the request of another, for a third person, a promise to indemnify the person for so becoming bail need not be in writing: the principle is the same. Most of the cases on this subject are brought together in *Selwyn's Nisi Prius*, title "Statute of Frauds." In no one of the cases is it laid down, that a writing is necessary where the undertaking is not made to the creditor. There are even cases where the undertaking, though made to the creditor, need not be in writing. Such was the case of *Williams v. Leaper* (1), where a person, who was in possession under a bill of sale of the goods of a tenant liable to distress, at the suit of the landlord, promised to guarantee the rent, on condition that the landlord would not distrain. The principle of that case was recognised by Lord Eldon, when Chief Justice of the Common Pleas, in the case of *Houlditch v. Milne* (2), and by Lord Ellenborough, and Mr. Justice Grose, in *Castling v. Aubert* (3). But even that case is not so strong as the present; there, the promise was made to the creditor: here, it was not. Morris, and not the plaintiff, was the creditor. The two parties to this contract were the two sureties. It may be thought that the statute was departed from in the previous cases; but their authority has never been shaken. Mr. Justice Buller, in the

(1) 2 Wils, 308; 3 Burr. 1866.

(2) 3 Esp. N. P. 86.

(3) 2 East, 325.

case of *Matson v. Wharam* (4), observed, that the authorities on this subject were not to be shaken. The promise in this case was the inducement to the plaintiff to become security for the third person.

Mr. Serjeant Russell and *Mr. Curwood*, contra.—The undertaking is within the Statute of Frauds. How is it possible to say that the defendant did not, in the words of the act, "promise to answer for the debt, default, or miscarriage of another person"? The true principle of construction of the statute was laid down in *Jones v. Cooper* (5); and the circumstance of the person to whom the promise is made being, or not being, the creditor, cannot make any difference. The defendant is equally liable on account of the debt, default, or miscarriage of another person. The case of *Williams v. Leaper*, upon which reliance is placed by the other side, was an extraordinary case; and it is well observed by *Mr. Selwyn*, p. 792, 4th edit., in his note upon it, that "it is extremely difficult to collect from the reports the precise grounds upon which the case was decided."

[*Mr. Justice Parke*.—Is the undertaking of the defendant anything more than this—"If you will enter into this bond, I will repay you in case you should be called upon to pay"?]

It is so; and that is what the statute meant to provide against. It is an undertaking to answer for the default of another person.

Mr. Justice Bayley.—I am of opinion that the contract in this case was not within the Statute of Frauds. The words of the statute are, that no action shall be brought "to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person," unless the agreement shall be in writing. I take it that those words mean, upon any special promise, the motive to the making of which is the pre-existence of a debt of another person. If this promise were made to Morris, the creditor, it would be within the statute; for it would be an undertaking to pay the debt due to him from Cooke. But the case is, that the defendant is about to become surety for Cooke; and he says to

the plaintiff, "If you will join me in the security, I will bear you harmless in case Cooke should not." The foundation of this action is, not the debt due to Morris, but the entering into the bond jointly with the defendant. I think such a case is not within either the policy or the words of the act; and I believe it never was supposed before, that a verbal promise to indemnify was within the statute.

Mr. Justice Parke.—I think this was not such a promise as is mentioned in the Statute of Frauds. It is an original promise, arising out of a transaction between the plaintiff and defendant, independent of the debt due from Cooke to Morris. If the plaintiff were to sue for contribution, treating the defendant merely as a co-surety, it cannot be supposed that he could not recover half, although there would be no written undertaking that the defendant should indemnify the plaintiff as to half. There was already an existing legal liability on the part of the defendant; and his promise only extended that liability.

Rule discharged.

[See also *Jarmain v. Algar*, 1 Ryan and Moody's Reports, 348; from which it seems that an engagement to sign a bail bond is not within the statute.]

1828. }
Nov. 6. } BEST v. SAUNDERS.

Shipping—Freight and Primage—Separate Actions.

1. *Primage belongs of right to the master of a ship; and nothing but an express agreement can exempt the consignee of the goods from the liability to pay it.*

2. *An agreement between the owner and the master, that the latter should have certain wages, "and a certain sum in full for all cabin or other allowances," held not to be sufficient to take away the master's right of primage.*

3. *A bill of lading contained in its terms "that the goods were to be delivered to the consignee, he paying freight for the said goods as per charterparty; with primage and average accustomed."—Held, in an action by the master for his primage, that the*

(4) 2 Term Rep. 81.

(5) Cowp. 227.

reference to the charterparty applied only to the freight; that it was not necessary for him to give it in evidence, and that, upon shewing what was the accustomed primage, he was entitled to recover.

4. *It is no legal objection to a written contract, that it gives separate rights of action to different persons.*

This was an action of assumpsit, by the master of a ship, against the freighter of certain goods, for the allowance called primage.

Plea—The general issue.

The cause was tried before Lord Tenterden, at Guildhall, the sittings after last term, when the following appeared to be the principal facts.

The plaintiff had agreed with the owner of the ship in question, to take the command of her on a voyage to New South Wales and back, by way of India. The plaintiff was to receive 10*l.* per month for wages; and 150*l.* "in full for all cabin or other allowances;"—upon the meaning of which latter words, the case principally turned. The plaintiff, accordingly, took the command, and sailed with the ship. Subsequently, an agreement was made between the owner and the defendant for a freight of certain sugars, the terms of which agreement appeared in a letter written by the defendant to his correspondents at the Mauritius, as follows:—

"London, June 5, 1828.

"I have this day engaged Captain Weller's ship, *Albion*, commanded by Captain Best, and calculated to carry about six hundred tons of sugar, to proceed direct from New South Wales to the Isle of France, there to receive from you a cargo of as much of that article as she can carry, at a freight of 5*l.* per ton, stipulated freight, for what she can bring to the port of London. [The remainder of the letter was immaterial.]

"James Saunders."

Accordingly, the defendant's correspondents at the Mauritius shipped a cargo on board the *Albion*, upon which occasion the plaintiff signed the usual bill of lading, the terms of which were, that the goods were to be delivered to James Saunders, or his as-

signs, paying freight for the said goods, as per charterparty, with PRIMAGE and average accustomed.

The defendant received the goods under this bill of lading; and the customary primage on the freight was 5*l.* per cent, which, at that rate, amounted to about 140*l.*; the charterparty was not given in evidence.

The counsel for the defendant contended, that the plaintiff was not entitled to recover; because,—

First, that the plaintiff, by his agreement with his owner, had accepted a specific sum in lieu of all "other allowances," and had thereby given up his claim to primage.

Secondly, that he was bound by the contract made by his owner, which (independent of the bill of lading,) was for a certain rate of freight, without any mention of primage.

Thirdly, that there was no privity of contract between the plaintiff and the defendant, the agreement being between the owner and the defendant.

Fourthly, that at all events, and even admitting that the defendant was bound by the bill of lading, yet, as it referred to another instrument, the charterparty, as containing the terms, the plaintiff was bound to give the contents of that instrument in evidence.

Lord Tenterden, however, was of opinion, first, that the words "other allowances," in the agreement between the plaintiff and his owner, were referable to the word, "cabin" and must mean allowances of that nature; and that, although the agreement did not mention primage, it contained nothing which shewed an intention to exclude it. Secondly, that the agreement between the owner and the defendant was equally silent as to any terms excluding primage. Thirdly, that the accepting of the goods by the defendant under the bill of lading, signed by the plaintiff, created a privity of contract between them; the general rule being, that he who accepts goods under a bill of lading, does thereby adopt the terms of the bill. Fourthly, that the terms in the bill of lading referring to the charterparty applied only to the freight; and that the terms "with primage and average accustomed," were clear in their reference to the customary rate of primage, independent of the charter-

party. These points being reserved, the plaintiff obtained a verdict.

Sir James Scarlett now moved to set that verdict aside, and to enter a nonsuit, repeating the objections already stated, and urging, that if the bill of lading gave a right of action to the plaintiff, it would follow that the same contract gave separate rights of action to different individuals; inasmuch as the owner might then sue for the freight, and the master for the primage.

Lord Tenterden.—I am of opinion, that unless there be a special agreement to the contrary, the master is in general entitled to primage. Primage, from its very nature, is the right of the master of the ship. It is given to him as an inducement to take care of the goods. It is sometimes called the master's hat-money; and was, I believe, originally so called, because, the master went round with his hat in his hand to receive whatever sum the owners of the goods shipped, or their agents, might think proper to give him (1). It is obvious, therefore, that it was formerly a gratuity, and consequently, uncertain in its amount; but it has now grown into a right; and there are generally some means to ascertain its amount. Then, the *prima facie* right being clear, is there anything in this case to shew that it has been taken away from the plaintiff? There are, it is true, different ways of stipulating for the payment of primage. It may be given for the benefit of the owner, and not to the master; but this can only be by a special agreement between the parties: and it is said, that here there was a written contract between the owner and master, in which the latter gave up his right; but in my opinion, that contract had no reference whatever to the master's claim for primage. If the defendant relied upon the charterparty as containing any special agreement about the primage, it was for him to give it in evidence. Then, as between the freighter and master, the bill of lading, after specifying the sum to be paid with a reference to some charterparty, adds, "with primage and average accustomed;" thereby expressly recognizing the customary claim of the master. But then, it is said,

if the master can sue the freighter on the bill of lading, two actions may be brought upon the same instrument. It may be so—and I know of no legal objection to it: if two parties have each a separate right upon a written instrument, each may bring his action for that part which concerns himself; and although such a consequence may be inconvenient, it is not contrary to law.

Mr. Justice Bayley.—In general, the owner may be entitled to an action for freight; the captain to an action for primage. The uniform usage is, that the owner is entitled to freight, the captain to primage; and each has a lien on the goods shipped in respect of his own claim. There is an implied contract, recognized by the law, on the part of the freighter to pay primage; and here it is expressly stipulated in the bill of lading that he shall pay it. The charterparty might, it is true, be made to exclude the plaintiff from it; but the bill of lading *prima facie* raises the inference that it is to be paid in the ordinary way; and then it lies upon the other party to rebut that inference by the production of the charterparty. Here no evidence was given of a contract between the owner and shipper, excluding primage to the master, and therefore the *prima facie* right remained.

Mr. Justice Littleton.—When we consider the nature and origin of primage, it is clear, that it is payable of right not to the owner but the master. It may, however, be doubted whether, if a contract were made by the owner with the shipper for so much in lieu of all charges, the master would have a right to enforce his claim against the shipper. But here, the agent of the shipper has expressly stipulated to pay the accustomed primage, and the goods have been received under that stipulation. Then, as to the argument, that two actions may be brought upon the same instrument, I own I see no objection to it either in law or practice; nor indeed has any objection been suggested beyond the supposed inconvenience which it might produce. That is a question for the parties when they enter into these agreements, but it has no bearing upon the question as to their respective legal rights.

Rule refused.

(1) See Abbott on Shipping, 272.

1823. } ALLAN AND ANOTHER v.
Nov. 6. } SUGRUE.

Insurance—Valued Policy.

Where a ship is insured upon a policy in which her value is stated and agreed upon, and the assured become entitled to recover as for a total loss, they are entitled to recover the full amount mentioned in the policy, although it be proved, that, in point of fact, she was not worth so much.

This was an action on a policy of insurance upon the ship *Benson*. The policy was for twelve months; and was what is called a valued policy, the value of the ship being stated in the policy to be 2000*l*. The cause was tried, before Mr. Justice Bayley, at the last Assizes, at Newcastle-upon-Tyne, when the following appeared to be the principal facts:—

The ship went aground near the entrance of the old harbour of Hull; and there received considerable damage by straining, and the breaking of her timbers. On being examined by surveyors, it was found that some of her timbers were decayed; and that the expense of a complete repair would amount to upwards of 1400*l*, which, in the opinion of the surveyors, was more than she would be worth after repairing. Upon this, the owner gave notice of abandonment. The ship was sold for 488*l*. to a purchaser, who broke her up. A sum had been paid into court which, with the sum for which she sold, would have been equal to the liability of the defendant, supposing that his liability was to be confined to the amount of the repairs.

The jury, by the recommendation of the learned Judge, found a verdict for the plaintiffs; and, in answer to a question from his Lordship, stated their opinion to be, that the damage the ship had received rendered her unfit for repair.

Mr. F. Pollock now moved to set aside the verdict, contending, that as this was the case of a constructive, and not a total loss, (for the ship had been sold,) all that the assured could require was, that the ship should be replaced in its former state;

and that if, on one hand, the assured had a right to take the value agreed in the policy as the actual value, they were, on the other hand, bound to take it as the value with reference to the propriety of repairing her. If, therefore, she was worth 2000*l*., it would be proper to lay out 1400*l*., upon her for repairs. The ship existed in specie, and might have been repaired. No case has hitherto occurred on this point; and if the case be considered upon principle, it is surely sufficient if the assured be indemnified, and placed in as good a situation as he would be in, if no accident had taken place.

Lord Tenterden.—I think the question, whether the loss is to be considered total or partial, is the same in substance whether the value is mentioned in the policy or not; and that the only difference between the two is this, that if there be a total loss, in one case the value must be ascertained by evidence, and in the other there is no need of further inquiry, the value having been settled by agreement. In my opinion, then, there is no distinction, as far as this question is concerned, between an open and a valued policy. The main point is, was there a total loss? Now the jury found that the ship was not worth repairing; she was no longer therefore to be deemed a ship, but rather materials for another ship, and that is, in law, a total loss; that is to say, where the vessel ceases to exist for any purpose as a vessel. I am therefore of opinion that the assurers are liable; treating the value of the ship as 2000*l*., but allowing for the value of the materials (1).

Mr. Justice Bayley.—The question whether a loss is total or partial, depends upon the facts of each case, and is the same whether the policy be a valued or an open one. The only difference is, that, in the latter case, the value must be proved; in the former, it has been previously ascertained by agreement between the parties.

Rule refused.

(1) It had been agreed that the amount should be ascertained out of court.

party. These points being reserved, the plaintiff obtained a verdict.

Sir James Scarlett now moved to set that verdict aside, and to enter a nonsuit, repeating the objections already stated, and urging, that if the bill of lading gave a right of action to the plaintiff, it would follow that the same contract gave separate rights of action to different individuals; inasmuch as the owner might then sue for the freight, and the master for the primage.

Lord Tenterden.—I am of opinion, that unless there be a special agreement to the contrary, the master is in general entitled to primage. Primage, from its very nature, is the right of the master of the ship. It is given to him as an inducement to take care of the goods. It is sometimes called the master's hat-money; and was, I believe, originally so called, because, the master went round with his hat in his hand to receive whatever sum the owners of the goods shipped, or their agents, might think proper to give him (1). It is obvious, therefore, that it was formerly a gratuity, and consequently, uncertain in its amount; but it has now grown into a right; and there are generally some means to ascertain its amount. Then, the *prima facie* right being clear, is there anything in this case to shew that it has been taken away from the plaintiff? There are, it is true, different ways of stipulating for the payment of primage. It may be given for the benefit of the owner, and not to the master; but this can only be by a special agreement between the parties: and it is said, that here there was a written contract between the owner and master, in which the latter gave up his right; but in my opinion, that contract had no reference whatever to the master's claim for primage. If the defendant relied upon the charterparty as containing any special agreement about the primage, it was for him to give it in evidence. Then, as between the freighter and master, the bill of lading, after specifying the sum to be paid with a reference to some charterparty, adds, "with primage and average accustomed;" thereby expressly recognizing the customary claim of the master. But then, it is said,

if the master can sue the freighter on the bill of lading, two actions may be brought upon the same instrument. It may be so—and I know of no legal objection to it: if two parties have each a separate right upon a written instrument, each may bring his action for that part which concerns himself; and although such a consequence may be inconvenient, it is not contrary to law.

Mr. Justice Bayley.—In general, the owner may be entitled to an action for freight; the captain to an action for primage. The uniform usage is, that the owner is entitled to freight, the captain to primage; and each has a lien on the goods shipped in respect of his own claim. There is an implied contract, recognized by the law, on the part of the freighter to pay primage; and here it is expressly stipulated in the bill of lading that he shall pay it. The charterparty might, it is true, be made to exclude the plaintiff from it; but the bill of lading *prima facie* raises the inference that it is to be paid in the ordinary way; and then it lies upon the other party to rebut that inference by the production of the charterparty. Here no evidence was given of a contract between the owner and shipper, excluding primage to the master, and therefore the *prima facie* right remained.

Mr. Justice Littleton.—When we consider the nature and origin of primage, it is clear, that it is payable of right not to the owner but the master. It may, however, be doubted whether, if a contract were made by the owner with the shipper for so much in lieu of all charges, the master would have a right to enforce his claim against the shipper. But here, the agent of the shipper has expressly stipulated to pay the accustomed primage, and the goods have been received under that stipulation. Then, as to the argument, that two actions may be brought upon the same instrument, I own I see no objection to it either in law or practice; nor indeed has any objection been suggested beyond the supposed inconvenience which it might produce. That is a question for the parties when they enter into these agreements, but it has no bearing upon the question as to their respective legal rights.

Rule refused.

(1) See Abbott on Shipping, 272.

King v. Bird (4). This shews, that so long as the property remains in the hands of the sheriff, the creditor remains unsatisfied. The money then, in point of fact, was not paid to the creditor until after the commission had issued.

[*Mr. Justice Bayley*.—Have you found any case where a sheriff, having levied, died insolvent. The question, whether the loss in such a case should fall upon the debtor or the creditor, might be a good test to try the present case.]

No such case has been found; but suppose the sheriff had not paid the money over to the defendant, and the latter brought an action to recover the amount, would not the defendant be obliged to rely upon his execution; and would not that be availing himself of the execution to the prejudice of the other creditors? It is better, therefore, not to leave it in the power of the sheriff to alter the rights of parties by his own voluntary acts.

[*Mr. Justice Bayley*.—If an action were brought upon the judgment against the debtor, how would the pleading turn if the debtor were to endeavour to shew that the creditor had been satisfied by execution?]

It seems, that, in such a case, a plea of payment to the plaintiff would have been a good answer to the action, according to 1 *Salk.* 28. pl. 17.

[*Mr. Justice Bayley*.—That is, if it were a writ of *ca. sa.*; but in the case of *Taylor v. Bekon* (5), and *Morton's* case (6), it is laid down, that where the writ is a *fi. fa.*, payment to the sheriff is a discharge of the debt; the reason given is, that under a *ca. sa.* the duty of the sheriff is merely to take the defendant's body; but under a *fi. fa.* it is to levy so as to have the money.]

The point was not decided in those cases; they were upon questions relating to the writ of *ca. sa.*, and what is said about the writ of *fi. fa.* are mere *dicta*.

[*Mr. Justice Bayley*.—But the case of *Notley v. Buck* shews that the mere seizure does not destroy the debt.]

Mr. C. F. Williams and *Mr. Serjeant Merrenether*, contra.—The money being paid to the officer on the 1st of May, was, in

point of law, paid to the sheriff; it therefore was money had and received by the sheriff to the plaintiff's use; and consequently the judgment debt was discharged before the act of bankruptcy. That money thus levied by the sheriff, is money received by him to the plaintiff's use, was laid down in *Dale v. Birch and another* (7). Then, with regard to the effect of the mere seizure: the property is not in abeyance, it is divested out of the defendant; and the sheriff himself might maintain trespass or trover on his possession of it: *Wilbraham v. Snow* (8). The writ was returnable on the 3rd of May, on which day there had been no act of bankruptcy committed by both the bankrupts. The case therefore falls within the principle of *Wymer v. Kemble*; and any question upon the old law is perfectly immaterial; for at the time of the bankruptcy, the defendant was not a creditor having security, and availing himself of it to the prejudice of the other creditors.

[It was suggested, that a case similar to the present was before the Court of Exchequer.]

Mr. Justice Bayley.—The rule in this case had better not be delivered out until we learn the result of the case in the Exchequer. But as I entertain a strong opinion on the subject, I will deliver it. I have no doubt, whatever, that the plaintiffs are not entitled to recover in this action. If, at the time of the bankruptcy, it could properly be said that the defendant was "a creditor having security" for his debt, according to the words of the 108th section of this act, no doubt he would not be entitled to hold the money he has received; but in my judgment, he was not such a creditor. The plaintiffs sue as assignees of the two bankrupts; and they must rely upon the bankruptcy of both. An act of bankruptcy was committed by one on the 2nd of May; but not until the 5th by the other. The 5th of May is therefore the date of their title by reason of the acts of bankruptcy: the seizure of the goods was in March, the writ being returnable on the 2nd of May, which was before any act of

(4) 2 Shower, 87; and the same is adopted in Dalton's Office of Sheriff, 147.

(5) 2 Levinz, 203.

(6) 2 Shower, 138.

(7) 3 Campb. 346.

(8) 2 Saunders, 47, & note.

bankruptcy had been committed by *both* the bankrupts. Before the return of the writ, the sheriff, by his officer, had received the whole of the money. Then, did the defendant from that time cease to be a creditor of the bankrupts? On the 3rd of May, the return day of the writ, it was the duty of the sheriff to have the money in court to pay over to the present defendant. He has not the money in court by that day; but his neglect is not to vary the rights of the parties. The authorities shew that the levy and payment to the sheriff, discharge the debtor; and the remedy of the creditor is against the sheriff only. Here, therefore, as in the case of *Wymer v. Kemble*, the judgment creditor had ceased to be a creditor at the time of the bankruptcy. In the case of *Notley v. Buck*, the bankruptcy intervened between the seizure and the sale of the goods; and until the sale, the plaintiff in the execution is a creditor; indeed, up to the time of sale, the debtor has a right to pay the money, and thus prevent the sale of his goods. This shews that the general property in the goods seized, remains in the debtor until the sale, there being a special property. On the whole, I think that as a principle it may be laid down, that the plaintiff in the writ of execution is a creditor, until the goods have, by sale, been converted into money.

Mr. Justice Littledale.—It is the last part of the section in the act in question, which raises the point in this cause. Here, the seizure was before the act of bankruptcy; and that, under the old law, would have been sufficient. But now, no creditor having security for his debt, under a judgment obtained by either of the modes pointed out in the act, shall avail himself of such security to the prejudice of the other creditors. The question then is, whether this defendant can be considered as having a security for his debt at the time of the bankruptcy. The money had been paid to the sheriff's bailiff before the return of the writ; there was no act of bankruptcy by *both* the debtors until after the return. At all events, the plaintiff was entitled to have his money from the sheriff on the return day of the writ. The security was then *functus officio*; and an action may be maintained against the sheriff for the amount of the levy, after the writ is returnable,

though the sheriff may not actually have returned the writ: 2 *Shower*, 79, 281; *Gillb. on Executions*, 25; *Tidd's Practice*, title "Execution by *scire facias*;"—and I believe even before the writ is returnable. I think, therefore, that the defendant was not, at the time of the bankruptcy, a creditor of the bankrupts; and consequently that this action is not maintainable.

Mr. Justice Parke.—I am of the same opinion; though I concur that the rule should not be delivered out until the judgment of the Court of Exchequer in a similar case be known. I do not think that the plaintiff, either on the 2nd or the 5th of May, was a creditor of the bankrupts availing himself of the security of his execution. In the case of *Parkinson v. Gifford and others* (9), which was an action against the executors of the sheriff of Dorset, for money levied under an execution, it was held, that the action lay after the writ was returnable, though in fact it had never been returned. I think it may be a question, whether such an action can be maintained before the return day of the writ. Be that as it may, after the money has been received by the sheriff under the levy, the defendant in the writ is discharged of the debt; that was expressly decided in *Rook v. Wilmot* (10), and *Mountney v. Andrews* (11); and the same doctrine was held in *Clerk v. Withers* (12). It appears to me clear, therefore, that the present defendant was not, at the time of the bankruptcy, a creditor of the bankrupts seeking to avail himself of the execution. It was said in argument for the plaintiff, that if the judgment creditor had to bring an action against the sheriff for the money, he would of necessity be availing himself of the execution; but that is not the case contemplated by the act, which speaks of the creditor availing himself of the execution, to the prejudice of the other creditors of the bankrupt. For the reason already given, the present defendant was, at the time of the bankruptcy, a creditor, not of the bankrupts, but of the sheriff.

Rule absolute.

(9) *Exo. Car.* 539.

(10) *Cro. Eliz.* 209.

(11) *Id.* 237.

(12) 2 *Lord Raym.* 1073; *Holt*, 303, 646.

1828. } WHITMARSH AND OTHERS v.
Nov. 7. } GENGÉ AND GIFFORD.

Evidence—Bankers' Books—Surety.

Where a bond was conditioned that a banker's clerk should faithfully account to his employers for all sums received by him on their account, and should faithfully conduct himself in that employment:—Held, that a book containing entries made by him in the course of that employment, of sums received by him from the customers, was admissible in evidence to shew the fact of those sums having been so received; although some of the persons who made the payments to the clerk were living.

This was an action of debt on bond.—The plaintiffs were bankers, and the defendants were sureties for one Pitman, who had been their clerk. The condition of the bond ran in the usual terms, by which the defendants were sureties, that Pitman should duly account for all sums which he might receive as the plaintiffs' clerk; and that he should conduct himself with fidelity in that employment. Pitman himself was no party to this bond. One of the defendants suffered judgment by default; the other pleaded in general terms that Pitman had duly accounted, &c. in the words of the condition. The plaintiffs replied, and stated certain sums to have been received by Pitman and not accounted for: and upon this replication issue was joined. The cause was tried at the last Summer Assizes, before Mr. Justice Littledale, when the following appeared to be the principal facts.

To shew that Pitman had received certain sums of money from the plaintiffs' customers, the plaintiffs' books were given in evidence, containing entries made by Pitman, in his own handwriting, of the sums which those entries denoted to have been received by himself. Some of the persons who had paid these sums were living; but none of them were called.

The defendants' counsel objected that these books were inadmissible for the purpose in question; but the learned Judge admitted them, subject to this point; and the plaintiffs upon this evidence obtained a verdict.

Mr. Serjeant Merewether now moved for a rule to shew cause why the verdict should not be set aside, and a verdict entered for
VOL. VII. K.B.

the defendants. The plaintiffs' own books were not admissible in evidence, although they contained entries in the handwriting of Pitman. The question, whether, in an action against a surety, evidence of admissions made by the principal could be received in evidence, came before Mr. Justice Holroyd, in the case of *Cutler v. Kewley*, which was tried at the Winchester Spring Assizes in 1819; and it was held, by that learned Judge, that they were not admissible. The point is stated in *Manning's Digest*, title "Evidence." The case relied upon by the other side as an authority in favour of their being received, is that of *Goss v. Watlington* (1); but that case was decided upon another ground; namely, that the books there kept by the principal (who was a collector of taxes,) were public books, and it was a part of the duty of the collector to deliver over the books to his successor. The facts there are very different from those in the present case; there was also another question in that case, whether the receipts given by the principal to persons who had paid money, were evidence against the surety of the fact of such payments, and the Court held, that they were not evidence. That case is therefore, upon that point, in favour of the defendants; treating the entries made by Pitman as receipts. And upon the mere ground of their being entries made in the book by Pitman, the case of *Goss v. Watlington* is not an authority for the plaintiffs; inasmuch as the Court declared their opinion in that case for the admissibility, on the ground that the book was a public book.

Lord Tenterden.—I think the evidence was properly received; Pitman was taken into the employ of the plaintiffs as a clerk. The defendants entered into a bond for his fidelity, a part of the condition being, that he should well and faithfully account for, and pay and deliver over, all sums which he should receive as such clerk. The issue was, whether he had received certain sums, and not accounted for them. Now the books received in evidence were kept by Pitman in the regular discharge of his duty. Either he had received the sums there entered, or he had not. But we are not to assume that

(1) 3 B. & B. 133; 6 J. B. Moore, 355.

the entries were false; because, if it was so, the only effect would be, that the plaintiffs would have an action against the sureties on their bond for this breach of duty in their clerk. The evidence was not an isolated entry, but regular accounts, for the faithful keeping of which the defendants were bound. It does not lie with them, therefore, to object to these accounts, as being produced for the purpose of shewing *prima facie*, that the sums therein mentioned as having been received by the clerk in the course of his employment, were in fact so received.

Mr. Justice Bayley.—The only difference suggested between the present case and that of *Goss v. Wallington*, is, that in the latter, the books were public books. But that circumstance does not appear to have been the foundation of the judgment in that case. Here, the bond was, among other things, for the fidelity of the clerk in the course of his employment; it was also a part of his employment to make, in this book, entries of the sums he had received; and supposing that he faithfully made the entries, as it was his duty to do, they are evidence of the sums being received by him in the course of his employment. The defendants cannot ask it to be presumed that he made false entries, which would charge himself; and would also be equally a breach of duty, which would render the defendants liable on that part of the condition of the bond which provided for his faithful discharge of his duty.

Rule refused.

[See also *Furness, assignee, v. Cope*, 6 Law Journ. C.P. Trinity Term.]

1828. }
Nov. 11. } CARPENTER v. BLANDFORD.

Buyer and Seller—Time for performance of contract.

1. *In general, the time appointed for the performance of a contract, is of the essence of the contract itself.*

2. *But where, from the nature of the subject matter, the exact day does not appear to be material, a party who seeks to exact a forfeiture in case of failure on the appointed*

day, must give notice to the other party that he intends to hold him to the day.

Assumpsit for money had and received by the defendant to the plaintiff's use.

Plea—Non assumpsit.

On the trial, before Lord Tenterden, at the Sittings after last term, the following appeared to be the principal facts.

By agreement in writing, between the plaintiff and defendant, the former was to be the purchaser of the interest of the latter in a public-house, with the stock, furniture, &c. The details of the agreement are immaterial; the contract was to be completed on the taking possession, which was fixed to be on the 25th of March 1828. The plaintiff paid 30*l.* as a deposit; and it was stated, that if the plaintiff did not complete his part of the agreement, the deposit money should be forfeited. On the day fixed for the completion of the contract, the appraiser for the defendant met the appraiser for the plaintiff in the street, when the plaintiff's appraiser stated, that the plaintiff would be ready to complete the contract on the following day. The defendant attended at the time and place originally appointed, ready in all respects to complete the contract, and the plaintiff not appearing, the defendant determined to avoid the contract and keep the deposit. On the following day, the plaintiff attended, ready to complete, but the defendant then refused: whereupon, the plaintiff brought the present action to recover back his deposit money. It appeared in evidence, that contracts of this nature were not always completed on the stipulated day.

Upon these facts, Lord Tenterden told the jury, that if the defendant meant to insist on a literal performance of the contract on the very day, he should have given notice of his intention. The jury, upon this direction, found a verdict for the plaintiff.

Sir James Scarlett now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted. The direction of my Lord Tenterden was open to objection; inasmuch as it went upon the assumption, that the time limited for the performance is not an essential part of the contract. But it has been held, over and over again, that time is essential; and that where a party makes default in respect of

time, he forfeits his rights under the contract. The case of *Berry v. Young* (1) gives the opinion of Lord Kenyon on this subject; and, although it was but a decision at Nisi Prius, it has been adopted by Mr. Sugden in several places in his work on *Vendor and Purchaser*. That opinion, indeed, was but an expression of a known principle in equity as well as law. This appears from a note to the case of *Lloyd v. Collett* (2), where the case of *Harrington v. Wheeler* (3) is cited. In the latter case, Lord Loughborough noticed the inaccuracy of the expression attributed to Lord Hardwicke, in *Gibson v. Patterson* (4). From that note it appears, that Lord Thurlow, acting probably on the incorrect report of Lord Hardwicke's judgment, had, on occasions without number, declared, that time was not of the essence of the contract. The decision of Lord Loughborough, correcting that supposition, has been adopted in a series of cases, which are there given in the note. The reasoning of the subject concurs with those decisions; for when the parties name a time, it shews that they consider the time as a part of the contract. Indeed, it would be monstrous to hold it to be otherwise; for half the dealings of mankind, in cases of contract, shew that time is of the essence of their bargains.

Lord Tenterden.—It appeared that it was not usual, in contracts like the present, to insist on their being completed on the very day appointed. The appraisers of the two parties had met, and the appraiser for the plaintiff then stated that the plaintiff would be ready on the following day. I told the jury, that, under these circumstances, if the defendant meant to insist on a forfeiture of the deposit, he should have sent word to the plaintiff that he insisted on the contract being performed on the very day. He did not do this; the plaintiff was ready on the following day, and the defendant then refused to complete the contract, and set up this claim of forfeiture.

Mr. Justice Bayley.—I think the direction of my Lord to the jury was perfectly correct. The defendant was seeking to exact a forfeiture, and it was therefore but

just to hold him to proof as strict as possible. There was nothing in the transaction from which it could be inferred, that a performance of the contract on the very day appointed was material. The defendant's appraiser, who, for the purposes of this contract, may be considered as his agent, was apprized that the plaintiff would be ready on the following day. Now, if the defendant objected to this, he should have given notice to the plaintiff that that would not be sufficient; and that he should insist upon a strict performance of the contract on the very day appointed. I think the case in *Vesey* decides, that where a party insists upon the strict observance of the time part of the contract, he must give the other party notice of his intention to hold him to the very words of the bargain.

Rule refused.

1828. }
Nov. 14. } BURGE v. JONES.

Baron & Feme—Liability for Necessaries.

The onus of proving expressly that a married woman, living apart from her husband, has the means of supporting herself, is not always cast upon the husband, in resisting a demand for necessaries supplied to her whilst so separated.

Where, therefore, it appeared that a married woman for some years subsequent to a separation from her husband maintained herself, and then went to live with her son-in-law, who brought an action against the husband for necessaries,—the Court refused to disturb a verdict for the defendant on the ground that it was against evidence.

Assumpsit for necessaries provided by plaintiff for the defendant's wife.

At the trial, before Mr. Justice Gaselee, at the Summer Assizes for the county of Gloucester, it appeared, that in the year 1811, the defendant, who was the owner of some small cottages in the before-mentioned county, went to reside in Guernsey, leaving his wife and daughter in England. In 1820, the plaintiff married the defendant's daughter, from which time, the defendant's wife resided with her daughter and the plaintiff. Some of the cottages were tenanted, but

(1) 2 Esp. N. P. C. 63, in note.

(2) 4 Bro. C.C. 471, (Eden's Edition).

(3) 4 Vesey, 609.

(4) 1 Atkyns, 18.

some in so dilapidated a condition, that the plaintiff had been obliged to pull them down and build others. It did not appear, however, whether the defendant's wife had ever received any rent in respect of these cottages, or any other means of maintenance from the defendant during his absence. In 1827, the defendant returned to England, and, as one of the plaintiff's witnesses stated, in a conversation wherein the plaintiff's demand, to the amount of 196*l.* for the maintenance of his wife, was mentioned, agreed to pay the same. The jury, however, found a verdict for the defendant; and now,—

Mr. Busby moved to set aside the verdict and for a new trial. The verdict was against evidence, inasmuch as an express promise to pay the debt was proved on the part of the plaintiff. There was no sufficient defence in point of law to the action, as, although the wife might have been maintained by the rents of the cottages, it did not appear that any payment in that respect was ever made to her. It is conceded that an action cannot be maintained against a husband for necessities supplied to his wife, where he has allowed her a sufficient maintenance; but it is incumbent upon the husband, in setting up that defence, to prove that it has been duly paid. No such proof was here given, but, on the contrary, it was in evidence that the cottages yielded nothing.

[*Mr. Justice Bayley*.—But the wife might maintain herself by her own industry; and it appears, that, in fact, she did contrive to subsist for nine years.]

It was for the defendant to shew that she could, and did, so maintain herself after she went to reside with the plaintiff; and the plaintiff, in shewing that he had supplied the necessities, *primâ facie* entitled himself to a verdict. But, even admitting the allowance and payment of an adequate maintenance to have been made out, still the defendant was liable upon his promise to pay: *Hornbuckle v. Hornbury* (1).

[*Lord Tenterden*.—The fact of his having made the promise was for the jury: in that case there was no doubt that the defendant had given a written promise to discharge the account.]

The principle upon which the husband

(1) 2 Stark. 177.

remains liable, notwithstanding a separation, is laid down in *Holt v. Brien* (2). According to that principle, that the wife remains an agent, in respect of the contracting of debts, until a countermand is shewn, the plaintiff was here entitled to recover.

Lord Tenterden.—It was proved in this case, that for nine years after the defendant left this country, his wife maintained herself; that then the plaintiff married her daughter, and that she went to live with her daughter and with the plaintiff. It might be that the cottages were of no value, and the rents never paid; but, for aught that appears, the woman was as capable of supporting herself after she went to live with her son-in-law as before. The promise, had it been proved, might have made the defendant liable; but the jury had a right to consider whether they believed the fact of such a promise.

Mr. Justice Bayley.—It was for the jury to decide upon the probability, or the fact, of the promise. I do not see any reason to disturb the verdict.

Rule refused.

1828. { DOE on the several demises of
CHARLES FRIDRAUX BRUNE
AND EDWARD COODE v. WIL-
LIAM MARTYN THE YOUNGER.

Fine—Remainder—Estoppel—Construction of Settlement.

1. *A fine levied by a contingent remainder-man, does not of necessity destroy his estate. When the intention of the conuzor is properly shewn by the deed declaring the uses, the fine works by estoppel only.*

2. *A stranger in estate cannot take advantage of such an estoppel.*

Accordingly, the deeds of conveyance to the lessors of the plaintiff were made after the remainders became vested; they recited fines sur conuzance de droit levied by the parties while the remainders were contingent. The defendant was a stranger in estate:—Held, that the nature of the fines might be collected from the recitals; that those contingent remainders were not thereby destroyed; but that the fines operated by way of estoppel

(2) 4 Barn. & Ald. 252.

only; and therefore, (inasmuch as the defendant, being a stranger, could not take advantage of the estoppel,) that a good title in ejectment could be made by parties claiming under a conveyance by the conuzors, after the remainders vested, against all but parties or privies to the fines.

By marriage settlement, *W. M.* and *T. M.* conveyed certain lands to trustees, their heirs and assigns, to the use of *W. M.* for life, with remainder to trustees to preserve contingent remainders; remainder to *T. M.* for life; remainder to trustees to preserve contingent remainders; remainder to the use of the first and other sons of *T. M.* by *M. H.* successively in tail male; with remainder to the use of the right heirs male of *T. M.* for ever:—Held, that the eldest son of *T. M.* took a contingent remainder, which on the death of *T. M.* became vested; and that the ultimate remainder in fee simple, on the death of such elder son without issue, vested in *H. M.* the only other son of *T. M.*

By the same settlement other premises were conveyed to the same trustees to the use of *T. M.* for life, with remainder, during his life, to the trustees to preserve contingent remainders; remainder to the use of *M. H.*, the intended wife, for life, for raising an annual sum; and, subject thereto, to the use of the first and other sons of *T. M.* by the said *M. H.* successively in tail male; with remainder, in case there should be no issue male, but should be issue female, to the use of the issue female for raising portions to be paid at the age of twenty-one; the trustees to raise maintenance for the daughters until they should attain that age out of the rents; but if the said portions, at the times of payment, could not be advanced out of the profits of the premises, the said premises should stand charged with the payment of the portions, as soon after as the same could be advanced and raised, &c.; and, after raising and paying the said sums of money, or in case there should be no issue female, to the use of the right heirs male of *T. M.* for ever:—Held, that the trustees at all events took only a limited fee, which determined when the portions were paid; that upon failure of the estate limited by the settlement, the ultimate fee resulted to the settlor; and that, no claim having been made by the trustees during more than twenty years' adverse possession, the presumption was that their right was satisfied or released,

and could not be set up by a stranger as a defence in an action of ejectment.

H. M. died without issue, devising all the premises mentioned in the settlement to his widow for life, remainder to the sons and daughters of his nephew and of his niece, as tenants in common. The tenant for life took possession of the premises and retained that possession until within two years of her death, when the defendant entered and exercised certain acts of ownership, but did not continue in possession. A month after the death of the tenant for life, and about six weeks before the commencement of the action, the defendant again obtained possession and ploughed the land; but it did not appear whether the parties entitled in remainder had entered previously, or that the defendant's possession was with their knowledge and against their will:—Held, that the defendant's acts did not amount to a disseizin, or give him such an estate by wrong as prevented the remaindermen from executing a conveyance of the estate to the lessors of the plaintiff.

This was an action of ejectment, for the recovery of certain land in the parish of Padstow, in the county of Cornwall, and was tried before Mr. Justice Burrough, at the Lent Assizes for that county, in the year 1825, when a verdict was found for the plaintiff, subject to the opinion of the Court upon the followingp

CASE.

By indentures of lease and release, dated 5th and 6th of November 1722, the release made between William Martyn, gent. and Thomas Martyn, gent., son and heir apparent of the said William Martyn, of the first part; Jenefer Hooper, widow, and Martha Hooper, her daughter, of the second part; and Lawrence Growden, gent. and John Hooper, gent., of the third part: in consideration of a marriage, then intended, between the said Thomas Martyn and the said Martha Hooper, and of the marriage portion of the said Martha Hooper, and for securing to her a competent jointure, and for limiting the said hereditaments thereafter mentioned, and in consideration of 10s., the said William Martyn and Thomas Martyn did grant, bargain, sell, alien and enfeoff, remise, release, convey, assure, and confirm unto the said Lawrence

Growden and John Hooper, one field, called Ninnissea, in the village of Trevoze, in Padstow; two fields, called Sandry's Fields, lying in the village and fields of Cragmere, in Padstow; and divers other fields, amongst which were some called the Varwell Closes, in Cragmere, in Padstow, (all which said premises were then in the possession of said William Martyn and Thomas Martyn, or one of them,) and the reversion, &c., to hold unto the said Lawrence Growden and John Hooper, their heirs and assigns,—as to Sandry's Fields and Ninnisses, to the use of the said William Martyn for life; remainder to the use of the said Lawrence Growden and John Hooper and their heirs, during the life of the said William Martyn, upon trust to preserve contingent remainders; with remainder to the use of the said trustees and their heirs, during the life of the said Thomas Martyn, upon trust to preserve contingent remainders; with remainder to the use of the first, second, third, &c. and other sons, of the said Thomas Martyn, by the said Martha Hooper, successively in tail male; with remainder to the use of the right heirs male of the said Thomas Martyn for ever. And as to all other the said settled premises, to the use of the said Thomas Martyn for life; with remainder to the use of the said trustees, their heirs and assigns, during the life of the said Thomas Martyn, in trust to preserve contingent remainders; with remainder to the use of the said Martha Hooper for her life, for raising out of the rents and profits an annuity of 25*l.*; and, subject thereto, to the use of the first, second, third, and other sons of the said Thomas Martyn, by the said Martha Hooper, successively in tail male; with remainder, in case there should be no issue male, but should be issue female, to the use and behoof of the issue female of the said Thomas Martyn, on the body of the said Martha Hooper, for raising and levying out of the rents, issues, and profits thereof, such sum or sums of money, to pay and satisfy such portion and portions to and with such daughter and daughters, at such time and times as are hereinafter mentioned: that is to say, if one daughter, the sum of 600*l.*; and if two daughters, to each of them the sum of 400*l.*; and if more than two daughters, the sum of 800*l.* to be equally divided between them at

twenty-one. But if it should happen, that the said sums and sum aforesaid could not be advanced out of the profits of the said hereditaments at the times of payment thereof as aforesaid, the said premises should stand charged with the payment of the portion or portions aforesaid, as soon after as the same could be advanced and raised out of the rents, issues, and profits thereof; and that until twenty-one, the trustees and their heirs, and the survivor of them and his heirs, should, out of the rents, raise such maintenance of such daughter and daughters, as to the said trustees, their heirs and assigns should seem meet and convenient. And after raising, levying, and paying the sums of money as aforesaid for the daughters, or in case there should be no issue female, to the use of the right heirs male of the said Thomas Martyn for ever.

William Martyn, one of the settlors, died in the year 1722, and Thomas Martyn, the other settlor, died in the year 1740; leaving issue, two sons, William, his eldest son and heir, and Hooper. William, the eldest son, entered into the estates in question, and died without issue in the year 1779, leaving Hooper his brother and heir; and he, after the death of his brother William, entered into the premises, and continued in possession of them till 1795, when he died, leaving no issue. The only other issue of Thomas Martyn, the settlor, were Martha Martyn and Grace Martyn. Martha died in the year 1793, unmarried. Grace married James Elliott, who died in the year 1761, leaving issue as in a pedigree which was stated in the case. [The material particulars are stated in the judgment.] On the 26th of September 1795, Hooper Martyn made his will in writing, duly executed, by which he devised all the premises in question to his wife Peggy (afterwards by her second marriage called Peggy Hobblyn) for life, with remainder to all and every the son and sons, daughter and daughters, of his nephew Richard Elliott and of his niece Martha Parnall, who should be living at the time of the decease of his said wife, share and share alike, as tenants in common and not as joint tenants, and to their heirs and assigns for ever. Peggy Hobblyn died the 12th day of March 1824; and at the time of her death, the issue of Richard Elliott and Martha Parnall then alive and entitled (if

by law they might be so entitled to take under Hooper Martyn's will), were the several persons named in the pedigree, (and named subsequently).

No evidence was given of the actual raising of the sums directed to be raised by the settlement of 1722, for the benefit of the female issue and charged on part of the premises in question; but, on the death of Hooper Martyn, his widow and devisee took possession of all the premises, and continued in the enjoyment of them from that time without interruption, except as hereinafter mentioned.

For some time previously to Michaelmas 1822, one Hawker had been tenant to Mr. and Mrs. Hobblyn, of the closes called Ninnisses and Sandry's Fields, but his tenancy ended at that time; and shortly before he quitted possession, he was served with a notice, signed by the defendant's father, intimating that he claimed the property, and forbidding the payment of rent to any other person.

Shortly after Hawker had quitted these premises, the defendant's father went to all the closes, claiming to enter as lawful heir, to take possession, and cut a turf on the several closes, but he did not keep or continue in possession. Mr. Hobblyn received the rent due at Michaelmas 1822. He could not then get another tenant, but he afterwards let the premises to one Retallick. At Michaelmas 1823, the defendant with his father went again to the said closes, and turned out the cattle then therein; and in April 1824, they went again, and began to plough the field, which was objected to on the part of Mr. Brune, but the defendant persisted, and has kept possession from that time. After Michaelmas 1824, the defendant paid the reeve of the Manor of Trevoose one year's chief rent for Sandry's fields, and the Varwells, parcels of the premises in question, due to the said manor.

By indentures of lease and release, bearing date the 6th and 7th of May 1824, the release made between Joseph Martyn and Agnes his wife, before her marriage called Agnes Elliott, spinster, William Martyn Elliott and Elizabeth his wife, John Ham and Grace his wife, before her marriage called Grace Elliott, spinster, (which said Agnes Martyn, William Martyn Elliott, and Grace Ham, were the only children

of Richard Elliott, nephew of Hooper Martyn, gent. deceased, living at the time of the death of Peggy his widow,) William Parnall and Olive his wife, Andrew Parnall and Mary his wife, John Parnall and Elizabeth his wife, Edward Parnall and Celia his wife, Mary Parnall, spinster, Grace Thomas, widow of Samuel Thomas, before her marriage with him, called Grace Parnall, spinster, (which said William Parnall, Andrew Parnall, John Parnall, Edward Parnall, Mary Parnall, and Grace Thomas, were the only children of Martha Parnall, the niece of the said Hooper Martyn, living at the time of the death of the aforesaid Peggy his widow, Thomas Parnall and Martyn Parnall, the only other children of the said Martha Parnall, having departed this life in her lifetime), of the first part; the Rev. Charles Prideaux Brune, clerk, of the second part; and Edward Coode, gent. (devisee named in the last will and testament of Thomas Rawlings, esq., deceased,) of the third part,—reciting the will of the said Hooper Martyn, and his death; and reciting the marriage of testator's widow to Thomas Hobblyn; reciting that under and by virtue of indentures of lease and release of the 10th and the 11th days of December 1807, the release made between the said Joseph Martyn and Agnes his wife, William Martyn Elliott, William Parnall, and Andrew Parnall, of the first part; the said Charles Prideaux Brune, of the second part; the said Thomas Rawlings, of the third part; and the said Edward Coode, of the fourth part; and a fine *sur conuzance de droit*, &c. by Joseph Martyn and Agnes his wife, unto the said Edward Coode and his heirs, in or as of Michaelmas Term 48 Geo. 3, in pursuance of a covenant for that purpose contained in the said indentures of release: And also indentures of lease and release of the 14th and 15th of December 1808, the release made between the said John Parnall, of the first part; the said Charles Prideaux Brune, of the second part; the said Thomas Rawlings, of the third part: and the said Edward Coode, of the fourth part; and also indentures of lease and release of the 24th and 25th of January 1810, the release made between the said Grace Elliott, of the first part; the said Charles Prideaux Brune, of the second part; the said Thomas Rawlings, of the third part;

Growden and John Hooper, one field, called Ninnisses, in the village of Trevoze, in Padstow; two fields, called Sandry's Fields, lying in the village and fields of Cragmere, in Padstow; and divers other fields, amongst which were some called the Varwell Closes, in Cragmere, in Padstow, (all which said premises were then in the possession of said William Martyn and Thomas Martyn, or one of them,) and the reversion, &c., to hold unto the said Lawrence Growden and John Hooper, their heirs and assigns,—as to Sandry's Fields and Ninnisses, to the use of the said William Martyn for life; remainder to the use of the said Lawrence Growden and John Hooper and their heirs, during the life of the said William Martyn, upon trust to preserve contingent remainders; with remainder to the use of the said trustees and their heirs, during the life of the said Thomas Martyn, upon trust to preserve contingent remainders; with remainder to the use of the first, second, third, &c. and other sons, of the said Thomas Martyn, by the said Martha Hooper, successively in tail male; with remainder to the use of the right heirs male of the said Thomas Martyn for ever. And as to all other the said settled premises, to the use of the said Thomas Martyn for life; with remainder to the use of the said trustees, their heirs and assigns, during the life of the said Thomas Martyn, in trust to preserve contingent remainders; with remainder to the use of the said Martha Hooper for her life, for raising out of the rents and profits an annuity of 25*l.*; and, subject thereto, to the use of the first, second, third, and other sons of the said Thomas Martyn, by the said Martha Hooper, successively in tail male; with remainder, in case there should be no issue male, but should be issue female, to the use and behoof of the issue female of the said Thomas Martyn, on the body of the said Martha Hooper, for raising and levying out of the rents, issues, and profits thereof, such sum or sums of money, to pay and satisfy such portion and portions to and with such daughter and daughters, at such time and times as are hereinafter mentioned: that is to say, if one daughter, the sum of 600*l.*; and if two daughters, to each of them the sum of 400*l.*; and if more than two daughters, the sum of 800*l.* to be equally divided between them at

twenty-one. But if it should happen, that the said sums and sum aforesaid could not be advanced out of the profits of the said hereditaments at the times of payment thereof as aforesaid, the said premises should stand charged with the payment of the portion or portions aforesaid, as soon after as the same could be advanced and raised out of the rents, issues, and profits thereof; and that until twenty-one, the trustees and their heirs, and the survivor of them and his heirs, should, out of the rents, raise such maintenance of such daughter and daughters, as to the said trustees, their heirs and assigns should seem meet and convenient. And after raising, levying, and paying the sums of money as aforesaid for the daughters, or in case there should be no issue female, to the use of the right heirs male of the said Thomas Martyn for ever.

William Martyn, one of the settlors, died in the year 1722, and Thomas Martyn, the other settlor, died in the year 1740; leaving issue, two sons, William, his eldest son and heir, and Hooper. William, the eldest son, entered into the estates in question, and died without issue in the year 1779, leaving Hooper his brother and heir; and he, after the death of his brother William, entered into the premises, and continued in possession of them till 1795, when he died, leaving no issue. The only other issue of Thomas Martyn, the settlor, were Martha Martyn and Grace Martyn. Martha died in the year 1793, unmarried. Grace married James Elliott, who died in the year 1761, leaving issue as in a pedigree which was stated in the case. [The material particulars are stated in the judgment.] On the 26th of September 1795, Hooper Martyn made his will in writing, duly executed, by which he devised all the premises in question to his wife Peggy (afterwards by her second marriage called Peggy Hobblyn) for life, with remainder to all and every the son and sons, daughter and daughters, of his nephew Richard Elliott and of his niece Martha Parnall, who should be living at the time of the decease of his said wife, share and share alike, as tenants in common and not as joint tenants, and to their heirs and assigns for ever. Peggy Hobblyn died the 12th day of March 1824; and at the time of her death, the issue of Richard Elliott and Martha Parnall then alive and entitled (if

and Grace Thomas, (by the direction of the said Charles Prideaux Brune,) and each of them, did grant, bargain, sell, alien, release, and confirm, unto the said Edward Coode and his heirs, all that field called Ninnisses Park, and also two fields or closes called Sandry's close, and also all that tenement called Cragmere, with divers other closes therein particularly mentioned, and all other the messuages, lands, tenements, and hereditaments, in which the said Hooper Martyn had, at the time of making his said will, any estate of inheritance; and all the estate, &c., to hold to the said Edward Coode and his heirs to certain uses (material only to the purchaser). Then followed a covenant to levy a fine, to the uses aforesaid.

In Trinity Term 1824, the fine was levied accordingly, and the third proclamation was in Hilary Term 1825.

The declaration contained two demises of the same date, namely, the 1st of September 1824; the first by the said Charles Prideaux Brune, and the second by the said Edward Coode; and the premises sought to be recovered were Ninnisses, Sandry's Fields, and the Varwell Closes, in Cragmere. If the lessors of the plaintiff or either of them were entitled to recover all or any part of these premises, the verdict was to stand for so much as they should be found entitled to; but if neither of them was entitled to any part, then a nonsuit was to be entered.

The points argued on the part of the lessors of the plaintiff were—

First, as to Ninnisses and Sandry's fields, the word "male" in the gift to the right heirs male must be rejected, and Thomas Martyn took a vested estate in fee simple.

Second, the like point is applicable to Varwell closes.

Third, as far as these points may fail, the title resulted to the settlor.

Fourth, under the title, as stated, Hooper Martyn had the ultimate fee as a devisable interest.

Fifth, the contingent remainder created by the will of Hooper Martyn, became vested, and governs the title, and proves the title of the lessors of the plaintiff to retain the verdict.

The points argued on the part of the defendant were—

First, the ultimate remainder in the settlement of 1722, to the use of "the right heirs male of the said Thomas Martyn for ever," did not unite with the prior estate for life to the said Thomas Martyn, but created a contingent remainder to vest in such person as should answer the description on the expiration of the prior estates.

Second, that as to the closes called Varwells, and the acres in Cragmere, the ultimate limitation in the settlement of 1722, "to the use of the right heirs male of the said Thomas Martyn" was an equitable estate, and consequently will not unite with the prior estate for life to the said Thomas Martyn.

Third, that the devise in Hooper Martyn's will to the sons and daughters of his nephew Richard Elliott, and his niece Martha Parnall, were contingent; that a contingent remainder is not assignable, and consequently, during the life of Peggy Hobblyn, nothing passed to the lessor of the plaintiff.

Fourth, that the fines *sur conuzance de droit come ceo*, levied in the lifetime of Peggy Hobblyn, operated as an extinguishment in favour of the possession, and consequently destroyed the title to two ninths of the premises.

Fifth, that on the death of Peggy Hobblyn, the defendants having entered into the premises, and no entry having been made by the contingent devisee, nothing passed by the conveyance made in May 1824, or by the fine subsequently levied.

The case was argued, at the Sittings before Trinity Term, by *Mr. Preston* for the lessors of the plaintiff, and *Mr. Fraser* for the defendants; but the arguments and all the authorities are so fully noticed in the elaborate judgment of *Mr. Justice Bayley*, that it is not considered necessary to repeat them.

The Court took time to consider; and on the 2d of July,

Mr. Justice Bayley delivered judgment in the following terms:—This case turned in some degree on the construction of a will, and also upon the operation of a fine upon a contingent remainder. The ejectment was brought for closes, called Ninnisses, Sandry's Field, and the Varwell

and the said Edward Cooode of the fourth part : and also indentures of lease and release of the 11th and 12th of November 1812, the release being made between the said Thomas Parnall, of the first part ; the said Charles Prideaux Brune, of the second part ; the said Thomas Rawlings, of the third part ; and the said Edward Cooode of the fourth part : also indentures of lease and release of the 19th and 20th of April 1814, the release being made between the said Samuel Thomas and Grace his wife, of the first part ; the said Charles Prideaux Brune, of the second part ; the said Thomas Rawlings, of the third part ; and the said Edward Cooode of the fourth part, and a fine *sur conuzance de droit come ceo* &c., by the said Samuel Thomas and Grace his wife, to the said Edward Cooode, in or as of Trinity Term, 54 Geo. 3, in pursuance of a covenant for that purpose contained in the said last-mentioned indentures : and also indentures of lease and release of the 11th and 12th of October 1818, the release being made between the said Edward Parnall, of the first part ; the said Charles Prideaux Brune, of the second part ; the said Thomas Rawlings, of the third part ; and the said Edward Cooode, of the fourth part ; the several and respective undivided parts or shares, in or to which the said Joseph Martyn and Agnes his wife, William Martyn Elliott, William Parnall, Andrew Parnall, John Parnall, and Grace Elliott, Thomas Parnall, Samuel Thomas and Grace his wife, and Edward Parnall, were or should respectively become entitled, under the said will of the said Hooper Martyn, in the hereditaments thereafter released, were, among others, conveyed to the said Edward Cooode and his heirs, as to part, to the use of the said Charles Prideaux Brune, in fee, subject to the estate which Peggy Hobblyn then had therein for her life, and as to the remainder, to the use of the said Thomas Rawlings, in fee, subject as aforesaid : and reciting the will of the said Thomas Rawlings, dated the 1st of July 1820, and the devise therein to the said Edward Cooode and his heirs of all testator's real estates ; and reciting the death of the said Thomas Rawlings ; and reciting, that under certain other indentures of lease and release, of the 7th and

8th of January 1819, the release being made between Martyn Parnall, of the first part ; James Boyd, of the second part ; and the said John Parnall, of the third part ; and certain other indentures of lease and release, of the 1st and 2nd of January 1819, the release being made between the said James Boyd, of the first part ; and the said John Parnall, of the second part ; and the said Charles Prideaux Brune, of the third part ; and also certain other indentures of lease and release of the 19th and 20th of May 1821, between the said Mary Parnall, of the one part ; and the said Charles Prideaux Brune, of the other part,—the several undivided shares in or to which the said Martyn Parnall and Mary Parnall were or should respectively become entitled under Hooper Martyn's will, were thereby conveyed to the said Charles Prideaux Brune, in fee ; and reciting that the said Thomas Parnall and Martyn Parnall died in the lifetime of the said Peggy Hobblyn ; and reciting the death of Peggy Hobblyn, on or about the 13th of March 1824, whereupon the said hereditaments hereinafter released would, under the said Hooper Martyn's will, but for the said recited conveyances, have come to and vested in the said Agnes Martyn, William Martyn Elliott, Grace Ham, William Parnall, Andrew Parnall, John Parnall, Edward Parnall, Mary Parnall, and Grace Thomas, as the surviving sons and daughters of Richard Elliott and Martha Parnall, as tenants in common in fee simple ; and therefore that the said Edward Cooode, as the devisee of the real estate of the said Thomas Rawlings, was become equitably entitled to eight ninth undivided parts of the said hereditaments, of which the like parts were thereafter limited to him ; and the said Charles Prideaux Brune was equitably entitled to the remaining one ninth part of the same hereditaments, as well as to the entirety of the hereditaments, of which the entirety was thereafter limited in use to him ; reciting the agreement for further assurance ;—it is witnessed—that for the considerations therein expressed, they, the said Joseph Martyn and Agnes his wife, William Martyn Elliott, John Ham and Grace his wife, William Parnall, Andrew Parnall, John Parnall, Edward Parnall, Mary Parnall,

and Grace Thomas, (by the direction of the said Charles Prideaux Brune,) and each of them, did grant, bargain, sell, alien, release, and confirm, unto the said Edward Coode and his heirs, all that field called Ninnisses Park, and also two fields or closes called Sandry's close, and also all that tenement called Cragmere, with divers other closes therein particularly mentioned, and all other the messuages, lands, tenements, and hereditaments, in which the said Hooper Martyn had, at the time of making his said will, any estate of inheritance; and all the estate, &c., to hold to the said Edward Coode and his heirs to certain uses (material only to the purchaser). Then followed a covenant to levy a fine, to the uses aforesaid.

In Trinity Term 1824, the fine was levied accordingly, and the third proclamation was in Hilary Term 1825.

The declaration contained two demises of the same date, namely, the 1st of September 1824; the first by the said Charles Prideaux Brune, and the second by the said Edward Coode; and the premises sought to be recovered were Ninnisses, Sandry's Fields, and the Varwell Closes, in Cragmere. If the lessors of the plaintiff or either of them were entitled to recover all or any part of these premises, the verdict was to stand for so much as they should be found entitled to; but if neither of them was entitled to any part, then a nonsuit was to be entered.

The points argued on the part of the lessors of the plaintiff were—

First, as to Ninnisses and Sandry's fields, the word "male" in the gift to the right heirs male must be rejected, and Thomas Martyn took a vested estate in fee simple.

Second, the like point is applicable to Varwell closes.

Third, as far as these points may fail, the title resulted to the settlor.

Fourth, under the title, as stated, Hooper Martyn had the ultimate fee as a devisable interest.

Fifth, the contingent remainder created by the will of Hooper Martyn, became vested, and governs the title, and proves the title of the lessors of the plaintiff to retain the verdict.

The points argued on the part of the defendant were—

First, the ultimate remainder in the settlement of 1722, to the use of "the right heirs male of the said Thomas Martyn for ever," did not unite with the prior estate for life to the said Thomas Martyn, but created a contingent remainder to vest in such person as should answer the description on the expiration of the prior estates.

Second, that as to the closes called Varwells, and the acres in Cragmere, the ultimate limitation in the settlement of 1722, "to the use of the right heirs male of the said Thomas Martyn" was an equitable estate, and consequently will not unite with the prior estate for life to the said Thomas Martyn.

Third, that the devise in Hooper Martyn's will to the sons and daughters of his nephew Richard Elliott, and his niece Martha Parnall, were contingent; that a contingent remainder is not assignable, and consequently, during the life of Peggy Hobblyn, nothing passed to the lessor of the plaintiff.

Fourth, that the fines *sur conuzance de droit come ceo*, levied in the lifetime of Peggy Hobblyn, operated as an extinguishment in favour of the possession, and consequently destroyed the title to two ninths of the premises.

Fifth, that on the death of Peggy Hobblyn, the defendants having entered into the premises, and no entry having been made by the contingent devisee, nothing passed by the conveyance made in May 1824, or by the fine subsequently levied.

The case was argued, at the Sittings before Trinity Term, by *Mr. Preston* for the lessors of the plaintiff, and *Mr. Fraser* for the defendants; but the arguments and all the authorities are so fully noticed in the elaborate judgment of *Mr. Justice Bayley*, that it is not considered necessary to repeat them.

The Court took time to consider; and on the 2d of July,

Mr. Justice Bayley delivered judgment in the following terms:—This case turned in some degree on the construction of a will, and also upon the operation of a fine upon a contingent remainder. The ejectment was brought for closes, called Ninnisses, Sandry's Field, and the Varwell

Closes, in Cragmere. The ejectment was upon the several demises of Charles Prideaux Brune and Edward Cooode. The facts were shortly these: the premises, Ninnisses and Sandry's Field, were conveyed to the use of William for life, with remainder to trustees to preserve contingent remainders; with remainder to Thomas Martyn for life; remainder to trustees to preserve contingent remainders; remainder to the use of the first and other sons of Thomas by Martha Hooper in tail male, with remainder to the use of the right heirs male of Thomas Martin. There are no words there to shew of what body; it being by deed, of course the words "of the body" are essential, in order to create an estate tail. As to the residue of the premises, there were limitations, to a certain degree similar, to the use of Thomas Martyn for life, except, I think, they omitted William Martyn; remainder to trustees to preserve contingent remainders; remainder to the use of Martha Hooper (that was the intended wife) for life to raise her 25*l.* a year; remainder to the first and other sons in tail male; remainder to the intent that the trustees should stand seised to the use of the issue female for raising portions, namely, 600*l.* if only one, otherwise 800*l.*; and the trustees were to raise maintenance for the daughters until twenty-one; and then, remainder, after raising the maintenance and the portions, to the use of the right heirs male of Thomas Martyn. Therefore the ultimate limitation, as to all the property, is to the use of the right heirs male of Thomas Martyn. The subsequent facts were shortly these—William Martin died in the year 1722; he was the settlor. In 1740 Thomas Martyn died; he left two sons, William and Hooper; and two daughters, Martha and Grace. In 1779 William died without issue; then Hooper was the remaining son. In 1795 Hooper died without issue; having made his will, and upon that will, and upon the operation of it, other parts of the question will arise. He devised to Peggy, his wife, for life; remainder to all and every the children of his nephew Richard Elliott, and his niece Martha Parnall, the son and daughter of Grace, who should be living at his wife's death, share and share alike. So that that gave clearly a contingent remainder to such children as should be living at

the time when Peggy, the tenant for life, died. In 1793 Martha died without issue. Grace died in 1741. On the 12th of March 1824, Peggy Hooper, the widow, died; and at that period of time Richard Elliott had three children, and Martha Hooper six. Therefore upon her death the shares would go to those nine persons in ninths, unless something had been done to destroy in the meantime the contingent remainder which was limited to them. On the 6th and 7th of May 1824, which was after the death of the tenant for life, and therefore when the remainder, which previously had been contingent, had become vested, all those children joined in making a conveyance to the lessors of the plaintiff. But the conveyance of the 6th and 7th of May 1824, recited a prior conveyance by some of them in 1822 and 1823, by which there had been a former conveyance by those persons who were the children of Elliott and of Parnall; and as to two shares, the persons being married women, they levied a fine, and those fines are recited in the deed of the 6th and 7th of May 1824; and it was insisted by Mr. Fraser, on the part of the defendant, that those fines had the effect of destroying the contingent remainder which had been limited to the two persons by whom those fines were respectively levied; and, if the contingent remainder was destroyed, those two persons had no share in them on the 6th and 7th of May 1824, when the conveyance was made to the lessors of the plaintiff, and that therefore the lessors of the plaintiff would be entitled to seven ninths only, and not to the whole. Now, upon this state of facts, the first question which was discussed was, what was the effect of the two limitations to the use of the right heirs male of Thomas Martyn; whether those were words of limitation, or whether they were words of purchase? Being in a deed, as I have already stated, you must have "body;" you must shew of what body, in order to create an estate tail, and therefore the limitation to the use of the right heirs male of Thomas Martyn, will either give a fee to Thomas Martyn, to whom there had been previous limitations, or it will give, by way of purchase, an estate to such person as shall become the right heir male of Thomas Martyn. It will probably turn out, that

afterwards, that person was William Martyn, when Thomas Martyn died in 1740. It was conceded, and rightly, by Mr. Fraser, that these were to be taken, not as words of purchase, but as words of limitation, unless a contrary intention was manifested. He insisted, from the whole scope of the deed, a contrary intention was obvious. He contended that a contrary intention was manifested, and that the limitation was to such persons as should be heir male of Thomas Martyn at the time the preceding estate should fail. Now, for such an intention, I have looked in vain throughout the whole of this deed, for the purpose of satisfying my mind that that was the intention of the party; to see whether he meant the "heir male" at any future period, and to use it as words of purchase. I think, the presumption would be, if that meant the heir male who should first become heir male, that, as soon as ever Thomas should die, and there was a person in whom the estate remaining could vest, that it should vest in that person, because the law leans against holding an estate either to be, in its creation, contingent, or to continue contingent longer than is necessary, for the purpose of satisfying the words by which the limitation is created; and, therefore, when you make a limitation to the right heirs of J. S., J. S. being at that time living, why that will be a contingent remainder; but it will be a contingent remainder to vest an interest as soon as J. S. shall die, and as soon as a person fills the character of heir of J. S. If in this case I were at liberty to conjecture in the case, I should say, not that the settlor was looking to any particular individual, or meant to make the object of his bounty any person who at a distant time might fill the character of heir male; but that he meant to create a general estate tail in himself, and that either by accident or otherwise he unintentionally omitted to shew of what body they were to be heirs male. The provision in the deed has provided for the taking care of the issue; the issue male of that marriage; and it might turn out that Thomas might marry again—might have no issue male by the first marriage, and might have issue male by the second marriage; and I think it is extremely probable that it was in the contemplation of the settlor

at this period of time to provide for the children for such second marriage, whom he meant to be provided for, not as purchasers, but by vesting an estate in tail male in the ancestor; but, there not being words to shew of what body they were to be heirs, it could not have that effect. Suppose these to be words of purchase, it would not bar, as it seems to me, the lessor of the plaintiff; because, on the execution of the deed, this would be a contingent remainder merely on the ground of *nemo est hæres viventis*; and, during the life of T. Martyn, no one could be either his heir or heirs male; but I can see no reason why it should not vest immediately that Thomas died; the instant there came a person who satisfied the character of his heir male. Now, on the death of Thomas, William was the person who filled that character. William was at that time his heir. On the death of William in 1779, the remainder would descend in fee on Hooper, who was another son of Thomas, and who was the brother and heir of William; and Hooper, when his will was made, had the complete ultimate remainder in himself in fee; and he would have a right to limit that in such ways as he by his will should think fit. Then the next question applies, not to the whole estate but to that property only which is included in the second branch of the settlement, the Varwell Closes. This question is, whether the limitations to the trustees to the use of the issue female of Thomas Martyn vests the whole fee in the trustees, so as to prevent the persons who claim under the ultimate remainder from having any claim at law. The limitation is, that for want of issue male of Thomas Martyn by Martha Hooper, or if such issue should die without issue male, and Thomas Martyn should have a daughter or daughters by Martha Hooper, living at his death, then the trustees, their heirs and assigns, should stand seised to the use and behoof of the issue female of Thomas Martyn by Martha, for raising, out of the rents, issues and profits of the estate, 600*l.* if there was only one daughter, and 800*l.* if there were more, to be paid to them at twenty-one; and if such sum could not be raised out of the profits by the time of payment, then the premises should stand charged with

those sums until they could be raised out of the rents, issues, and profits. Until the daughters had attained twenty-one, the trustees and their heirs were to raise such maintenance for the daughters as they should think fit. The trustees, therefore, have no express power given them over the rents, except during the infancy of the daughters; and upon the daughters attaining twenty-one, the use seems executed in the daughters; and it is to them, and to them only, that the control appears to be given over the rents, issues and profits. Suppose, however, that the legal estate had been vested in the trustees, and that the 600*l.*, or the 800*l.*, in the events which happened, were to have been raised, and that the trustees were the persons who ought to have raised them, and that they took a fee; it is impossible to say they took more than the limited fee, a fee which must have determined when the 600*l.* or the 800*l.* should have been raised; and the ulterior right expectant on the determination of that limited fee must at law have been in the heir-at-law of the settlor, not by way of limiting a fee upon a fee, but because it was part of the old right; and upon failure of the estate which was limited by the settlement it returned back upon the settlor. The doctrine applicable to that part, that everything which is not entirely and absolutely parted from, remains in the settlor and his heir, is to be collected in *Coke Littleton*, 191, *a.* note 1. Considering then, that no claim appears to have been made by the trustees; that nearly twenty years of possession adverse to their claim had occurred at the time this ejectment was brought, and that much more than the full term of twenty years adverse possession is since completed; and that up to the present time they appear to have made no claim,—I think the defendant cannot avail himself of any supposed right in the trustees. The presumption is, that it was either released or satisfied. I think it is too doubtful and too distant to be a defence in the mouth of a stranger.

The next point was, whether the conveyance of the 6th and 7th of May 1824, when the contingent interest had become vested, passed any interest to the lessors of the plaintiff. One objection to that was, that prior to the death of Peggy, the tenant for

life, the defendant had exercised some act, committed some act of trespass on the land in question; and that, after the death of the tenant for life, and before any actual entry by that person in whom that remainder was vested, this party entered again; and, as far as there was any evidence in the case, might have been in possession at the period of time at which the conveyance was executed. The death was on the 12th of March 1824. Now, who was in possession at that period of time, the case does not state. Whether any of the remainder-men entered, or whether any person entered on their behalf, the case does not state. Sometime in the month of April, it does not state when; but, sometime in the month of April, the defendant entered, and then he began to plough the field. This was objected to. It does not appear that it was objected to, or known by any of the parties in whom that remainder was vested, but Brune, who before had a conveyance, and there was an objection made on his part; the case does not state that he knew of it, but the case states this was objected to on the part of Brune. However, at that period of time Brune had no legal interest in him. The former conveyance, which had been made to him before the contingency happened, was an inoperative conveyance, except as far as the fines could have operated by way of estoppel; and, therefore, it does not appear that at the time when this party executed, when this entry was made, and these fields were ploughed by the present defendant, that the fact of his so doing was known to any of the parties in whom any legal interest was at the time vested. But it was insisted, that the persons who were entitled to the vested remainder could not legally convey, because they had not at that period of time, as it was assumed (though not proved, but as it was assumed,) that they had not legally entered. It was admitted that, generally speaking, an entry by a remainder-man is not necessary, but that he might convey before he had made an actual entry; because, being clothed with the right, and there being no hostile possession in him at the time when the remainder vested in him, it would be competent for him to make a perfect conveyance. But reliance was placed on a

passage in *Coke Littleton*, 49, a. which says, "If the feoffor be out of possession, neither fine, recovery, indenture of bargain and sale enrolled, nor other conveyance, doth avoid an estate by wrong." Now, it does not say that the conveyance is void, but it only says that it does not avoid an estate by wrong. Now, I take it to be clear then when he states, if the owner is out of possession, by out of possession, he means disseized; possession and seizin being, in *Coke Littleton*, over and over again considered as synonymous; and it assumes, on the terms of that passage, there is in somebody an estate by wrong. Now, at the period of time at which this conveyance was executed, I think it is impossible to say that anybody ever had acquired an estate by wrong. Mr. Fraser argued, that this defendant was an intruder, and that he had an estate by intrusion. The owner, on whom the right devolves, has a right, if he thinks fit, at his election, to treat any person who comes into the possession and occupation of the land as being an intruder; but he is not bound so to consider him. Intrusion is a species of disseizin, and there are many instances in which you may elect to consider yourself as being disseized, and that is for the purpose of advancing your remedy. It is to protect your rights. But unless there is such conduct on the part of the defendant as could disseize the remainder-men against their will, I think it impossible to say that an estate by wrong was acquired by this. The doctrine of disseizin, of right by disseizin, is well noticed by my Lord Ellenborough in *12 East*, 155. He there says, "Disseizin—(you may say so of that species of disseizin which an intrusion is)—was formerly a notorious act, where the disseizor put himself in the place of the disseizee as tenant of the freeholder, and performed the acts of the freeholder, and appeared in that character in the Lords' Courts." Now these were notorious acts, but what acts of notoriety are there in this case on the part of the defendant? All that he does is, he goes on the land, and he ploughs the land from the period in April when he enters, until the time when this conveyance is executed, which is on the 6th and 7th of May 1824. Therefore, at the most, he would only have been in possession six weeks. Indeed he

could not have been in possession quite so long as that period. Under those circumstances it does not appear to us that there was such an estate by wrong acquired by him, as would prevent the conveyance, which was made by the nine persons who were the children of Elliott and Parnall, from conveying their estate. But, it was insisted, that, although the bulk of the property might pass, and there was no objection as to the seven ninths, yet that, as to two ninths, which were the shares of a person of the Christian name of Agnes, and of a person of the name of Grace, that by fines which they had levied in their life, before the contingency happened, the contingent remainders which belonged to them at the time when those fines were levied, were effectually destroyed; and that, consequently, they did not pass to the present lessors of the plaintiff; and there being no demise, except by the present lessors of the plaintiff, who claimed under those persons, that the right of the plaintiff must be confined to seven ninths, and seven ninths only. —The fines were fines *sur conuzance de droit come ceo*. Those fines were not produced in evidence at the time of the trial, and they do not constitute any part of the special case; but they are stated in the deeds of the 6th and 7th of May 1824; and being so stated in the recital, we are bound, as we apprehend, to assume that they were such fines. And if those fines had the effect supposed of destroying the contingent remainder, then these deeds are, as to two shares, bad on the face of them. The fines are described on the face of those deeds, not as fines for years only, which might not have the effect of working any destruction or extinguishment; but as fines *sur conuzance de droit come ceo*. Then the question is, whether the fact of the persons standing in the situation these children did, who had a contingent remainder in them at the time those fines were levied, destroyed that contingent remainder. There is no destruction of the particular estate; the particular estate necessary to support a contingent remainder continues from the period when the settlement was made, down to the time when the tenant for life died, and when what was before in contingency vested in interest and in possession. The point—what is the effect

of a fine in fee by a contingent remainderman, is a question on which living writers differ. *Mr. Preston*, in his first volume of *Conveyancing*, page 209, seems to consider that the fine has the effect of destroying the contingent remainder. *Mr. Sugden*, in his book on *Uses*, considers that it has no such effect; and there are some passages in *Fearne*, in the edition published by *Mr. Butler*, in which he considers also that a fine will not destroy a contingent remainder, but that a contingent remainder may be passed by way of fine, so as to operate, not to transfer the interest at the time when the fine is levied, but to operate when contingency is at an end, and to bind the party in whom at that period of time the interest would have vested by estoppel; and therefore, to confer upon the individual in whose favour the fine was levied, a title by way of estoppel, and by way of estoppel only. It is quite clear that a contingent remainder cannot be conveyed at law—you cannot make a good and valid conveyance of it so as to pass the interest which a limitation by way of contingent remainder gives; that is laid down in *Fearne*, 289, in one edition, and in *Butler's* edition, 366. There is no doubt also, but that in equity you may make a valid conveyance of a contingent remainder in fee, or a contingent remainder in landed estate. That is established by *Whitfield v. Fausset* (1) and *Wright v. Wright* (2). Although it cannot be conveyed in law it may be released or extinguished. It would operate by way of extinguishment by making a release to the owner of the estate, or to the heir-at-law of the owner of the estate; and the question here is, whether a fine, in fee, of necessity extinguishes it. If it were intended to have that effect, there can be no doubt but that that would be the operation of the fine. If the contingent remainderman levies the fine to the person in whom the ultimate remainder in fee is, out of which fee the remainder would be to be fed, that fine extinguishes the contingent remainder, and it is gone. Perhaps, *prima facie*, you would assume, where no contrary intention appeared, and no motive in the conuzor for levying the fine is apparent,—perhaps it may be right to assume

that it was with a view to the benefit of the inheritance, and for the purpose of extinguishing the contingent remainder: but the question is, whether the fine will have that operation when a contrary intention is apparent. *Mr. Preston* thinks that it may; and he relies upon *Weale v. Lower*, which is in *Pollexfen*, 66; and which is bottomed also on *Buckler's case*, which is in 2 *Coke*, 55. *Mr. Preston's* expression (I can only refer to it for the purpose of giving it the answer)—“a person who has merely a right of action, or of entry, or a contingent remainder, or other future or executory interest, which does not give a vested estate, should cautiously avoid levying this species of fine, that is, a fine *sur conuissance de droit come ceo*, unless he means to extinguish his interest; for as rights of action &c. cannot be transferred, the conuzee in the fine cannot derive any advantage from the fine. On the other hand, strangers to the fine may avail themselves of it to preclude the title of the conuzor, and thus the party will not be allowed, in opposition to his own fine, to assert a title to the land; the consequence is, that the fine enures to the benefit of the person to whom the right would have been released, exactly the same as if the right had been released.” Then he says, “Hence the resolution in *Buckler's case*.” Now it is not a resolution in *Buckler's case*; it is an assertion—a dictum only; and that dictum is this; it is not the point resolved:—“Sixthly, it was said, that if the disseizee levy a fine to a stranger, that in this case the disseizor shall retain the land for ever; for disseizee, against his own fine, cannot claim the land, and the conuzee cannot enter, for the right which the conuzor had cannot be transferred to him; but by the fine the right is extinct, whereof the disseizor shall take advantage.” In *Weale v. Lower*, which is in *Pollexfen*, the question did not arise distinctly in judgment, but there was a contingent remainderman in tail, who had also a remainder in fee, and levied a fine to the use of J. S. for five hundred years, and he died before the contingency happened; and then on his death the remainder in fee descended on his heir; and whether J. S. had a right for five hundred years against such heir, was the question; and that depended on the point, whether the fine destroyed

(1) 1 Vesey, 391.

(2) Id. 411.

the contingent remainder: and it was held that it did not, because the fine was for years only; but in that case, my Lord Chief Justice Hale, when the case was first before him (it was afterwards argued a second time, because, there being difficulty in it, he desired the assistance of other Judges, it being at first only argued before him), he said, "Had the fine been levied in fee, it would have barred the heir, destroyed the contingent use, and operated to the benefit of the possessions as the fine of a disseizee to a stranger." He therefore adopts the position which had been laid down in *Buckler's case*, that a fine by a disseizee to a stranger will destroy the right of the disseizee, and make the right of the disseizor perfect. Now those positions are the positions which are relied on for the purpose of shewing that a fine by a contingent remainder-man destroys the contingent remainder. There are authorities the other way. The first of them that I am aware of is in *March*, page 105, that is clearly against *Buckler's case*, Placitum 180, Trinity, 17th Charles the First, which is after the period of *Buckler's case*; *Buckler's* being 39th and 40th of Elizabeth. The case in *March* was this: disseizee levies a fine. By Reeve and Crawley, Justices, "It shall not give right to the disseizor, because, that this fine shall enure merely by way of estoppel, and estoppels bind only privies to them, and not a stranger; and therefore the disseizor shall not take the benefit of it: and therefore they did conceive 2 *Coke* (3) to be no law." In *Fitzherbert's case* (4), it was moved "if the disseizee, not knowing of the disseizin, had levied a fine to a stranger, whether that would have barred his right and enured to the benefit of the disseizor, according to *Buckler's case* in 2 *Coke*, which, if admitted, would have a very mischievous consequence? But herein the Court delivered no opinion; but Brampston and myself conceived it should not enure to the benefit of the disseizor, but to the use of the conuzor himself, for otherwise a disseizin, being secret, may be the cause of the disinherison of any one who intends to levy a fine for his own benefit, for the assurance of his lands on his wife or otherwise."

Coke Littleton (5) refers to *Buckler's case*, and says, "Fine by disseizee extinguishes his right, and shall enure to the disseizor;" but he adds, "But see this denied, Michaelmas, 13th Charles 1, Croke, (6) *Fitzherbert's case*. That is Hale's manuscript. My Lord Hale, in that manuscript, considers the case in *Croke* as inconsistent with the doctrine in *Buckler's case*. In *Goldsbrough* 162, Coke, attorney-general, demanded this question of the Court, "If there be disseizor and disseizee, and during the disseizin, the disseizee, when he hath nothing but a right, levies a fine to a stranger, if by this fine the right of the disseizee be gone, and if the disseizee shall take advantage thereof?" Popham and Gaudy say "Nay, truly." That is the whole of that. Then there is another authority, 1 *Rolle's Abridgment* (7). Disseizee suffers a recovery to the use of D: this shall be "a good recovery by estoppel to bind the disseizee, and his heirs." The true principle, as it seems to me, is laid down in the case of *The Earl of Peterborough v. Sir Thomas Bludworth* (8). It was an ejectment, before Bridgman Chief Justice. It appeared the disseizee levied a fine and declared the use by deed to the conuzee: Bridgman held this should not enure to the use of the disseizor; but if no use had been declared, it should have been to the use of the disseizor, and should have extinguished the right of the disseizee. He meant, the jury should have found the facts specially; but they gave a verdict at large, against his direction; and therefore his opinion at that period of time seems to be, that if there is a fine levied by the disseizee, if he declares the use of that fine to be to any other person than the disseizor, it may not enure to the benefit of the disseizor, that excluding what the law would otherwise raise to be the inference and the consequence of levying that fine; but if it be silent as to the uses, it may and will enure to the benefit of the disseizor. This agrees with the decision on that case, so often noticed, of *Helps v. Hereford* (9), and also with a very recent determination, that of *Davies v. Bush*, which I shall notice afterwards.

(3) 56 A.

(4) Cro. Car. 434.

(5) 49 A. n. 4.

(6) Cro. Car. 484.

(7) Estoppel, 2 pl. 3.

(8) Levinz, 128.

(9) 2 Barn. & Ald. 242.

In *Vick v. Edwards* (10), a case before my Lord Talbot, there was a conveyance to the husband and wife, with what was considered a contingent remainder to the survivor of the husband and wife. Mr. Fearne, in his edition, doubts whether it was a contingent remainder, or whether the whole fee was not vested in the husband and wife and the survivor of them; but my Lord Talbot seems to have considered that the limitation to the survivor of the husband and wife was a limitation by way of contingency, and that it would vest in fee in the husband if he survived; it would vest in fee in the wife if she survived: but that until there was a survivorship, it would continue a contingency; and in that case my Lord Talbot was of opinion, that a good title would be made to a purchaser by a fine by the husband and wife, and that it was not necessary that the heir-at-law of the ultimate owner of the estate, of the person from whom the estate moved, should join in that conveyance. Now the only principle on which my Lord Talbot could have proceeded in that case was, which is the principle on which it was meant to be decided, that the fine by the husband and wife would operate by way of estoppel, and that, when either the one or the other became the survivor, that then, whichever it might be would be estopped, and by means of that estoppel the purchaser would have a good title to the estate. Now that could not have been the case if the effect of a fine levied by the contingent remainder man were to destroy the contingent remainder; for if that contingent remainder had been destroyed, the husband destroying his chance, and the wife destroying her's, why then, on the determination of the preceding estate, the heir-at-law of the person to whom the estate had come would have been entitled to insist on having that estate, because he would have been entitled to say, "you cannot claim under this conveyance; it passed nothing at the time when it was executed, and the contingent remainder being destroyed by this fine, why then, when either of them became the subject of survivorship, their right was at an end, and the contingent remainder no longer being *in esse*, no right could enure either to them or to any person claiming under them."

(10) 3 P. Wms. 372.

But the contrary was Lord Talbot's opinion; for he was of opinion that by estoppel a good title might be made to a purchaser, and it was not at all necessary that the heir-at-law should join. And a similar doctrine was held in the case of *Davis v. Bush* (11). In that case there was a limitation to the husband and wife, with a limitation also by way of contingent remainder to the survivor, exactly in the same way in which it was in *Vick v. Edwards*. The husband and wife joined in mortgaging; and, having mortgaged, at the time of the mortgage they levied a fine, and that fine was declared to be to the use of the mortgagee. The mortgage was afterwards paid off; the husband became the survivor, he claimed the estate, and it was insisted upon that the fine had destroyed his contingency—his chance under the contingent remainder, and that he had no right whatever to have the estate. My Lord Chief Baron Alexander delivered the opinion of the Court, and he says there were two answers: one of them was, there was the estate to preserve contingent remainders, and that would be barred; but he says one is, that the deed to lead the uses, which, according to many authorities, must rule and must control the operation of the fine, shews unequivocally that the parties meant only to give the mortgagee a security for his money, and had no intention to affect any of the limitations contained in the original settlement; but on the contrary, he said, "we cannot look on the fine and attribute to it those consequences, which it must have had, if unexplained and uncontrolled." The cases of *Lord Cromwell* (12), and *Lord Jersey and Deane* (13), prove, that where the uses are controlled by the previous deed, where the uses are led by a previous deed, expressly referring to the fine, that deed, in its turn, limits and controls the legal effect of the fine, and prevents it from destroying those powers, authorities, and conditions, which it otherwise would have destroyed, and from extinguishing that estate and interest which it otherwise would have extinguished; and therefore he concluded in that case, that inasmuch as it was clear that that fine was levied, not for the purpose of destroying the contingent estate,

(11) 1 M'Clel. & Y. 48.

(12) 2 Co. Rep. 72, b. 73, a.

(13) 5 Barn. & Ald. 559.

but for the purpose of passing it for the benefit of the mortgagee, and for the benefit of the mortgagee only, that it had no further operation, and that when the remainder would have vested in interest, if the fine had not been levied, it would, notwithstanding the fine, continue so to vest. Indeed, if you consider it on principle, it is so. A contrary doctrine must proceed upon the law of estoppel, and upon that only; and upon the law of estoppel it will be found in *Coke Littleton*, 352, a. and *Coke's reading on the Statute of Fines*, very clearly laid down, that all estoppels must be reciprocal; that a stranger will not be bound by, and a stranger cannot take advantage of estoppel. Whoever is to be bound by an estoppel, may bind; but unless each party is bound, neither party is bound. A party to a fine is bound; a privy to a fine is bound: a party to a fine may take advantage of it; a privy to a fine may take advantage of it. A stranger is neither bound, nor can he take advantage of it. The statement in *Coke Littleton* is, "Every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason, that regularly a stranger shall neither take advantage of, nor be bound by the, estoppel: privies in blood, as the heir; privies in estate, as the feoffee, lessee, &c.; privies in law, as the lord by escheat; tenant by the courtesy, tenant in dower, the incumbent of a benefice, &c.," and in his *Reading on Fines*, Lord Coke says, "Estoppel is reciprocal of both sides, for he that shall not be concluded by a record, or other matter of estoppel, shall not conclude another by it." And then he mentions an exception, as to the King, and he refers you to the name of the case; he says, 41 Edward 3. by *Fynch*, "that a stranger shall be concluded by a fine *come ceo*." I think that will be found to be a mistake; I have looked at 41 Edward 3, I can find nothing of the kind there. He was probably referring to the dictum of one of the Judges of the Common Pleas about that time, in the 40 Edward 3; and there it was argued, that a person who was a stranger to the person who levied the fine, should not be bound by it; and *Fynch* said, "he may well counter plead against the fine, because he is not privy to the fine;" and at the end of the note there is this: "A stranger to a fine or other matter of re-

Vol. VII. K.B.

cord shall not be estopped." Now in this case the defendant is a stranger to this fine. It does not estop him, if my *Lord Coke* in his *Littleton*, 352 a. and in his *Readings*, is right; if the defendant would not be precluded by it, he cannot conclude any other party by it. For these reasons we are of opinion, in this case, that these fines have not the effect of destroying the contingent remainders, it being quite clear that they were levied for the purpose of passing an interest, if they could pass the interest, to the person in whose favour those fines were made. We are therefore of opinion, in this case, the lessor of the plaintiff is entitled to recover.

Postea to the plaintiff.

1828. }
Nov. 15. } SIGOURNEY v. LOYD & OTHERS.

Bill of Exchange—Restricted Indorsement.

1. *A bill of exchange may be indorsed on a certain condition, as for a particular purpose; and if such condition or purpose be expressed on the face of the indorsement, the person who receives such a bill, must receive it liable to all the consequences resulting from a breach of the condition, or a failure of the purpose.*

2. *Whether such a restriction will apply to every subsequent indorsee—quære.*

A bill of exchange was thus indorsed: "Pay to S. W., or order, for my use." The bankers of S. W. discounted this bill for him. The proceeds were by him misappropriated:—Held, that the bankers were liable to the indorser for the amount of the bill.

Assumpsit for money had and received by the defendants to the use of the plaintiff. Plea—the general issue. The cause was tried before Lord Tenterden, at Guildhall, when a verdict was found for the plaintiff for 3164l. 11s. 8d., subject to the opinion of the Court, upon a case of which the following is the substance.

CASE.

The plaintiff was a merchant at Boston, in the United States of America; the defendants were bankers in London. One Sa-

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muel Williams was a customer of the defendants ; he carried on the business of an American agent ; and in that character, received from the plaintiff, a bill of exchange upon a London house for 3164*l.* 11*s.* 8*d.* indorsed by the plaintiffs in the following words : "Pay to Samuel Williams, Esq. of London, or his order, *for my use*. Henry Sigourney." The defendants were in the habit of discounting for Williams ; and on the 22nd of October 1825, they discounted for him the bill in question. In the morning of that day the balance in his favour exceeded the amount of this bill. In the course of the morning he indorsed this, with other bills, to the defendants to the amount of 7081*l.*

They discounted *bona fide*, giving him credit for the amount, short by the discount only. By five o'clock of that day, they paid his drafts and acceptances to the amount of upwards of 10,000*l.* On the 24th of October, Williams stopped payment, and subsequently became a bankrupt. The bill in question was paid by the acceptors, and the amount received by the defendants.

The question for the opinion of the Court was, whether, under the circumstances, the plaintiff was entitled to recover from the defendants the amount of the bill in question ? If he was, the verdict was to stand ; if not, a nonsuit was to be entered.

The case was argued by *Mr. F. Pollock* for the plaintiff ; and by *Mr. Parke* for the defendants.

For the plaintiff.—There is no legal objection to a restricted indorsement of a bill of exchange ; that is to say, an indorsement for a particular purpose, and subject to a certain condition. There is a dictum of Lord Hardwicke to this effect in *Snee v. Tollet* (1). The question there was, as to the consequence of a bill of lading being indorsed specially, or in blank. His Lordship said, "Promissory notes and bills of exchange are frequently indorsed in this manner—'Pray pay the money to my use ;' in order to prevent their being filled up with such an indorsement as passes the interest. Mr. Lutwyche, who was an experienced practitioner in this court, always did so in his bills of exchange." It seems

(1) 1 Atkyns, 249.

therefore, that in his opinion, and in that of other lawyers, a bill of exchange might have a sort of mark put upon it to designate the particular individual who had a property in it, and to render its negotiability subject to the condition, that value should be received by the indorser. A similar dictum was expressed in the case of *Edie v. the East India Company* (2). The main question there was, whether a bill payable to order, once indorsed to another individual, passed the property to him without the words "or order," though that question had indeed been before decided in the affirmative. Mr. Justice Wilmot there, speaking of the holder of a bill, observes, "To be sure, he may give a mere naked authority to a person to receive it *for him*. He may write upon it, 'Pray pay the money to my servant for my use ;' or use such expressions as necessarily import that he does *not mean* to indorse it *over*, but is only authorizing a particular person to receive it *for him* and *for his own use*. In such a case it would be clear, that *no valuable consideration* had been paid to him. But, at least, that intention must appear upon the *face* of the indorsement."

[The Court here called upon the defendants' counsel.]

For the defendants.—The general proposition, that an indorsement may be restrictive in its terms, is not denied ; but the restriction must be in terms, clear and unequivocal. It was so declared, by Mr. Justice Denison, in the case which has been cited of *Edie v. the East India Company*. Here there is no expression of a clear, unequivocal intention to restrict ; on the contrary, the plaintiff says, "Pay to Williams, or order," evidently denoting an intention that the bill should be negotiated. The expression "to my use," was only a direction to Williams. This point was expressly decided in *Evans v. Cramlington* (3). There the defendants drew a bill of exchange payable to one Price to the use of Calvert. It was indorsed by Price to the plaintiff, who sued upon it. The defendant pleaded that the money had been paid under an extent against Calvert at the suit of the King. To this plea the defendant demurred. Lord

(2) 2 Burr. 1227.

(3) 1 Show. 4 ; 2 Vin. 296 ; Carth. 5 ; Skinner, 264 ; Holt, 108.

Holt, there said, "Calvert hath his action; but we can take notice of none but Price; and at this rate, the credit of bills of exchange will be spoiled." And so the plaintiff had judgment. The argument of the other side, must go the length of contending, that every subsequent indorsee would be a trustee for the plaintiff, and would be bound to see that Williams had properly applied the money.

[*Mr. Justice Bayley*.—It is not necessary in this case to go that length. We may stop at the first indorsee.]

The force of the argument applies as much to the first as to every subsequent indorsee; supposing the first, as in this case, to have acted *bond fide*. A case of fraud would make a material difference; and this was the point in *Treutel v. Barandon* (4). The only trustee in the case was Williams, in whom it is to be supposed the plaintiff placed confidence, and not in any person to whom Williams might pay away the bill, as he was authorized to do by the words "or order." It cannot be expected that a subsequent indorsee is, before he takes the bill, to look into the accounts between the parties who have preceded him; though even if he could, or did, his doing so could not guard against a subsequent misapplication of the money.

Lord Tenterden.—I am of opinion that the plaintiff is entitled to recover. It appears by the case of *Snee v. Prescott*, where Lord Hardwicke's opinion is reported, and by the opinion of Mr. Justice Wilmot, in *Edie v. the East India Company*, that an indorsement in this form, is not unusual in commercial transactions; and it seems to have been the opinion of those learned persons, that such an indorsement would have the effect of preventing a subsequent transfer for any other benefit than that of the person who has made the indorsement, and for whose use it was in terms expressed to be. There is another case, which has not been quoted, that of *Ancher and others v. the Governor and Company of the Bank of England* (5), of which the effect is the same, though the indorsement was somewhat different in form. The indorsement there was this:—"The within must be credited to

Captain Morten Larsen Dahl, value in account." Some person forged the name of Dahl on the back of the bill, and the Bank of England discounted it. The acceptors, having failed, did not pay it when it became due; and a person of the name of Fulberg paid it for the honour of Ancher. Ancher brought his action against the bank, to recover that money, on the ground that they had discounted it in their own wrong; the negotiability having been restrained by the indorsement. The case being brought before the Court upon a motion for a new trial, (for the plaintiff at the trial was nonsuited,) the opinion of Lord Mansfield, Mr. Justice Willes, and Mr. Justice Ashurst, was to that effect; but it appears Mr. Justice Buller thought otherwise. The case however went to a new trial, and Lord Mansfield directed the jury to find for the plaintiff, which they accordingly did, and it does not appear that that verdict was afterwards questioned. Now, it has been said, that the effect of this indorsement on the bill, "Pay to Williams for my use," is only a direction as to the manner in which he should apply it. But these words are useless for that purpose; for, whether these words were on the face of the indorsement or not, when Williams received that bill from the plaintiff Sigourney, he must necessarily apply it to his use, and place it as a matter of account between them. So that these words will really have no effect at all, unless they have the effect of restraining the negotiability of the bill, or at least of making the first person who subsequently takes the bill, (we need not go beyond that; for the defendants were the first indorsees,) if he takes it with those words in it, a trustee for the original indorser, in like manner as Williams is admitted to have taken it. The case that has been quoted, as being contrary to these opinions, is the case of *Evans v. Cramlington*, which is of a prior date; but, duly considered, it does not appear to me to be sufficient to countervail the opinions given in *Ancher v. the Bank of England*. In *Evans v. Cramlington*, the bill was drawn by Cramlington, upon a person who had accepted, but did not afterwards pay it; it was made payable to Price, or order, for the use of Calvert; Price indorsed it to Evans; Evans brought his action against the drawer, upon the failure of the acceptor.

(4) 8 Taunt. 108; 1 Moore, 513.

(5) 2 Doug. 537.

A seizure under an extent against Calvert was made. These facts appeared upon the pleadings. It seems that Cramlington, in answer to the claim of Evans, the indorser of the bill, set up what may sometimes be denominated the *jus tertii*; and one of the questions for the opinion of the Court, and the one ultimately decided, was, whether or no this money, being in trust for the use of Calvert, was liable to be seized under the extent? The Court were of opinion it was not liable to be seized; and the proposition therefore of Cramlington, that the *jus tertii* intervened, failed, and was altogether nugatory. I doubt whether, since that time, it would not have been held, that the right of the Crown, under an extent, was a good and valid right. I rather conceive that trusts of money, as well as of land, are seizable under an extent. That case therefore, as it seems to me, not being a sufficient authority to countervail the opinions I have alluded to in the decision of the Court in *Ancher v. the Bank of England*, I think the plaintiff is entitled to recover. The use of indorsements of this kind is by no means trifling, nor is it inconsistent, as it seems to me, with the interests of commerce; it is true, it will not have the effect of preventing an indorsee, under circumstances like the present, from receiving the money from the acceptor when the bill becomes due, and if he pays it at the time he receives it, all is well; at all events, the first indorser must look to him for the application of it: but it will have the effect of preventing a falling man from disposing of the bill before it becomes due; from pledging it for his own debt, to rescue him from a temporary difficulty at the expense of one of his correspondents. I cannot see that the interests of commerce are by any means prejudiced by holding out that this may be done by means of a restricted indorsement. On the contrary, I think the objects of commerce are advanced by allowing it. But it is said, that it cannot be expected, that a person who takes a bill, under the circumstances under which these bankers took it, should look into the accounts between the restricted indorsee and the indorser. I agree it cannot be expected he should; but if he takes the bill, under the circumstances, so indorsed, he takes it at his peril. If the indorsee has made a due application of the money, or if the circum-

stances, and the state of the account, as between him and the indorser, are such as that the indorser has no claim to the money, all is well; but a person who takes it from an indorsee, subject to the claim of another, is not safe, nor ought he to be safe. If he takes a bill with a restricted indorsement as this is, I think he takes it at his peril; and if it turn out afterwards that the person from whom he received it, that is, the restricted indorsee, is debtor to the indorser, he must stand in the place of the debtor and pay that debt.

Mr. Justice Bayley.—The indorsement here is, "Pay to Williams, or order, for my use"; and the question is, whether the words "for my use," have or have not any effect with reference to the bill itself. The person who remits may give private directions in his letter inclosing the bill to his agent; and if he means to give nothing more than a private direction, he must confine himself to the letter only. But the introduction of the words "to my use," upon the face of the bill itself, is for the purpose of apprising the world in general that he has not given to the indorsee a general and unlimited authority to possess that bill, and to apply it to his own purposes; but that he is restricted to apply it to the use of the indorser only. Mr. Parke suggests, that the most convenient construction to be put on these words is to consider them as directing Williams only, and not as intended to put indorsees on their guard. My opinion is, that that is the most convenient rule of construction, which will most effectually protect the party who appears, by the mode which he has adopted, to ask for protection. It is said, why introduce the words "or order"? It may be that the purposes of Sigourney required that the bill should be indorsed; but before any person can honestly and *bonâ fide* take that bill and advance money upon it, he ought, seeing these words on the face of the bill, to satisfy himself, from the correspondence, and the state of the accounts between the parties, whether the holder is negotiating it for the benefit of the indorser or for his own use; and if he advance the money upon it without making that inquiry, he does it at his peril. But in this instance, the present defendants advance the money without making any inquiry; and then they apply the whole of it to the

use of Williams. With respect to the case of *Evans v. Cramlington*, it is sufficient to say, that as that came before the Court on demurrer, there was no question there, whether there had been a misapplication of the money which had been received by the means of that bill. Is not this quite a sufficient distinction between that case and the present? In this case, there does appear to me to have been a gross misapplication. For these reasons I am of opinion, that the plaintiff who guarded himself by that indorsement, gave himself effectual protection, and is entitled to retain the verdict, which has been given for him.

Postea to the plaintiff.

[Note.—Mr. Justice Littledale was in the Bail Court on the argument of the above case; and Mr. Justice Holroyd had resigned; his situation being filled a few days afterwards by Mr. Parke, who argued for the defendants.]

1828. } CALVERT v. GORDON, EXECU-
Nov. 10. } TRIX, &c.

Surety—Bond countermanded.

Where a bond is given by a person, as surety for the fidelity of a collecting clerk, and there is no express provision enabling the surety to determine it, whether he can by notice, withdraw the security—quære.

But if a surety in such a case have a power to determine it, he must give a reasonable notice, in point of time, to the employer, so that he may without inconvenience provide another person to collect for him.

Debt on bond conditioned for the fidelity of a brewer's collecting clerk. The defendant had pleaded, that she gave notice to the plaintiffs, that she would be no longer answerable for the fidelity of the clerk; and the plaintiff in reply assigned breaches. The first, shewing that the clerk had received and not accounted for monies *before* that notice was given by the defendant; and secondly, that he had received and not accounted for monies *after* that notice was given.

These pleas led to a demurrer; the argument upon which, with the pleadings fully given, will be found in 7 B. & C. 809, 1 M.

& R. 497, 6 Law Journ. K.B. 187. The form of the pleading admitted the notice to have been given. The cause was tried before Lord Tenterden, at the Guildhall Sittings before this term, when it was referred to a gentleman at the bar, to examine the accounts, and to certify the amount of damages upon each breach. And he having certified, that the damages upon the first breach (before the notice was given,) were to be entered for 17*l.* 2*s.*; and those upon the second breach (after the notice), for 174*l.* 1*s.* 8*d.*—

Mr. F. Pollock now moved for a rule to shew cause why the judgment, as to the second breach, should not be arrested. The condition of this bond undoubtedly does not contain any provision in terms by which the defendant should be at liberty to withdraw the security; but such a provision must be intended from the very nature of the transaction. If it were held otherwise, a bond of this description would last during the lives of the clerk and the master, although the confidence of the surety in the honesty of the clerk might be withdrawn, and although he might have disclosed to the master the most satisfactory reasons for having withdrawn it.

[*Lord Tenterden.*—But do you find any authority which lays down, that a surety in such a case may say, "I will not be answerable any longer" ?]

There is certainly no authority for it; but the reason of the case shews most forcibly, that that must be the meaning of the parties. Like all other unexecuted authorities, it may be revoked by reasonable notice. The surety, giving a reasonable notice, may say, "I do not authorize you to trust that person upon my security any longer."

[*Lord Tenterden.*—But you do not allege by your plea, that you gave a reasonable notice to the plaintiff. You say, that within a reasonable time after the death of the testator you gave notice.]

The question as to the reasonableness of the notice has never been raised by the plaintiffs. They have contended, that the defendant had no right to determine the security at all.

Lord Tenterden.—We are not called upon now to say, what would be the effect of

a notice to the obligee from the surety, that, from some future day, he would no longer hold himself liable. The question raised by these pleadings is, whether the obligation would cease from the *very day* on which the notice is given. There has been no reason assigned why it should. A party deliberately entering into suretyship cannot release himself at any moment: it would be hard upon the master if he could. The master cannot upon the instant dismiss his clerk, and provide himself with another. It is said, that it will be a hardship on the surety if his liability is to continue perhaps during the whole life of the person for whose fidelity he engages. It may be so; but we can only look at the instrument, and, judging from that, we must collect that it was his intention so to bind himself. If it be found inconvenient to incur an obligation so extensive (as it may,) it should in future be a matter of consideration, whether it cannot, by some means be limited. All difficulties would be obviated if a provision were embodied in the instrument, that the obligor should be discharged from his liability in a specified time after due notice given.

Rule refused.

1828. } CHURCHILL AND ANOTHER, AS-
Nov. 12. } SIGNED, &c. v. DAY.

Assumpsit—Covenant—Payment of Money into Court.

1. *A plaintiff cannot recover in assumpsit, in respect of a subject matter which originated in covenant, unless there has been an express promise to pay a specific balance; although the defendant's own wrong prevents the plaintiff having any remedy upon the covenant. The remedy, in such a case, must be sought in equity.*

2. *Where a declaration consists of several counts, and among them one upon an account stated, against which latter count the defendant pays money into court, the plaintiff will not be allowed to recover upon the other counts, unless he prove a demand exceeding the sum paid in upon the specific count.*

Assumpsit by the assignees of a bankrupt for work and labour performed by the bankrupt for the defendant in building a

house. There were the usual common counts, with two counts upon accounts stated; one charging the stating of an account with the bankrupt before his bankruptcy, and the other charging the stating of an account with the assignees since the bankruptcy.

The defendant pleaded the general issue; and he also paid 420*l.* 2*s.* 1*d.* into court upon the two counts last mentioned. The cause was tried before Lord Tenterden, at the Middlesex Sitings after last term, when the following appeared to be the principal facts.

By articles of agreement under seal between the bankrupt and defendant, the former was to build a house for the latter. The agreement contained a great number of provisions; one of them being, that matters of dispute should be referred to a surveyor therein named, (who, in point of fact, was the defendant's surveyor,) and that his determination should be binding. The plaintiffs however, did not adduce this agreement in evidence, but went on the general demand for work and labour, contending that this agreement had been departed from by alterations directed in the course of the work.

They also complained, that the surveyor had not acted fairly. They at the same time claimed 106*l.* for work done beyond the contract, and they proved a small demand of about 9*l.* for work done by the bankrupt at another house of the defendant, and not mentioned in the contract.

Lord Tenterden was of opinion, that the plaintiffs must be nonsuited, for not having declared upon the agreement under seal. The plaintiffs then insisted, that at all events they were entitled to a verdict for the 9*l.*, that being out of the agreement, and not covered by the sum paid into court, which had been paid in, expressly, on the counts going upon accounts stated; and of which stated accounts there was no evidence. His Lordship however thought the plaintiffs had no right to apply this money to a cause of action of which they had given no evidence; and that it was fairly applicable to whatever demands the plaintiff had proved in the action.

The plaintiffs were accordingly nonsuited.

Mr. Brougham now moved for a rule to shew cause why the nonsuit should not be

set aside, and a new trial granted. The action was brought for extra work, not at all contemplated by the contract; and independent of this, (supposing the work to be really within the contract,) the plaintiffs were in a condition to shew, that the conduct of the surveyor was fraudulent. The plaintiffs have no means, therefore, of suing upon the written contract.

[*Mr. Justice Bayley*.—You cannot recover in assumpsit a balance due upon covenant.]

But the plaintiffs' objection is, that by reason of the fraudulent conduct of the surveyor, they have no remedy upon the covenant.

[*Mr. Justice Bayley*.—Then you must go into equity.]

That does not appear to be so conclusive. In *Cook v. Jennings* (1), where the plaintiff sued in covenant, and the case was such, that the defendant succeeded in point of strict law, though against the merits, and in consequence of his own conduct, Lord Kenyon said, "It is not necessary now to determine, whether or not the plaintiff might not have brought an action of assumpsit. It will be time enough to decide that case whenever the question arises." Upon that opinion, it seems, that the action of *Christy v. Rowe* (2) was brought in assumpsit; and the Court held, that the action might be maintained. But, supposing the opinion of the Court to be unfavourable to the plaintiffs upon this point, they are still entitled to the verdict for the 9*l*. The work which amounted to that sum, was, beyond all question, independent of the written contract. For this sum the plaintiffs were entitled to recover, as for work and labour. The defendant had no right to apply any part of the money paid into court to the count for work and labour. Each count is, for this purpose, to be considered as a distinct action. To the counts upon accounts stated, the defendant, by paying money into court, says, he admits he owes so much upon those counts. To the count for work and labour, he says, he owes nothing at all. Payment of the money into court admits the cause of action; and so conclusive is the admission, that although the defendant might on the trial be prepared

with evidence, which, if money had not been paid in, would go to defeat the action, he can only use such evidence for the purpose of preventing the plaintiff from recovering for more than the sum paid in: *Cox v. Parry* (3). And it has been decided, that assumpsit will lie for a balance due upon an account arising out of matter of covenant: *Foster v. Allanson* (4), and *Moravia v. Levy* (5).

[*Mr. Justice Bayley*.—You observe what Mr. Justice Buller said in that case. "There was an express promise to pay the balance which had been struck; and that is the ground of the action, otherwise the objection would have been good."]

Lord Tenterden.—No doubt Mr. Brougham, when he opened the plaintiffs' case, stated that he meant to impeach the conduct of the surveyor; but I am of opinion, that if he successfully did so, the plaintiffs would still not be entitled to sue at common law in assumpsit. The plaintiffs must seek their remedy in equity. Then, they must be confined to work done beyond the contract. For this Mr. Brougham claimed 106*l*. and 9*l*. for repairs at the other house of the defendant. It may be taken at those sums. The defendant had paid into court a sum exceeding their amount. But the plaintiffs say, "as to that sum, it is for a different cause of action: for an account stated." But surely I must allow the defendant to apply it to whatever the plaintiffs may prove in this action. They proved no charge against the defendant for any account stated. I think it would be dangerous to hold, that, where a defendant pays into court against one count a sum enough to cover the whole of the plaintiff's demand, the plaintiff should be at liberty to prove a demand upon the other counts, and none upon that against which the money was paid, and take a verdict for what he proved. In the strictest right of the plaintiff, he would in such a case be entitled only to nominal damages; but I am of opinion that he ought not to be allowed to take this course at all.

Mr. Justice Bayley and *Mr. Justice Littledale* concurred.

Rule refused.

(1) 7 Term Rep. 384.

(2) 1 Taunt. 300.

(3) 1 Term Rep. 464.

(4) 2 Term Rep. 479.

(5) Id. in note.

1828. } HOLDERNESS AND ANOTHER,
Nov. 15. } ASSIGNEES, &c. v. SHACKELS.

Partners — Bankrupt — Possession of Goods.

1. *Where several* persons engaged in a joint adventure which produced certain property, and one of them became bankrupt after the completion of the adventure, before the delivery of his share:—Held, that his assignees were not entitled to recover the share of the property without paying the bankrupt's share of the expenses.*

2. *Where, in such a case, the course of business was, to put into a warehouse all the shares apart, marked with the initials of each adventurer, and to deliver it out, if his share of the expenses had been paid; and in the particular case there had been a partial delivery:—Held, that this did not amount to a virtual delivery of the whole, although a charge for warehouse-room formed a part of the expenses.*

— This was an action of trover.

The declaration was in the ordinary form. The first count thereof stated, that the bankrupt, before his bankruptcy, was lawfully possessed of certain goods and chattels, to wit, twenty tons of whale-oil, of the value of 1000*l.*; and that the defendant converted the said goods and chattels to his own use. The second count stated the property to be in the plaintiffs as assignees.

The defendant pleaded the general issue.

At the trial, before Mr. Justice Bayley, at the last Spring Assizes for the county of York, a verdict was found for the plaintiffs, damages 220*l.* 10*s.*, subject to the opinion of this Court upon the following

CASE.

The plaintiffs were the assignees of Thomas Foxton, a bankrupt, under a commission, dated the 2d of May 1826, and their title to sue in that character was fully proved. The bankrupt Foxton, jointly with a person of the name of Lorking, and the defendant and some other persons, was part-owner of the ship *Jane*, a vessel belonging to Hull, engaged in the whale fishery. Lorking was the ship's husband. The usual mode of managing the cargo was as follows:—On the arrival of the vessel

at Hull from the fishery, the whalebone was taken into the possession of Lorking, and sold by him for the part discharge of the expenses of the ship. The blubber was landed and deposited in a yard belonging to the defendant, in which were several warehouses, each of which was appropriated to a particular ship. One of these was rented from the defendant by the owners of the ship *Jane*, and appropriated exclusively to that ship. The blubber was boiled in a boiling-house in the yard by one Gilchrist, employed at the defendant's yard as foreman, and paid by the owners of the several ships; and for this a certain price per ton was charged by the defendant. The blubber, being then reduced into the state of oil, was put into casks. Each part-owner's share was then weighed out and placed separately in the warehouse rented by the owners of the ship; and the particular casks containing his oil were marked with his initials in chalk. Gilchrist kept the key of the warehouse and lived in the yard. After each division, the practice was for him to deliver to the separate orders of each owner the oil belonging to them, unless previously to the delivery he received a notification from the ship's husband that the part-owner's share of the disbursements had not been paid to him. In that case he used to detain the oil till the ship's husband's demand had been satisfied. It was optional for the owner to have his oil in his own or the ship's casks; in the latter case, he was to send away the oil in the ship's casks, he returning the casks, or paying for them when wanted. In June 1825, the ship *Jane* arrived with a cargo; and the above, being the usual course, was followed on that occasion. The share weighed and set apart for the bankrupt Foxton, before his bankruptcy, was twenty-nine tons and thirty-six gallons. Part of this was stowed in the ship's casks. All the casks were set apart in the ship's warehouse, and had the bankrupt's initials upon them in chalk. Foxton, before his bankruptcy, gave various delivery orders to Gilchrist, under which twenty tons of this oil had been delivered. The remainder, being nine tons thirty-six gallons, being all in the ship's casks, remained in the ship's warehouse at the time of the bankruptcy. In January 1826, Gilchrist had

orders from Lorking, as ship's husband, not to deliver to Foxton the remaining oil, as his share of the disbursements of the ship was not paid. Lorking, the ship's husband, became bankrupt in April 1826. Foxton stopped payment in January 1826. There were two accounts between Lorking and Foxton: one being the ship's account, and the other a general account current. In the ship's account it appeared, that, after charging every disbursement on account of the vessel, as if they had been actually paid by him (except the rent of the warehouse and the charges of boiling, which remained due to the defendant); and after giving credit for the sale of the whalebone, and a small portion of oil, there remained due from the bankrupt Foxton, at the time of his bankruptcy, in respect of his share of the ship, the sum of 864*l.* 12*s.* 10*d.* This sum was due to the defendant and the other owners. The other owners have paid up Foxton's share. It is only by deductions from balances Lorking owed them, that they have paid Foxton's share. Lorking had not paid every disbursement before he failed; he has paid them since by money from the other owners. Upon the general account current there was a balance against Lorking of 261*l.* 7*s.* 4½*d.*; but Foxton had credit therein for two of his own acceptances for 300*l.* and 450*l.*, which were afterwards dishonoured. Copies of these accounts are annexed to the case, and are to be taken as part thereof. On the 8th of January last, the plaintiffs, as assignees of Foxton, formally demanded possession of the nine tons thirty-six gallons of oil from the defendant; offering to pay to him a sum which exceeded what he demanded in respect of rent and charges for boiling the blubber. This sum he had himself, by an account in his own hand-writing, fixed at 59*l.* 6*s.* In answer to this demand, the defendant stated, that he wished the matter to stand over for a few days. Accordingly, on the 31st of January, the plaintiff Holderness called again upon the defendant, and tendered to him the sum due in respect of his demand for rent and boiling; but the defendant then absolutely refused to receive the money or give up the oil. He, however, stated, that the oil was in his possession and under his controul, and that he could give it up if he thought proper; but, he added, that the

VOL. VII. K.B.

owners of the *Jane* had instructed him not to do so. The value of the oil so detained was 220*l.* 10*s.*

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover; if in the negative, a nonsuit to be entered.

The items in the account appended to the case, did not become material in the argument; and they are therefore not given. There was one item in the general account of Lorking, thus:—"Thomas Shackel (the defendant), warehouse rent; boiling, &c. 72*l.* 5*s.* 2*d.*"

Mr. Alderson, for the plaintiffs.—The assignees of Foxton are entitled to this oil. *First*,—the other part-owners would not be entitled to retain it, even had it not been separated from the bulk. *Secondly*,—if they had any right, the accounts shew that nothing is due, so as to entitle them to set up any lien. *Thirdly*,—the oil being set apart, marked with the initials of the bankrupt, combined with the other circumstances, makes it a property in the possession, order, and disposition of the bankrupt at the time of the bankruptcy, so as to pass the property to his assignees.—(6 Geo. 4. c. 16. s. 72.)—If the Court should entertain an opinion favourable to the plaintiffs upon either of these points, they will be entitled to recover. To the first point; the case of *Smith v. De Silva* (1) is an authority. It was there decided, that where one of three partners in a ship and cargo, the cost and outfit of which was 4568*l.*, had paid only 410*l.* in part of his third share, and gave his notes for the remainder, but before they became due was declared a bankrupt, the other partners could not, by voluntarily discharging the notes, stand in his place for any share of the profits; but that the assignees were entitled to a full third, both of the profits of the adventure and of the value of the ship. That case came from the Court of Chancery; and, it appears, from a note of Mr. Cowper, that the then Lord Chancellor was also of opinion that the assignees were entitled; but that, as it was a question of law, he directed an issue. So, in *Ex parte Harrison* (2), it was held, that the owners of a ship are not interested in it as joint tenants, but as tenants

(1) 2 Cowp. 469.

(2) 2 Rose, 76.

in common; therefore in that case it was decided, that, upon the bankruptcy of a part-owner, the bankrupt's share passed to the creditors under the bankruptcy, without being liable specifically to the claims of the other part-owners, in respect of their disbursements and liabilities for the ship. So, in *Ex parte Young* (3), Lord Eldon again came to the same result. In the last case his Lordship appears to have given the subject great consideration, on account of the case of *Doddington v. Hallett* (4), in which a decision of Lord Hardwicke appeared to be the other way. Those cases therefore decide, that even for a specific balance against the bankrupt the assignees have no lien; but the defendant calls upon the Court to decide in favour of a lien for a general balance. Secondly, on the general account there was a balance in favour of Foxton; though upon the ship's account there was a charge against him. Therefore Lorking had no claim upon Foxton. But, at all events, the third point is in favour of the plaintiffs. The parties had possession of their shares of the oil; and among these the bankrupt had his share. The share was set apart; he was allowed to sell twenty tons out of the twenty-nine; and he was charged warehouse-room. The account made out by Lorking makes a charge for warehouse-rent as paid to the defendant. Upon this point, the case of *Henry v. Mangles* (5) seems to be very similar to the present. There, the taking of warehouse-rent was held to be a proof that the delivery was complete; although the goods remained in the actual custody of the seller.

[*Mr. Justice Bayley*.—The action was there brought by a person who had *bond fide* bought of the first buyer.]

It was so; but Lord Ellenborough's judgment goes to the general principle. He says, "The acceptance of warehouse-rent was a complete transfer of the goods to the purchaser. If I pay for a part of a warehouse, so much of it is mine. This is an executed delivery by the seller to the buyer. If there was any conspiracy or contrivance on the part of the plaintiffs to cheat the defendant out of the price of the goods, proof

of that will be an answer to this action; but it would be overturning all principles to allow a man to say, after accepting warehouse-rent, 'the goods are still in my possession, and I will detain them till I am paid.' The *transitus* was at an end. The goods were transferred to the person who paid the rent, as much as if they had been removed to his own warehouse, and there deposited under lock and key." The right therefore to the goods in this case was as complete as if they were in the bankrupt's possession. There are other cases which shew, that where there is a part delivery, as there was in the present instance, there is, in point of law, a delivery of the whole. Such were the cases of *Harman v. Anderson* (6), *Stoveld v. Hughes* (7), and *Slubey v. Heyward* (8).

[*Mr. Justice Bayley*.—Those were all cases upon the question as to the right of stoppage *in transitu*.]

They were; but it is submitted, that there is no solid distinction between the principle which is admitted to have guided those cases, and that which ought to govern the present. Here there was a part delivery; a charge of warehouse-rent and expenses; a marking of the casks with the initials of the bankrupt; and a setting of them apart for his use.

Mr. Parke, *contra*.—To the first point made for the plaintiffs. It has been settled, that in such a case as the present, the part owner has a lien; and, in the case of *Ex parte Young*, which has been cited, a distinction was expressly taken between the ship and the freight.

[*Lord Tenterden*.—Was the case of *Smith v. De Silva* quoted in the case of *Ex parte Young* ?]

It was not; probably because it was not considered to be of authority. Then, as to the second point. It is clear, that upon the whole of the account there was a balance due from the bankrupt; and that balance the co-owners were obliged to pay.

[He was then stopped.]

Lord Tenterden.—I think the assignees are not entitled to recover. This is not a

(3) 2 Vesey & Beames, 242; 2 Rose, 78, n.
(4) 1 Ves. 47.
(5) 1 Campb. 451.

(6) 2 Campb. 242.
(7) 14 East, 508.
(8) 2 H. Bl. 504.

claim of lien upon the ship, but on the proceeds of an adventure. The clear general principle is, that, in partnerships of this nature, there is no share of either in the proceeds, until the charges upon the whole have been paid. The case of *Ex parte Young* went upon the question as to the lien upon the ship. The case of *Smith v. De Silva* is somewhat entangled in its facts; and the principle does not appear to be very clearly stated. De Silva seems to have been an agent for the rest of the parties. It was a case with very particular circumstances; and it may have been well decided with reference to those particular circumstances, without breaking in upon the general rule. Then, if the other part-owners in this case had a lien upon the proceeds in the first instance, has any thing occurred to take it away? Take the account either way, there was a balance against the bankrupt; because the other part-owners were liable for the amount of the bills given by Foxton, and which were not paid; because, if the bills were not paid, the charges which those bills went to satisfy remained unsatisfied. Then, it is said, that the share had been appropriated, and that the bankrupt was in possession of it. But look at the course and practice of the business in antecedent voyages. The shares were put apart in casks, were left in the warehouse, and delivered out; but when delivered out? Why, when the share money was paid. The course was, not to deliver out the oil, unless the money had been first paid. That being the course of dealing and the practice, the appropriation by the bankrupt of a part was not an absolute, but a qualified appropriation, liable to be divested, as it was done in this case, concurrently, as I think, with law, as well as justice.

Mr. Justice Bayley.—When there is a joint adventure, the proper course is to deduct all the expenses, and then to divide the profit. Here the ship came home with the blubber in bulk. Neither party had any right to any aliquot part of the produce until he had paid his aliquot part of the expenses of procuring it. That would be the same, whether the part-owner were bankrupt or not. If the share of the expense were not paid, the aliquot part of the thing would have to be sold to pay that expense. Well, what are the facts of this

case? Foxton, the part-adventurer, is a bankrupt and cannot pay. Law and justice require that his share should be paid as far as his share in the produce will extend; and until that be paid, neither he, nor those who claim through him, have any right to the share of the oil in question. But, it is said, there has been a delivery of the goods to the bankrupt. I think, however, that there has not been a perfect delivery. The other part-owners were not effectually dispossessed of their right, until the expenses were paid. The property remained in the usual place until, by payment of the whole share, it became a right in the part-owner to take it away. It has been said, too, that there was a change in the possession by debiting the bankrupt with his portion of the rent of the warehouse; but, I think, that was only making an account of what was his share of the expense in that particular. It is not at all like the case of buyer and seller.

Postea to the defendant.

[See *Abbott on Shipping*, p. 78, where all the cases respecting part-owners of ships are collected.]

1828. } HARTLEY AND OTHERS v. SPIT-
Nov. 10. } TAL AND ANOTHER.

Bill of Exchange—General Acceptance—Presentment.

Although a bill of exchange, accepted "payable at" &c., is a general acceptance, and does not compel the holder, in an action against the acceptor, to prove presentment at the place expressed, yet presentment at that place is a good presentment to the acceptor for the purpose of an action against the drawer.

Action by indorsees against drawers of a bill of exchange.

The cause was tried at the last Assizes for the county of Carlisle, before Mr. Baron Hullock, when the plaintiffs obtained a verdict, subject to a point raised by the following facts:—

The bill in question was drawn by the plaintiffs upon one Birkett, dated Whitehaven, and addressed to Birkett, with the

addition of the words "payable in London." It was accepted by Birkett, "payable at Sir William Kay, bart. & Co., bankers, London." The plaintiffs proved that the bill was presented at Sir William Kay's, and was dishonoured, and that the defendants had due notice; but there was no evidence that the bill had been presented to the acceptor himself.

Mr. Alderson now moved to enter a nonsuit. The stat. 1st and 2d Geo. 4. c. 78. made this a general acceptance. The presentment at Kay's was altogether unnecessary as against the acceptor; and unavailing as against the drawers. The statute then having declared the acceptance to be general, the presentment should have been to the acceptor himself.

Mr. Justice Bayley.—The acceptance is a general acceptance as regards the necessity of proving a presentment against the acceptor; but it is an intimation that he will be at the place named when the bill becomes due, and that the holder will there find him.

Lord Tenterden.—The practice in this respect is of daily occurrence; and I think it is the proper one.

Rule refused.

[See also the cases before the 1st and 2d Geo. 4. c. 78. collected in *Rowe v. Young*, 2 B. & B. 165; 5 Moore, 291.]

1828. } THE KING v. THE INHABITANTS
Dec. 11. } OF RAWDEN.

Landlord and Tenant—Written Contract.

1. *The facts of occupation and payment of rent, will be sufficient to raise a presumption, that the person who so occupied and paid was the tenant; and for the purpose of raising merely this presumption, those facts may be ascertained by parol, although the tenancy was under a written agreement, which is not produced.*

2. *But if it be sought to carry this presumption any further, or to alter it, by shewing either the terms of such a tenancy, or that the person who so appeared to be tenant was*

tenant with others, the written agreement must be produced.

(This case will be found among the Magistrates Cases, 7 Law Journ. Suppl. p. 35.)

1828. }
Nov. 13. } *DOE d. GRIFFITH v. MAYO.*

Ejectment—Mortgagor and Mortgagee.

The mere circumstance of a person being the mortgagor in possession does not create such a tenancy between the mortgagor and mortgagee as to entitle the former to a notice to quit, or even to a demand of possession before ejectment be brought against him at the suit of the latter.

Ejectment tried at the last Assizes for the county of Gloucester, before Mr. Justice Gaselee. The facts were as follows:—

The defendant was the mortgagor in possession. The lessor of the plaintiff was the mortgagee in fee. No notice to quit, or demand of possession was proved. The learned Judge inclined to think that neither was necessary; though of late it had been doubted. This point being reserved, the plaintiff obtained a verdict.

Mr. Talfourd now moved for a nonsuit. —The mortgagor is tenant to the mortgagee. No matter of what character the tenancy may be. It may be taken to be the lowest tenancy at will. Still, that will should be determined before the mortgagee can maintain ejectment. The ejectment treats the mortgagor as a trespasser; but he cannot be a trespasser and a tenant at the same time. Supposing the defendant to be a tenant merely at will, the case of *Goodtitle d. Gallaway v. Herbert* (1) is an authority, that ejectment cannot be maintained until that will be determined. And the case of *Partridge v. Bere* (2) expressly lays down that a mortgagor in possession of the premises mortgaged is tenant to the mortgagee.

Lord Tenterden.—The expression in *Partridge v. Bere* is tenant "by sufferance." And how often has it not happened

(1) 4 Term Rep. 680.

(2) 5 Barn. & Ald. 604.

in your own experience that the mortgagee in such a case has recovered without proving a demand of possession?

Rule refused.

[*Note.*—The case of *Partridge v. Bere* was not a case, like the above, between the mortgagor and mortgagee. It was between the mortgagee and a third person, who was sued as a wrong doer, in diverting a water course belonging to the premises. The action was for the benefit of the premises; and by so much was in advancement of the interest of the mortgagor in possession.]

1828. }
Nov. 13. } *DOE d. BESLEY v. MAISEY.*

Copyhold—Admittance of Reversioner.

Where a grant is made by the lord to A. to hold to B. and others for lives, it is not necessary for B. to be admitted, in order to recover in ejectment.

Ejectment, tried at the last Assizes for the county of Berks. The following were the principal facts:—

The lessor of the plaintiff relied upon a mortgage surrender, and a grant therein to one Saunders the mortgagee, to hold during the lives of the mortgagor and others. A custom was relied upon in support of grants of this nature. But it did not appear that Saunders the mortgagee had ever been admitted tenant. Besley, the lessor of the plaintiff, was assignee of Saunders, who had been discharged under the insolvent act, and of course claimed through him. It was objected that the title of the lessor of the plaintiff was incomplete, in not shewing that the relation of lord and tenant subsisted between the lord and Saunders by the admission of the latter. Subject to this point, the plaintiff obtained a verdict.

Mr. Talfourd now moved to set aside the verdict; and repeated the objection, but he admitted that the Court, in the case of *Roe d. Cosh v. Loveless* (1), had decided, that where the lord of a manor, by

copy of court roll, granted A. the reversion of certain premises then in his tenure, to have and to hold to B. for his life, immediately after the death of A., that B. might on the death of A., maintain an ejectment, although he had never been admitted; the Court considering that he had acquired a perfect legal title by the grant without admittance. If the Court should not consider that the question was yet open, he admitted he could not distinguish the present from that case.

The Court expressed a strong opinion that there was nothing in the objection:—*Mr. Justice Bayley* observing, that the grant was a good grant against the defendant; and the objection was not therefore pressed.

Mr. Talfourd then moved, upon affidavits, touching the alleged custom. Into the question raised by the affidavits it is unnecessary to enter.

Rule refused.

1828. }
Nov. 13. } *NORTON v. PICKERING.*

Bill of Exchange—Accommodation Acceptance—Presentment.

The holder of a bill of exchange, which has been accepted for the accommodation of the drawer, is bound to present the bill and to give notice to the drawer of its non-payment, although the acceptor never had any effects of the drawer in hand to meet it.

Action by indorsee against drawer of a bill of exchange. The plaintiff could not prove notice to the defendant that the bill had been dishonoured by the acceptor; but he sought to dispense with this by shewing that the defendant had no effects in the hands of the acceptor. For want of proof of notice the plaintiff was nonsuited.

Mr. Milner now moved to set aside the nonsuit and to enter a verdict for the plaintiff.—The case of *Cory v. Scott* (1) has undoubtedly decided that the drawer in such a case is entitled to notice; and it

(1) 2 Barn. & Ald. 453.

(1) 3 Barn. & Ald. 619.

thereby over-ruled the previous decisions in *Bickerdike v. Bollman* (2) and *Walwyn v. St. Quintin* (3). But the present case is distinguishable from *Cory v. Scott*, inasmuch as it did not appear that the present plaintiff knew the situation of the parties towards each other.

Lord Tenterden.—I think the decision in *Cory v. Scott* is right. And I think that it is better to observe the law merchant in all cases; and to lay down that the party who holds the bill is bound in all cases to give notice to the other parties of the default which has been made by the acceptor. At least, speaking with deference for those decisions which preceded *Cory v. Scott*, I think it is questionable, whether it is not better that it should be so. The plaintiff here seeks to go into matter *dehors* the bill. He says, "You had no effects in the hands of the acceptor." The defendant, I think, may answer, "It does not follow that I am to pay. You took the bill upon the compact that you should present it to the acceptor. You have no right to calculate whether he would or would not pay. Present in the usual course. If the acceptor pay not, give me notice, and I then become liable." The drawer may have arrangements with other parties, which may be deranged by his not having notice, although he may have no effects of his own in the hands of the acceptor.

Mr. Justice Bayley concurred.

Rule refused.

[See also *Camidge v. Allenby*, 6 B. & C. 373; 5 Law Journ. K.B. 95; and *Firth v. Thrush*, 8 B. & C. 387; 6 Law Journ. K.B. 355.]

1828. } CROWDER AND ANOTHER v.
Nov. 13. } LONG.

Sheriff—Officer.

1. *Although, in general, the sheriff must bear the consequence brought upon him by his own officer's misconduct, yet where that misconduct has been caused by another party,*

(2) 1 Term Rep. 403.

(3) 1 Bos. & Pul. 652.

the sheriff may have his remedy over against that party.

2. *Where, in such a case, the sheriff had paid money to the party, in ignorance of the facts,—Held, that he was entitled to recover it back, although the facts were all known to his officer.*

This was an action by the sheriff of Middlesex, to recover back from the defendant a sum of money which the sheriff had paid him under an execution, and which money the sheriff had afterwards been compelled to pay again to a subsequent execution creditor, who, in an action against the sheriff, had proved that the defendant's execution was fraudulent.

This cause was tried before Lord Tenterden, at the Sittings before this term, when the following appeared to be the principal facts:—

Long sued out an execution against the goods of one Rowley; but his object in doing so at that time appeared to be to protect the goods from other creditors. Long arranged with the officer that the latter should go out, leaving the warrant in the hands of Rowley's servant. Long paid the poundage. When the officer went out, Rowley signed a consent that the sheriff should re-enter. In point of fact, the sheriff's officer, at Long's instance, *did* re-enter; and the execution then no longer bore the appearance of a friendly one. The goods were sold; the officer received the money, kept it for some time, and it was then paid over to Long. But in the interim, and before the second entry, Wade, another judgment creditor of Rowley, sued out an execution; insisted that it ought to have priority over Long's; and, upon the sheriff returning *nulla bona* to Wade's execution, the latter brought an action against the sheriff. In that action a verdict passed against the sheriff, on the ground that Long's execution was fraudulent. The sheriff paid the money to Wade; and he sought by this action to recover back from Long the amount which he had so paid. Lord Tenterden was of opinion that he was entitled to recover, and he thereupon obtained a verdict.

Mr. Joshua Evans now moved for a rule to shew cause why the verdict should not be set aside.—The sheriff's officer knew

all the facts when he paid the present defendant the amount of his execution. If his conduct was illegal, he has no right to call upon the defendant to bear the consequences. The cases of *Brisbane v. Dacres* (1), and *Skyring v. Greenwood* (2), establish the proposition, that money paid with a knowledge of the facts cannot be recovered back. But, it was said, that it was incumbent on the defendant to shew that the sheriff knew the circumstances. The sheriff is the same as the officer for all legal purposes of this nature. The sheriff himself rarely knows any of the circumstances which take place in the ordinary course of civil process which goes through his office; and because he does not, and because he is himself liable, he takes bonds of indemnity from his officers. He is so identified with his officer that he is liable to an action for a false imprisonment committed by his officer, and even for extortion committed by the officer without his knowledge. This is laid down in the case of *Woodgate v. Knatchbull* (3), wherein all the earlier cases are noticed. The sheriff must therefore be taken to have equal knowledge of the facts with his officer. Indeed there can be no doubt that this is the officer's action.

Lord Tenterden.—If you had proved that, the case might be very different. It was the sheriff who paid the money to the other creditor. The officer violated his duty in leaving possession, and in entering the second time; and all this he did at the instance of the defendant. I should be sorry to break in upon the general rule that the sheriff is liable for the acts of his officer; but, I think, this case will not do so. The sheriff here was made liable to Wade, the other creditor, for the act of his officer. The defendant received the money produced by that improper act; he himself having suggested the act, and the sheriff being made to suffer from it.

Mr. Justice Bayley.—It was the defendant who caused the officer to misconduct himself; for it was the duty of the officer to seize and sell. The defendant suggested the leaving possession, and the leaving the warrant in the hands of the

servant; and the defendant it was that paid the poundage. These, and other circumstances, are adduced by the other creditor in his action against the sheriff; and the consequence was, that that other creditor obtained the preference, and the sheriff was forced to pay the debt. It is therefore evident that this was caused by the defendant, who had been a party to the misconduct of the officer. When the sheriff paid the money to the defendant, it does not appear that he knew of these facts; and there is therefore nothing to exonerate the defendant on account of their being, as alleged, a payment, with a full knowledge of all the facts. The defendant, in short, ought never to have received the money. Considering then that this is the action of the sheriff, I think he is entitled to recover. If it had been the action of the officer the parties would have been *in pari delicto*; and the action would not have been maintainable.

Mr. Justice Littledale.—I am of the same opinion; and I think this decision will not break in upon any general rule, either as regards the sheriff being identified with the acts of his officer, or as regards the payment of money with a knowledge of the facts. Here, the act was illegal. The sheriff was no party to it. He had no knowledge of it. He has been damnified; and he seeks his remedy over.

Rule refused.

[See also *Milnes v. Duncan*, 6 B. & C. 671; 5 Law Journ. K.B. 239; upon the point, whether money paid with a knowledge of the facts can be recovered back.]

1828. }
Nov. 17. } EWINGTON v. ALLEN.

Practice—Ac etiam.

A bailable bill of Middlesex, with an ac etiam clause, stating the cause of action to be "for 120l. according to the custom" &c., but without stating what was the nature of the action,—Held to be irregular.

The defendant had been arrested upon a bill of Middlesex, with an *ac etiam* clause, stating the cause of action to be "for 120l.

(1) 5 Tunt. 143.

(2) 4 B. & C. 281; 6 D. & R. 401.

(3) 2 Term Rep. 148.

according to the custom of the court of the said Lord the King," but not stating whether it was upon promises, or any other words to denote the nature of the action. A rule having been obtained, calling upon the plaintiff to shew cause why the bail bond should not be delivered up to be cancelled upon filing common bail,—

Mr. Denman appeared to shew cause; but admitted that the cases of *Munroe v. Howe* (1) and *Davison v. Frost* (2) were against him, as laying down that the nature of the action must be expressed in the *ac etiam*, although it appears by the affidavit of debt.

Lord Tenterden.—Those cases decide the point.

Rule absolute.

1828. }
Nov. 27. } RUSSELL v. MAY.

Set-off—Judgment and Simple Contract Debts.

Where an action is brought for a simple contract debt, which is not denied, the Court, on motion, will set off a judgment obtained by the defendant against the plaintiff in that action; subject to the lien of the attorney in the judgment for his costs.

May, in the Exchequer, sued Russell for a debt. In that action, Russell gave a cognovit, upon which judgment was entered up, and execution issued against Russell's goods. The Court of Exchequer, upon

(1) 1 Chitty Rep. 171.

(2) 2 East, 305. The note to this case set out the Rule of Court on this subject, which gives the form of the *ac etiam* thus:—

"And also to a bill of the said Q. against the aforesaid D. for fifty pounds, for divers goods, wares, and merchandises, sold and delivered to the said D. by the aforesaid Q. according to the custom," &c.

From the above form, it would seem, that the subject matter of the action is required, rather than a statement of the class of action under which it would come. The above form answers the first of these requisites, but not the second; for the subject matter might be either debt or assumpsit.

The general words "upon promises," do not appear substantially to comply with the above form given by the Rule of Court; for they convey no information to the defendant, as to the subject matter of the action.

motion, set aside the cognovit and execution for some irregularity. Russell thereupon brought the present action in this court against May for trespass, in respect of that taking of his goods. May in this action suffered judgment by default; and the jury gave 65*l.* damages. Judgment having been thereupon signed, a rule was obtained by the present defendant, calling upon the plaintiff to shew cause why the debt for which suit was brought in the Exchequer, should not be set off against the judgment obtained in this court.

Mr. Cottingham and *Mr. Alexander* shewed cause.—These debts are of a different nature; and a simple contract debt cannot be set off against a judgment debt.

[*Lord Tenterden*.—You do not deny that the debt is due.]

No; but the case of *Phillipson and another v. Caldwell* (1) is decisive against the present application. That was a motion similar to this; and it was observed by the Lord Chief Justice Gibbs, "In all the cases where the Court has been desired to relieve the party by way of set-off, it has been the set-off of one execution against another; and it has been at too late a stage of the cause for the party to avail himself of the set-off by way of plea."

Mr. J. Williams, *contra*, was stopped.

Lord Tenterden.—It is clear that a verdict will be recovered against this plaintiff. The debt is not denied. We are not laying down or interfering with any general rule. We make the present rule absolute for the sake of the party against whom it was moved.

The following was the substance of the rule accordingly drawn up:—

"The debt and costs in the Exchequer, in which the plaintiff gave a cognovit, or so much thereof as remains due to be set off against the damages and costs recovered in this action; subject to the lien of the plaintiff's attorney."

See also *Harrison v. Bainbridge* (2).

(1) 6 Taunt. 176.

(2) 2 B. & C. 800.

1828. }
Nov. 27. } TENON v. MARS.

Practice—*Affidavit of Debt*—Foreign Contract.

Where an affidavit of debt arising upon a contract in a foreign country, is made by a person who sues in a character analogous to that of assignee of a bankrupt in this country, the affidavit must shew; that by the laws of that country such person is allowed to sue in his own name.

The defendant had been arrested in the action at the suit of the plaintiff Tenon, upon an affidavit stating that he was liquidator (legally appointed by the laws of France,) of the estate of Jaques Vernarel and himself, Tenon, who lately carried on business in co-partnership as booksellers in Paris. It then went on to state that the defendant was indebted to the deponent, as such liquidator, in so much money, by virtue of certain promissory notes, drawn by the defendant, and made payable to the order of Vernarel and Tenon.

A rule had been obtained by *Mr. Carrington*, calling upon the plaintiff to shew cause why the bail bond should not be delivered up to be cancelled on filing common bail. This had been obtained upon affidavits, shewing, that the plaintiff and defendant were French subjects; that the cause of action accrued in France; that, by the laws of France, arrest of the person for debt, was not allowed until after judgment; and that no judgment had ever been recovered against the defendant at the plaintiff's suit.

Mr. Manning, now appeared to shew cause, and submitted, that the Court would not upon motion try the question as to what was the law of France.

Mr. Justice Bayley.—But your affidavit of debt is defective on the face of it. You shew a cause of action to two persons; the plaintiff sues as liquidator; but the affidavit does not state, that by the law of France the liquidator is allowed to sue in his own name.

Rule absolute.

[See also *Melan v. the Duke of Fitzjames*, 1. B. & P. 138; *Imlay v. Ellefson*, 2 East, 453; *Talleyrand v. Boulanger*, 3 Ves. 488.]
Vol. VII. K.B.

1828. }
Nov. 28. } ALDERSON v. GADSDEN.

Landlord and Tenant—Bankrupt—Costs.

1. *The Court will allow money to be paid into court by the plaintiff in replevin, upon a special application for that purpose.*

2. *Where a distress is made for more than a year's rent, after an act of bankruptcy by the tenant, the Court will allow the assignees of the tenant to avail themselves of the 6 Geo. 4. c. 16. s. 74, and to pay a year's rent into court.*

3. *But if the landlord under such a rule accept the sum so paid into court, he is entitled to double costs under the 11 Geo. 2. c. 19. s. 22.*

This was an action of replevin. The landlord had distrained for rent in arrear for a period of one year and a half. Before the making of the distress the tenant had committed an act of bankruptcy. The goods were replevied, and the usual replevin-bond was executed. A commission afterwards issued. The assignees thereupon obtained a rule calling upon the landlord to shew cause why the nominal plaintiff (the said bankrupt) should not be at liberty to pay into court a year's rent, and why, upon payment of the same with the costs, all proceedings should not be stayed. This was made under the new bankrupt act, 6 Geo. 4. c. 16. s. 74, which limits a distress after an act of bankruptcy to one year's rent.

Mr. Solicitor General and *Mr. Archbold* shewed cause; contending, that in replevin no sum short of the rent actually due could be paid into court; and that if the assignees intended to seek to avail themselves of this clause, they must do so in some other mode; that, as regarded the estate of the bankrupt, this clause would make no difference; because the contest was, in fact, between the landlord and the sureties in the replevin-bond. The question was, upon which of those two the loss occasioned by the bankruptcy would fall; inasmuch as the loser would be entitled to prove against the estate.

Mr. Justice Bayley.—Then, ought the landlord to be in a better situation when there is a replevin, than he would if there was not?

[It being admitted that the bankruptcy was not disputed—]

Lord Tenterden.—Let the year's rent be paid to the landlord, with costs, if he will accept it, in full. If not, let the money be brought into court, and let the subsequent costs abide the event.

The landlord afterwards accepted the money; and on the taxation of the costs, the Master allowed 5*l.* for the costs of the distress and other proceedings before the action of replevin in this court; and he also allowed double costs; conceiving that this was a case of "discontinuance" of the action, within the meaning of the 11 Geo. 2. c. 19. s. 22.

In Hilary term *Mr. Chitty* moved for a bill to review the Master's taxation; contending, that this was not a case within the meaning of the act, which applied only to cases of vexatious actions of replevin by the tenant. But—

The Court refused the rule.

Rule refused.

[*Note.*—For cases on the part of this subject which relates to the costs, see *Vernon v. Wynne*, 1 H. Bl. 24; *Hopkins v. Shrole*, 1 B. & P. 382; and *Gurney v. Buller*, 1 B. & A. 670. In the latter case the cause was referred to arbitration: the award was in favour of the landlord; but he was only allowed single costs.]

1828. }
Nov. 17. } HANDLEY v. LEVY.

Costs—Arrest—Palace Court.

A defendant who removes into one of the superior courts a cause commenced in an inferior court, is not entitled to the remedy given by the 43 Geo. 3. c. 46. s. 3. when it appears the plaintiff has arrested him without probable cause for a larger sum than he has recovered.

In this case the plaintiff, having recovered by verdict a less sum than that for which he had arrested the defendant, had been called upon to shew cause why the defendant should not be allowed his costs under the 43 Geo. 3. c. 46. s. 3.

Mr. Thesiger now shewed cause.—This action was brought in the Palace Court, and was removed hither by the defendant. That alone is fatal to this application, inasmuch as this Court has no power to interfere. This construction of the statute was given by the Court of Common Pleas in the case of *Costello v. Cawley* (1).

Lord Tenterden.—I think the decision of the Court of Common Pleas was right. The defendant, too, increases the expense by removing the cause.

Rule discharged.

(*Mr. Adolphus* was in support of the rule.)

1828. }
Dec. 12. } IN THE MATTER OF THE ARBITRATION BETWEEN HIGGEN AND WILLIS.

Arbitration—Attachment pending Action on Award.

Where an action upon the award has been brought, and is depending at the time a demand is made for the purpose of proceeding by attachment, the Court will not interfere by attachment, but will leave the party to the remedy he has sought by action.

But, where a party moved for an attachment, and it appeared that an action had been brought and was discontinued, but it did not appear whether the action was depending when the demand was made,—Semble, that this is not sufficient to deprive the party of his remedy by attachment.

A rule having been obtained to shew cause why an attachment should not issue for non-performance of this award,—

Mr. Alderson shewed for cause, that the party now applying had brought an action on the award, and discontinued it. He had therefore made his election to proceed by action; and, according to the case of *Badley v. Loveday* (2), he was precluded from asking for the assistance of the Court by attachment. It did not appear from the affidavits, whether the action was pend-

(1) 1 Bos. & Pul. 81.

(2) 1 Moore & P. 385; 6 Law Journ. C.P. 13.

ing when the demand upon which the motion was founded had been made.

Mr. Justice Bayley.—It appears to me that the case cited is distinguishable. It appeared there, that the action was depending at the same time with the motion. The party who moves for the attachment makes out a *prima facie* case by shewing the demand and refusal. To answer that it is incumbent on the party against whom the application is made, to shew that the action was pending at the time.

Mr. Justice Littledale appeared to entertain some doubt; but, it being agreed that the attachment should remain in the office a month,—

Rule absolute.

1828. }
Dec. 13. } WILTON v. BUXTON.

Evidence—Nominal Plaintiff.

Where the parties to the record are at issue upon a plea of set-off by the defendant, it is not competent for those who represent the plaintiff to give evidence, shewing that the plaintiff on the record is only the nominal plaintiff; and that, as regards the real plaintiff, the defendant has no set-off. Such an alteration of the parties to the action, if admissible in evidence, must be specially pleaded in reply to the plea.

This was an action of covenant.

The declaration stated, that, by indenture, dated 21st February 1828, between Cardale, Buxton (the defendant) and Parlby, of the one part, and the plaintiff of the other part; Cardale, Buxton and Parlby did jointly and severally covenant, promise, and agree with the plaintiff, that they would pay to the plaintiff the sum of 300*l.* per annum for four years; and the plaintiff then averred non-payment.

The defendant, after setting out the deed upon oyer, pleaded (among other pleas) a set-off in respect of a debt due from the plaintiff to Buxton and Parlby as surviving partners of Cardale. The plaintiff denied that he was indebted as pleaded, whereupon issue was joined.

The cause was tried at the Spring As-

sizes for the county of Kent, before Mr. Justice Burrough, when the following appeared to be the principal facts:—

The real plaintiff was a person of the name of Francis. Wilton, the nominal plaintiff, entered into a treaty with Francis for the sale to him of an annuity of 359*l.* per annum during the life of Wilton, in consideration of 2000*l.* It was agreed that Cardale, Buxton and Parlby, Wilton's attornies, should guarantee the payment of 300*l.* a year, part of the annuity, for four years, he depositing in their hands a sum sufficient to meet such payment. Accordingly, a bond was prepared by the attorney of Francis, making Cardale, Buxton and Parlby obligors to Francis; but Cardale & Co. objected to this, as they did not wish their names to appear at the Inrolment Office as sureties for an annuity. They therefore suggested that the annuity should be granted by Wilton to Francis in the ordinary form; and that a deed should be prepared, by which it should be recited, that Wilton had deposited with them money and securities to the amount of 1200*l.* in order that they should retain the same, and thereout pay to him, his executors, administrators, or assigns, the sum of 300*l.* per annum for four years; that they should thereupon covenant to do so; and that Wilton should assign over this deed to the plaintiff. This was accordingly done. The defendant proved that Wilton was indebted to Cardale, Buxton and Parlby in a sum which, with a small sum paid into court, equalled the amount of the arrears. This debt was due before or at the time of the annuity transaction; and Wilton shortly afterwards wrote to Cardale & Co. authorizing them to deduct it out of the money in hand.

This being the state of the facts, it was contended by Francis, who represented the nominal plaintiff Wilton, that it was not competent for the defendant to set up this defence; while, on the other hand, the defendant contended, that it was not competent for any party upon this record to go into evidence to shew that the plaintiff on the record was not the real plaintiff, in order to deprive the defendant of his set-off.

The learned Judge was of opinion that it was not competent for the defendant to

set up this set-off; and the plaintiff thereupon obtained a verdict.

A rule had been obtained calling on the plaintiff to shew cause why the verdict should not be set aside,—

Mr. Gurney now shewed cause.—The course of law required that the action should be brought in the name of Wilton.

Mr. Justice Bayley.—But look at the terms of the issue upon this record. The issue is, whether Wilton was indebted or not. To let in the evidence upon which you obtained the verdict, you should have replied the matter specially.

Mr. Justice Littledale.—That mode of pleading has been adopted in several cases; but whether it can be maintained, is a matter of doubt.

Mr. Justice Bayley.—But, as the defence goes to exclude the merits, which were not fully tried, the plaintiff may amend on payment of costs.

Rule absolute to set aside the verdict.

[The cases which appear to bear upon this subject are,—

Baerman v. Radenius, 7 T. R. 663.

Alner v. George, 1 Campb. 392; and the cases there cited.]

1828. } THE KING v. THOMAS YOUNG
Dec. 19. } GREET, ESQ.

Borough Charter — Burgesses — Inhabitants.

Where a charter, creating a corporation of mayor, jurats, bailiffs and burgesses, provided that the vacancies in the office of jurat should be filled up from the burgesses "or inhabitants" of the town; and nothing appeared to shew that it was intended that a jurat should first be a burgess:—Held, that an inhabitant who had not been previously a burgess was well elected to the office of jurat.

This was an information in the nature of a *quo warranto*, calling upon the defendant to shew cause by what authority he exercised the office of a jurat of the borough of Quinborowe, or Queenborough, in the

county of Kent (1). The defendant admitted that he had usurped the office from the 20th of May to the 9th of June 1823; but from the latter day he claimed title. His plea set out the charter, for part of which a reference may be made to the case of *The King v. Greet*, mentioned in the note. That which related to the office of jurat declared, that there should be four honest and discreet "burgesses or inhabitants" of the borough to be elected, who should be called jurats; and it was upon the meaning of this expression that the case turned. The defendant justified under an election of him as jurat, he being an inhabitant of the borough.

To this plea there were several replications; but the argument turned upon the 7th and 8th. The 7th averred, that from the time of the charter it had been used and accustomed, that every inhabitant elected to the office of jurat, before he took upon himself that office, should be sworn and admitted a burgess of the borough: and that the defendant was not a burgess before he took upon himself the office of jurat. The 8th replication merely averred that the defendant was not a burgess at the time he took upon himself the office of jurat.

To these replications the defendant demurred; and the prosecutor joined in demurrer.

In support of the demurrer the defendant advanced the following points:—

1st. That the usage pleaded in the 7th replication was contradictory to the charter, and that usage cannot be pleaded to explain, still less to contradict, a charter, when the words and meaning of the charter are (as in this case) clear and unambiguous: *Rex v. Miller* (2).

2d. If the usage pleaded was not intended to be pleaded as an exposition of the charter, but as an usage independent of it, then that the replication is bad for not shewing the legal foundation of the usage—whether a bye-law or otherwise: *Rex v. Holland* (3).

(1) See the former case relating to this borough, *The King v. Greet*, 6 Law Journ. K.B. 331; s. c. 8 B. & C. 365.

(2) 6 Term Rep. 268.

(3) 2 East, 70.

3rd. If the usage was anterior to the charter, the acceptance of the charter determined it: *Powell v. Rex*, in error (4).

4th. If founded on a bye-law subsequent to the charter, it is bad as contradicting the charter, particularly as it tends to restrain the number of persons eligible, by superadding qualifications not in the charter: *Rex v. Spooner* (5), *Tucker v. Rex*, in error (6).

5th. That replication is also objected to for uncertainty, in not shewing what qualifications are necessary to entitle an inhabitant to be admitted a free burgess. They may be such as to exclude a large class of inhabitants, to give the free burgesses a controul over the election; and materially alter the constitution of the corporation.

Mr. Tomlinson, in support of the demurrer.—The charter, as it is stated in the plea, provides that the office of jurat may be held by burgesses or inhabitants; and the plea also states that the defendant was an inhabitant. The charter speaks of burgesses and inhabitants as two distinct classes of persons; and, consequently, the charter is satisfied by the person elected coming within the description of either of them. The terms "burgesses" and "inhabitants" are here used as synonymous terms. Besides, independent of this question upon the construction of the charter, the replication is bad; inasmuch as it sets up usage to contradict, or, at least, to explain, the charter. This mode of pleading is not good, and the case of *The King v. Miller* is against it. (Here he was stopped by the Court.)

Mr. Platt, contra.—Enough appears by the charter, as set out in the pleadings, to raise the argument upon the present question. The person should not only be an inhabitant, but he should be a burgess also. It has always been held, that these grants from the Crown should be construed strictly (*Comyns's Dig.* (7) and reasonably (*Webb's case*) (8). The case of *James and Wife v. Tallent*, (9), is a very strong au-

thority for the giving a reasonable construction to instruments in the nature of grants. There, a bond was given to secure the payment of an annuity to a woman "during the joint natural lives of herself and her two children"; which annuity was to be applied to the maintenance and education of the children, as well as the maintenance of herself. It was provided, that, in case of the death of the two children, the annuity was to be payable to her during her life. One of the children died, leaving the other, and the mother surviving. The question before the Court then was, whether the woman was entitled to the annuity during the lives of herself and the other child. And the Court held that she was; on account of the manifest intention of the parties. Yet, in that case, the words, if taken literally, would have left the child and the woman without support during the life of the surviving child. Then, with regard to the expression "or inhabitants." There is no legal rule against the reading of this word as "and," if the reason of the case requires it. This appears from *Comyns's Dig.* (10). It is stated in the plea, that, at the time of the charter being granted, the borough was an ancient borough, and had consisted only of burgesses; and that the burgesses were a body corporate. The charter grants that the mayor, bailiffs and burgesses shall be incorporated by the name of the mayor, jurats, bailiffs and burgesses; so that at that time the jurats did not exist. Neither at that time were the inhabitants, as inhabitants, a part of the corporate body; and there does not appear in the other part of the charter any intention to make them so.

[*Mr. Justice Bayley*.—But the King, by the charter, might have named any inhabitant to be a jurat, and he would, *ipso facto*, become a member of the corporation. That was decided in the case of *The King v. Downes* (11), where a charter declared that there should be eighteen common councilmen chosen out of the free burgesses, and then nominated eighteen persons to be common councilmen:—it was held, that this made them free burgesses. If, therefore, the King can grant that an

(4) 2 Bro. P. C. 298 (last edition).

(5) 3 Burr. 1828.

(6) 2 Bro. P. C. 304 (last edition).

(7) Tit. "Grant," 12.

(8) 8 Co. Rep. 45.

(9) 5 Barn. & Ald. 889.

(10) Tit. "Parol," A. 11.

(11) 5 B. & C. 182; 7 D. & R. 777.

inhabitant shall be a common councilman, he may authorize the corporation to select future common councilmen from the inhabitants ; and here he might name an inhabitant to be a jurat.]

In *The King v. Tate* (12), it appeared that a charter was granted by Queen Elizabeth, which incorporated the inhabitants of Richmond in Yorkshire, by the name of the mayor, bailiffs and burgesses ; and the Court held, that an inhabitant afterwards could not claim to be a burgess by reason of his being an inhabitant.

[*Mr. Justice Parke.*—In the Maidstone case, *The King v. Spencer* (13), it was held, that the common councilmen might be elected at once out of the inhabitants.]

[*Mr. Serjeant Merewether*, who was with *Mr. Platt*, suggested, that, in the case of common councilmen at Maidstone, all who are chosen to that office are, in fact, burgesses.]

[*Mr. Justice Bayley.*—But what reason can there be why the Crown in granting a charter should not name the class of persons out of which future vacancies are to be filled up ? Why may the King not say, we will not confine the corporation to choose out of the burgesses ?]

Because, in that case, the whole corporation, in the course of time, may be taken out of the inhabitants to the exclusion of the burgesses. In the *West Loo case* (14), it was held, that mere inhabitants did not gain an inchoate right of admission by a grant, that the borough should consist of a mayor and burgesses, being inhabitants. The reason and the authorities, therefore, combine to shew, that mere inhabitancy is not sufficient.

Mr. Justice Bayley.—I am clearly of opinion, that the defendant is entitled to judgment. The legal effect of this charter, as it is pleaded, is, that on the removal of a bailiff or jurat, either the one or the other of two descriptions of persons, viz. "burgesses" or "inhabitants," shall be eligible to fill the office of bailiff or jurat. The plea shews that an inhabitant has been elected.

(12) 4 East, 337.

(13) 3 Burr. 1829.

(14) 3 B. & C. 677 ; 5 D. & R. 590.

Mr. Justice Littledale.—I think this is a very clear case. The word "inhabitant" is first used in the clause relating to the election of mayor. It provides, that there shall be one of the more honest and discreet burgesses or inhabitants of the borough to be elected mayor. There then follow clauses, which provide for the election of jurats and of bailiffs, from the burgesses or inhabitants. Those words import that the jurats and bailiffs may be taken either from burgesses or inhabitants. It is insisted that the word "or" must be read "and"; and, consequently, that jurats are to be chosen out of the burgesses and inhabitants. If those words are synonymous, it was sufficient for the defendant to state in the plea that he was an inhabitant ; for that implies burgess. But if they are not, still it appears to me that the construction contended for in support of the replication ought not to prevail ; for if the intention of the Crown had been that the jurats should be elected from persons being inhabitants and burgesses, the charter would have described them as burgesses inhabiting within the borough, or burgesses who were inhabitants. It is clear that it was intended that the jurats should be selected either from burgesses or from inhabitants. Such a provision is not unreasonable, nor is there anything in the charter to shew that it was intended that the two characters of burgess and inhabitant should be united in a person eligible to the office of jurat. The mayor may be elected out of the burgesses or inhabitants ; so may the bailiffs or jurats. I see no reason why the Crown should not give a power to the principal officers of the corporation to elect to the office of jurat, an inhabitant who has not passed through the inferior office of burgess. A man may make as good a jurat without being a burgess at first, as he might if he had been a burgess before.

Mr. Justice Parke.—It appears to me that the replication is bad for the reason already stated. Then, as to the plea, it is perfectly clear that either burgesses or inhabitants may be elected jurats at once. There is nothing unreasonable in this provision, nor in the slightest degree inconsistent with other parts of the charter. We

must hold, therefore, that the defendant was eligible at once to the superior office of jurat, without passing through the inferior office of a burgess. The judgment of the Court must therefore be for the defendant.

Judgment for the defendant.

1829. }
Jan. 17. } MORGAN v. CURTIS, BART.

Pew—Faculty—Presumption.

The plaintiff shewed an uninterrupted enjoyment, for upwards of 50 years, of a pew in the chancel of a church, but gave no evidence of a faculty, and there were slight circumstances to explain the enjoyment; the jury, upon the question being left to them, whether they would in favour of the plaintiff presume a faculty, returned a verdict for the defendant; and the Court refused to disturb the verdict.

This was an action on the case. The declaration stated, that the plaintiff was lawfully possessed of a certain messuage, with the appurtenances, in the parish of Catherington, in the county of Southampton, and therein inhabited and dwelt with his family; and by reason thereof he had and ought to have for himself and his family inhabiting the said messuage the use of a certain pew in the chancel of the parish church of Catherington, to hear and attend divine service celebrated therein, as to the said messuage belonging and appertaining. The declaration then went on to complain that the defendant unlawfully entered and continued in the pew during the time of divine service, and thereby hindered and prevented the plaintiff from using and enjoying the pew.

Plea—the general issue.

At the trial, before Mr. Justice Park, at the Hants Summer Assizes 1828, the following, according to the report of the learned Judge, appeared to be the principal facts, and the mode in which the case was left to the jury.

The house in question was called Catherington House, and had been built by the late Lord Hood. Upon the site wherein it stood was formerly a cottage. The

late Lord Hood purchased the premises in that state about the year 1772; pulled down the cottage, and built Catherington House. The present Lord Hood, who was examined for the plaintiff, stated, that the family of his father sat in the chancel before the pew was built. In fact, they lived at Catherington many years before the present house was built. The pew was built by the late Lord; but whether before or after the house, did not appear with certainty: Lord Hood thought it was before. There was some evidence of there having been two old pews in the chancel before the present pew was built; but this part of the evidence, from the distance of time, did not appear very distinctly: Lord Hood spoke of it as a strong impression upon his mind. Several of the family were buried in the chancel. The house was afterwards occupied several years by Admiral Halkett under a lease from Lord Hood; the Admiral and his family enjoyed the pew without interruption. In 1824 he left; and shortly afterwards the property was bought of the present Lord Hood by the plaintiff. His Lordship stated that he said nothing about the pew in the course of the treaty for the sale.

It was proved by other witnesses, that about 30 years ago there was a vestry meeting, when a question was discussed as to the expediency of painting the pews in the church. Lord Hood attended, and said he would not have his pew touched: his pew, he said, was of a very good colour. The chancel was not painted on this occasion; but the rest of the church was. About 27 years ago, a witness put a drawer for the books in the pew in question, at the desire of Lord Hood.

The plaintiff did not give his title deeds in evidence; nor did he adduce any evidence of search having been made at the Bishop's registry for faculty.

The counsel for the defendant contended, that, the house being modern, and the pew modern, there was not sufficient evidence from which a faculty could be presumed; that the rank and situation of Lord Hood rendered it very probable that he would be accommodated with a pew in the chancel, or at least that there would be no interference against it. It should here be observed that the defendant, Captain Sir Lu-

cius Curtis, of the Royal Navy, was the son of Admiral Sir Roger Curtis, and through him was lay rector of the parish; and it was suggested, as an additional reason to explain the uninterrupted possession, that Sir Roger Curtis passed the chief part of his life in service from home; and that whenever he was in this country, it was not probable that he would feel inclined to disturb a brother officer in the enjoyment of the pew in question.

The learned Judge left it to the jury, in the terms used by Mr. Justice Buller in the case of *Stocks v. Booth* (1), and according to the opinion of the Court in *Griffiths v. Mathews* (2), whether, under the circumstances, they could presume that there had been a faculty (without which there could be no legal foundation to the plaintiff's claim), and which faculty had now been lost. He observed upon the facts, intimating his own opinion, that the enjoyment of the pew had been by permission only. He noticed also the non-production by the plaintiff of his title deeds: the inference from which was, that they contained no mention of his alleged right, which was a valuable one, and in all probability would have been mentioned had it been contemplated to have passed such a right. He observed, too, that there was no evidence of a search having been made at the Bishop's registry. With regard to the repairs, he stated that he (the learned Judge) had lined the seat, and placed drawers in the seat, of the pew in which he sat; but still the pew was not his as a matter of right.

The jury found a verdict for the defendant, and, a rule having been obtained calling upon him to shew cause why a new trial should not be granted, on the grounds that the learned Judge had misdirected the jury; and also that the verdict was against the weight of evidence,—

Mr. Manning shewed cause.—The other side rely upon the case of *Rogers v. Brooks*, which appears in a note to *Stocks v. Booth*. In that case the defendant was clearly a wrong-doer; and the plaintiff had exercised a most unequivocal act of ownership by putting a lock upon the door of the pew. Nothing but uninterrupted and unexplained

possession can warrant a jury in presuming a grant: *Livett v. Wilson* (3). And here the possession was explained: at all events it was for the jury to decide; and in the absence of that evidence which it was in his power to adduce, if his claim were well founded, the jury were warranted in not presuming that there had been any faculty.

Mr. Serjeant Meremether and *Mr. Dampier*, contra.—The defendant was a wrong-doer; and the evidence was sufficient to warrant the jury in presuming a legal title in the plaintiff, who was suing upon his possessory right. That right might be either by prescription or by faculty; and there was evidence sufficient to warrant the presumption of a faculty. The case of *Livett v. Wilson* has laid down no new rule on the subject of prescription: but has merely illustrated the old one, which is consistent with the plaintiff's case. There, the right claimed had been disputed. Here, it never was; and after an uninterrupted possession for a number of years, longer than there was in the case of *Rogers v. Brooks*, the case should have been differently left to the jury. In the case last cited, although the possession was only for 36 years, Mr. Justice Willes said, that after so long a possession he would presume anything in favour of the plaintiff. There was also a very strong fact in the present case favourable to the plaintiff. The late Lord Hood would have been a trespasser in building the new pew unless he had some legal right to do so; and seeing that his so doing had never been called in question, it was to be presumed that what had been done and acquiesced in, had been done rightly. The case, too, is clearly distinguishable from that of *Griffith v. Mathews*, which made some impression upon the learned Judge; because in that case the new seat was not connected with any previous right.

Mr. Justice Bayley.—I think this was a case proper to be left to the jury; and I see nothing objectionable, either in the manner in which it was left, or in the conclusion at which they have arrived. The plaintiff was bound to make out his case, and shew either a prescription or a faculty. And I think it is nothing to shew, that, in a case

(1) 1 Term Rep. 431.

(2) 5 Id. 296.

(3) 10 Mees. 439.

somewhat similar, another jury came to a different conclusion; for that is really the whole of the case of *Rogers v. Brooks*. Every case of this nature depends, as was observed by Mr. Justice Buller in *Griffith v. Mathews*, upon its own particular circumstances. I concur in the observation, that it was probable Lord Hood, from his rank and situation, might have a pew assigned to him in the chancel of this church; but this alone, the mere occupation, is not sufficient to force a jury to presume either a prescription or a faculty. The plaintiff did not produce his title deeds. If the pew had been mentioned in them, there would have been something in that circumstance. The absence of it is something. In *Rogers v. Brooks* the plaintiff had put a lock upon the pew; and it appeared that possession had been given of it by the churchwardens. If the jury had found in favour of the right claimed by the plaintiff, we might not have disturbed their verdict; but we cannot say decidedly, upon this evidence, that they have come to a wrong conclusion.

Mr. Justice Littledale and Mr. Justice Parke concurred.

Rule discharged.

[See also *Walter v. Gunner and another*, 1 Haggard, 314; *Clifford v. Wicks and another*, 1 B. & A. 498; *Mainmaring v. Giles*, 5 B. & A. 356; *Jones v. Ellis and others*, 2 Y. & J. 265.]

1829. } HIGGINS & OTHERS, ASSIGNEES,
Feb. 12. } &c. v. M'ADAM.

Bankrupt—108th section of 6 Geo. 4. c. 16.—Act of Bankruptcy.

1. Semble, that on the sale of the goods under an execution, the property is divested out of the debtor; and the creditor is no longer a creditor having security for his debt under the 6th Geo. 4. c. 16. s. 108.

2. But, at all events, he is not such a creditor after the money (the produce of the sale) has been paid over to the sheriff; and, consequently, an act of bankruptcy committed afterwards will not affect the rights of the judgment creditor.

3. Nor will the rights of the judgment
Vol. VII. K.B.

creditor be affected by the circumstance of the act of bankruptcy being committed before the writ is returnable.

4. An act of bankruptcy committed by lying in prison twenty-one days is not complete, under the 6 Geo. 4. c. 16. s. 5, until the twenty-one days have expired; but the days are reckoned inclusive. Thus, an imprisonment commencing on the 4th of July became an act of bankruptcy at the end of the 24th; and the assignees were held entitled to the produce of goods sold on the 25th, under an execution at the suit of a judgment creditor.

This was the case in the Exchequer, to which reference was made in the case of *Morland v. Pellatt*, which will be found in the Law Journal for February 1829, Vol. 7, K.B. p. 54. We have been favoured with a note of the case by a gentleman at the bar.

The action was by the assignees of Cartwell, a bankrupt, against a creditor who had obtained judgment by *nil dicit*, and seized the goods of the bankrupt under an execution, authorized by that judgment.

The following were the principal facts.

The seizure of the goods took place on the 3rd of July 1827, by an officer named by the plaintiff. This was the practice in the county of Cumberland, into which the writ issued. There are no bound bailiffs there; and the warrants are made out to such person as shall be named by the party seeking to enforce the writ; and he gives an indemnity to the sheriff. The sale began on the 23rd of July; and continued on the 24th and 25th. The goods sold amounted on the 23rd to 94*l.* 13*s.* 8*d.*; on the 24th to 80*l.* 8*s.* 11*d.*; and on the 25th to 66*l.* 2*s.* 4*d.* The son of the attorney for the judgment creditor (the present defendant) was clerk to his father, and attended as clerk of the sale; and as such received the proceeds. On the 23rd he received 50*l.*; on the 24th 50*l.*; and the remainder on the 25th. The whole was afterwards paid over to the judgment creditor, the present defendant.

The act of bankruptcy was committed by the lying in prison twenty-one days, according to the 6 Geo. 4. c. 16. s. 5. That imprisonment commenced on the 4th of July 1827.

Two questions were made.

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First—Whether the act of bankruptcy by relation back to the time of the arrest was complete on the 4th of July, the date of the arrest.

Secondly—If it was not completed until the 24th of July, whether the plaintiff was entitled to the whole, or to any part of the sum paid over to present defendant.

The case was argued by the present *Mr. Justice Parke*, then at the bar, and *Mr. Alderson*.

The Court took time to consider, and the judgment was this day delivered by—

Mr. Baron Garrow, to the following effect.

Upon the first question, the Court were of opinion, that the act of bankruptcy was not complete until the twenty-one days imprisonment had expired; and consequently that there was no act of bankruptcy until after the 24th of July.

Upon the second question, after noticing the case of *Wymer v. Kemble* (1), and *Notley v. Buck* (2), the Court were of opinion, that, by the sales which took place on the 23rd and 24th of July, the goods ceased to be the property of the bankrupt, and did not therefore pass to his assignee; that the money received in respect of those sales was the money of the plaintiff in the writ; the sales themselves being made by a person who, for this purpose, was to be considered as his agent; and consequently, this money was money had and received by that person to the use of the plaintiff in the writ, according to the judgment of Lord Chief Justice Dallas, in the case of *Swain v. Morland* (3). The agency of the person who thus received the money for the plaintiff in the writ was clearly established by the circumstance that that plaintiff never could call upon the sheriff to return the writ; as the bailiff had been specially nominated at the instance of the party himself. This appeared from the cases of *De Moranda v. Dunkin* (4), and *Taylor v. Richardson* (5).

For these reasons, they were of opinion,

(1) 6 B. & C. 479; 5 Law Journ. K.B. 232.

(2) 8 Id. 160; 2 M. & R. 68; 6 Law Journ. K.B. 271.

(3) 1 B. & B. 370; 3 Moore, 740.

(4) 4 T. R. 119, and the cases at p. 121, in note.

(5) 8 Term Rep. 505.

that the right of the plaintiff as assignee was limited to the sum of 66*l.* 2*s.* 4*d.*, being the amount of the sale of the goods on the 25th of July, after the act of bankruptcy, which was completed on the 24th.

Verdict reduced accordingly.

[See the note to *Chitty's Collection of the Statutes*, title "Bankrupt," vol. i. p. 112.]

1829. }
Feb. 12. } FOX v. BURRIDGE.

The plaintiff obtained judgment by *nil dicit*, and caused the goods of the defendant to be seized and sold, under a writ of *feri facias*. The goods were sold; and the money paid over to the sheriff before any act of bankruptcy was committed by the defendant. After it had been so paid over, and before the writ was returnable, the defendant committed an act of bankruptcy; and a commission afterwards issued. The plaintiff and the assignees, as well as the sheriff, now appeared before the Court, in consequence of a rule obtained by the plaintiff, calling upon the sheriff, the defendant, and his assignees, to shew cause why the proceeds of the sale should not be paid over to the plaintiff.

Mr. Follett appeared for the plaintiff, and submitted, that, at all events, the Court would not order the money to be paid to the assignees, inasmuch as the bankruptcy might be disputed. For this he cited *Ex parte Washbourne's assignees* (1). But upon the general question respecting the rights of the parties, he contended, that the case of *Morland v. Pellatt* (2) had decided, that where the money is paid over to the sheriff, the creditor is no longer a creditor having security for his debt, within the meaning of the 6 Geo. 4. c. 16. s. 108. That case, too, had been confirmed by a decision in the Exchequer this day. —[See the preceding case.]

Mr. Holroyd, for the assignees, endeavoured to distinguish this case from that of *Morland v. Pellatt*, by the fact, that the act of bankruptcy was in this case committed

(1) 8 B. & C. 144; 6 Law Journ. K.B. 396.

(2) 7 Law Journ. K.B. 54.

used to enforce criminal process; one of the leading distinctions being, that, in some cases, for the purposes for the latter description of process, the outer door may be broken open; while for those of the former it cannot. In this case the arrest is a third one; and it is impossible not to see that the criminal process was used on Sunday to give an opportunity for making the arrest on Monday. This, I think, ought not to be allowed. The assault warrant was obtained on the 16th of October, and nothing appears, as to any exertion having been made to put it in force. The officer who held this warrant makes no affidavit. There was an agreement entered into between Parlett and Bozon; and there is no doubt that in consequence of that agreement Parlett caused the arrest under the assault warrant to be made on the Sunday. And, although it is stated that Bozon did not cause it to be made on that day, and did not know of it until afterwards; yet the whole shews, that it was done for the purpose of making the arrest in this cause; and that for this purpose Parlett was only an instrument in the hands of Bozon. I admit that contrivances must sometimes be used in order to cause the process of courts of justice to be served; but, I think, no contrivance should be used to cause civil process to be served, which would not justify the arrest to be made under that process.

Mr. Justice Parke.—I think the right of a plaintiff to arrest a third time may be very doubtful. The general rule is, that a man shall not be arrested a second time for the same cause of action. An exception to that rule is, where a plaintiff has not been able to make the first arrest available; and he therefore, without any vexatious conduct on his part, arrests a second time. I doubt whether the exception ever has been or can properly be extended to warrant a third arrest. But, without giving a decided opinion on that question, I agree that, in this particular case, the rule should be made absolute on the ground put by my Brother Bayley.

Rule absolute to discharge the defendant out of custody.

No action to be brought by him if Mr. Bozon shall within two days pay the costs.

[The principal cases on this subject are collected in *Pratt's Digest*, tit. "Arrest," p. 77; and in a note to the case of *Kearney v. King*, 1 Chitty's Rep. 274. In the latter are several cases which do not appear to be elsewhere reported.

See also *M'Ginnis v. M'Curling*, 6 D. & R. 24, where the general rule, as to the interference of the Court with respect to affidavits of debt, was laid down by the Lord Chief Justice Abbott.]

1828. }
Dec. 16. } *EDGE v. PARKER.*

Bankrupt—Limitation of Actions—Assignees.

The 44th section of the 6 Geo. 4. c. 16. does not protect assignees in the seizure of goods supposed to be those of the bankrupt, and consequently an action against them, in respect of such seizure, is well brought, though it be commenced after the expiration of three months from the fact committed.

Declaration in trespass for breaking and entering a certain building of the plaintiff.

There were other counts for taking the plaintiff's goods.

Plea—Not guilty.

The cause was tried at the last Spring Assizes for the county of Stafford, before Mr. Justice Park, when the following appeared to be the principal facts.

The defendant was assignee of one Timothy Edge, a bankrupt, the father of the plaintiff; and he justified the seizing of the goods in question as such assignee. He did not, however, appear as an assignee upon the record; and, upon its being proposed on his behalf to put in the commission and other proceedings, to shew his title as assignee, it was objected, on behalf of the plaintiff, that it was incumbent on the defendant to prove the trading, the act of bankruptcy, and the petitioning creditor's debt, to support the commission. The defendant relied upon the 6 Geo. 4. c. 16. s. 90, as relieving him from the necessity of this proof, no notice having been given of any intention on the part of the plaintiff to dispute the commission. The learned Judge was of opi-

him, Mr. Parlett, against all claim or demand which Mr. Parlett now has against the said Mr. Gurney, and also to pay Mr. Parlett 20*l.* for his trouble and information within three days after Mr. Gurney's arrest. Dated this 19th day of November 1829.

" Frederick Bozon."

A writ had been issued between the time of Parlett's first calling on Bozon and the making of the above agreement, and, in consequence thereof, an endeavour was made, through information given by Parlett, to arrest the defendant that evening, but it was ineffectual.

On the night of Sunday the 16th of November the defendant was arrested under the assault warrant, which had been obtained by Parlett a month before, and he was taken to the Compter Gaol in Giltspur-street. In the morning he was taken to the Police-office at Bow-street, and the matter of the assault was examined into by the magistrate. Parlett, in the interim, sent notice of the arrest to Bozon's chambers, he being out of town. His clerk immediately apprized the officer; and Bozon, upon his return to town, as well as the officers, went to the Police-office. Bozon did not previously know that Parlett intended to cause defendant to be arrested on a Sunday under the assault warrant.

When the magistrate heard the case, he ordered the defendant to find bail for the assault. For want of bail the defendant was remanded. The sheriff's officers then proposed to become his bail on the charge of assault; but the defendant (perceiving that the object was to procure his discharge from the Police-office in order to take him again into custody under the writ,) refused to accept of their bail, or to join in any recognizance with them. Parlett thereupon stated to the magistrate that he withdrew the charge of assault. The defendant was thereupon discharged from the Police-office, but was immediately taken into custody by the sheriff's officers at the plaintiff's suit. And it was from this arrest, under the circumstances, that the defendant sought to be relieved.

Mr. Crowder and *Mr. Kelly* for the plaintiff.—The course taken in order to obtain the arrest of this defendant was unobjectionable. The charge of assault was not fabricated. It was so far proved that the

magistrate ordered the defendant to find bail. Nor was the warrant taken-out for the purposes of this cause, as it had been taken out by Parlett before he had any communication with Bozon. The mere circumstance of the warrant, when executed, becoming available for the purpose of civil process, is no objection to it. In this respect the case is mainly distinguishable from that of *Birch v. Prodger and another* (2). There the person arrested was illegally seized in the street by the plaintiff, forced into a coach and carried to the chambers of the plaintiff's attorney, on his discharge from which he was arrested by the officer who had been placed on the outside for the purpose. There, the original taking was illegal, and was caused by the plaintiff himself. Here, the original taking was perfectly lawful, and was in fact not brought about by the plaintiff or his attorney. The undertaking given by the attorney to Parlett was perfectly legal; and if some skill and dexterity be not allowed to apprehend those who seek to elude the service of legal process, justice will be much impeded. The Court will only see that the means used be legitimate and proper. Neither is this third arrest vexatious.

[*Mr. Justice Parke*.—Can you find any case in which a third arrest for the same cause of action has been allowed?]

None has been found; but it is submitted, that the principle is the same, whether the arrest be a second or a third. Where the defendant has been relieved from a previous arrest upon some ground independent of the merits, and the plaintiff has been guilty of no vexatious conduct, he is entitled to arrest the defendant again. This was held in the case of *Kearney v. King* (3), where the plaintiff, having been nonsuited in the first action on the ground of a variance, was allowed to arrest the defendant a second time.

Mr. Campbell, *Mr. F. Pollock*, and *Mr. Holroyd*, *contra*, were stopped.

Mr. Justice Bayley.—It is clear that there can be no arrest made on civil process on a Sunday. And there is a great difference between the power given to make arrest on civil process, and that which may be lawfully

(2) 1 New Rep. 135.

(3) 1 Chitt. Rep. 273.

used to enforce criminal process; one of the leading distinctions being, that, in some cases, for the purposes for the latter description of process, the outer door may be broken open; while for those of the former it cannot. In this case the arrest is a third one; and it is impossible not to see that the criminal process was used on Sunday to give an opportunity for making the arrest on Monday. This, I think, ought not to be allowed. The assault warrant was obtained on the 16th of October, and nothing appears, as to any exertion having been made to put it in force. The officer who held this warrant makes no affidavit. There was an agreement entered into between Parlett and Bozon; and there is no doubt that in consequence of that agreement Parlett caused the arrest under the assault warrant to be made on the Sunday. And, although it is stated that Bozon did not cause it to be made on that day, and did not know of it until afterwards; yet the whole shews, that it was done for the purpose of making the arrest in this cause; and that for this purpose Parlett was only an instrument in the hands of Bozon. I admit that contrivances must sometimes be used in order to cause the process of courts of justice to be served; but, I think, no contrivance should be used to cause civil process to be served, which would not justify the arrest to be made under that process.

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nion, that it was not necessary for the defendant to go into this proof, and the proceedings were accordingly read.

The next point was one raised by the defendant under the 44th section of the above act, which provides, that every action brought against any person for anything done in pursuance of that act shall be commenced within three calendar months next after the fact committed. It was contended that this was a thing done in pursuance of the act; and as the action was not brought within three months after the fact committed, it was submitted, on the part of the defendant, that it was out of time. Subject to this point, the plaintiff recovered a verdict, with nominal damages; the finding of the jury being to the effect, that the building which had been entered was the plaintiff's; but the goods taken were the bankrupt's.

A rule having been obtained, calling upon him to shew cause why the verdict should not be set aside,—

Mr. Campbell and Mr. Curwood shewed cause.—First, it was incumbent on the defendant to give proof of the trading, &c. in support of the bankruptcy. The plaintiff was not bound to give him any notice. The plaintiff's goods were taken wrongfully; and he does not know in what asserted right the trespasser seizes them. On the trial, it merely turns out that he says he was assignee of a person, who, as he says, became a bankrupt, and under whom, for the first time, he sets up a claim.

[*Mr. Justice Parke*.—That construction of the clause would render it inoperative.]

(This point was not pressed further.)

Then, upon the second point, arising out of the 44th section.—It applies only to actions against the commissioners and those who act under the commissioners' warrant. This appears to be evident from a consideration of the sections which immediately precede the one in question. Section 40 provides for cases where the commissioners have committed the bankrupt or any other person, and declares that the Court, before whom any action is tried, may look at the whole of the examination. Section 41 provides, that no writ shall be served upon any commissioner for anything by him done as such commissioner, until he has had a month's notice in writing. Section 42 pro-

vides, that the plaintiff shall not recover unless he prove the service of such notice; nor shall he recover at all for anything not expressed in the notice. Section 43 gives the commissioner a power to tender amends within a month after the notice; and then comes section 44, which provides, that the action shall be brought within three months next after the fact committed. Now, how is it possible for the Court to say, that this was intended to protect all persons who might happen to be assignees and to set up a defence in that character? It may often happen that the plaintiff may not know of the fact committed until after the expiration of three months. The seizure of goods lying in a dock may be put as an instance. The whole of the clause, taken in connexion with the previous clauses, shews that it was intended to apply to cases where the act had been done under the authority of the commissioners' warrant. The assignees are nowhere mentioned in these clauses; nor are their rights mentioned at all until the 90th section, in which a distinct provision is made for the course of proceeding in actions against assignees. It may be said that this construction would place no limit to actions against assignees, but that which is given by the Statute of Limitations; and undoubtedly it is so; nor is there any reason why, in such a case as the present, it should be otherwise.

Mr. R. V. Richards, contra.—Assignees are entitled to the benefit of this clause where they act in that character, though they may have gone beyond their authority. They are entitled, by analogy to the case of a constable, to this benefit; because, as it was observed by Lord Ellenborough in the case of *Theobald v. Crichmore* (1), the protection is only required in cases where the person authorized has gone beyond his authority; for where he has acted in strictness within it, he does not require any protection.

[*Mr. Justice Bayley*.—But there must be at least some colour for the person acting under such an authority.]

Mr. Justice Littledale.—This case does not at all fall within the principle of that which you have cited.]

Then, looking at the case upon the act itself.—The 44th section has nothing to do

(1) 1 Barn. & Ald. 227.

with actions against commissioners. The provisions applicable to actions against commissioners are in the preceding sections, and in those the commissioners are expressly named. Section 44 makes no mention whatever of the commissioners.

[*Mr. Justice Parke.*—That section may explain section 31, which regulates actions against persons acting in obedience to the commissioners' warrant.]

The 106th section provides for the auditing of the accounts of the assignees, and fixes the time for doing so, at not later than six months from the last examination. If, then, an assignee is compellable to put the property in a course of distribution within six months from the time of the last examination, it would scarcely be in the contemplation of the legislature to leave him exposed to actions in respect of that property for any period within six years. The assignees merely discharge their duty in taking the property.

[*Mr. Justice Bayley.*—But is it their duty to seize the property? With the messenger it may be different. If there be any property which the messenger has not seized, is it *their* duty to seize, and thus to take the remedy into their own hands?]

The Court took time to consider; and on the following day the Judges delivered their opinions.

Mr. Justice Bayley.—The verdict found in substance, that the goods in question were the bankrupt's, and that the building in which they had been taken was the plaintiff's. The defendant, the assignee, had consequently been guilty of a trespass in order to seize them; and the question was, whether he was protected by the 44th section of the 6 Geo. 4. c. 16; whether this trespass was a thing done "in pursuance of that act." It is not necessary to cite cases for the purpose of shewing the principle which in general governs the interpretation of words like those which I have mentioned. It has always been understood, that the act done, need not be in strict conformity with the statute which uses those words; because, if it were, protection would be altogether unnecessary. The statute in question contains many clauses giving powers to get in the bankrupt's property. The 27th empowers the messenger to break open the bankrupt's

doors; but gives no power to break open any other doors, or to enter any other places where the goods of the bankrupt may happen to be. It goes on to give a power to seize on property belonging to the bankrupt in any prison where the bankrupt is in custody. Afterwards comes a special provision (in the 29th section) as to property concealed in the houses of other persons; and, to assist in the obtaining possession of property thus situated, a Justice of the Peace is empowered to grant a search-warrant. As you advance in the act; you find by the 33rd section, a power given to the commissioners to put questions to persons relative to the person, trade, dealings, or estate of the bankrupt, and to commit, in case satisfactory answers should not be given. Subsequently, beginning at the 41st section, is a series of provisions respecting actions against the commissioners. There is to be a month's notice of action; and the commissioners may tender amends. All those seem to apply to actions against the commissioners. Now comes the clause upon which the present case must turn; and the question is, whether the act done for which this action is brought, is a thing done in pursuance of that act? The act directs the property of the bankrupt to be assigned to the assignee; and it clothes him with a right to the property, but it goes no further. The ownership of the property is confirmed to the assignee: but when he does an act in respect of his ownership of the property, and not in respect of anything directed by the statute, is he entitled to the benefit of this provision? If it should be held that he is, one of the consequences must be, that a person residing abroad, having no agent here, would be barred of his remedy, if the action were not brought within the three months. That would be merely one of the consequences. But the right construction of the statute, as it seems to me, is, that if the assignees take a step directed by the act of parliament, but take it erroneously, they are within the protection of the words "in pursuance of the act;" but that where they exercise merely their rights, or asserted rights, of ownership in the property of the bankrupt, they are not within that protection. This very point was decided in the Court of Common Pleas

in the case of *Carruthers v. Payne*. (1) That was an action of trover for a carriage; and this very question being raised, the Court took time to consider; and although there was a difference of opinion among the Judges, the majority were of opinion that the act done, the seizing of the carriage by the assignees, was an act done with reference to their ownership in the property of the bankrupt, and not done "in pursuance of the act," according to the proper interpretation of that expression. Upon the reason applicable to this subject, as well as upon the authority of the case I have mentioned, I think the defendant is not entitled to the protection given by the clause in question.

Mr. Justice Littledale.—I am of the same opinion. In no part of this act is there any direction given to the assignees to *seize* the property of the bankrupt. Their right to seize must therefore be subject to the same legal regulations to which all other owners of property are subject. We have been pressed with the argument that this construction may bear very hard upon assignees who may have distributed the property, for which they are called to account, in dividends among the creditors. But a different construction would bear very hard upon the rest of the community who may have their property seized, and whose right to obtain redress would be limited to the period of three months. It may be hard either way. The course for assignees to take in such cases, is, to proceed with great caution; to report the special circumstances to the creditors, and to obtain their sanction and indemnity for any measure which it may be necessary to take in order to obtain possession of the property. We, however, are not to weigh the comparative hardship between the assignees on the one hand, and the rest of the community on the other; but are to give that which we conceive to be the just construction of the act, in order to effect the intention of the legislature. And, looking at the whole of this act, in order to give that construction, it appears to me that the act done by the assignee in this case was not done in pursuance of the act of parliament, as that phrase is used, but was done with reference to the rights of

property with which he was vested in his character of assignee; and, consequently, that this action was well brought, although it was commenced after the expiration of three months from the fact committed.

Mr. Justice Parke.—I entirely concur in opinion with my learned Brothers. I think this clause was not intended to place assignees in a situation different from that they were in before.

Rule discharged.

1828. }
Dec. 17. } MORLEY AND OTHERS v. HAY.

Stoppage in Transitu—Waiver of Lien.

1. *Where goods were sent directed to the residence of the buyer, arrived at the warehouse of a wharfinger, and subsequently, the buyer being insolvent, the contract between him and the seller was rescinded, but no application was made to the wharfinger until six weeks after their arrival at the warehouse: it was held, that the mere delay in applying to the wharfinger did not determine the transitus; that the goods were still in transitu; and consequently that the wharfinger could not set up a lien upon the goods in respect of the general balance due to him from the seller.*

2. *Where a person was assumed to have had a lien upon goods for his general balance as a wharfinger, and upon being applied to by the consignor made a charge only in respect of the particular goods; but was not paid at the time on account of the difficulty of getting change for a bank note; and the card of the consignor, with the consent of the wharfinger, was nailed on the goods, and the parties separated upon the understanding that the consignor should send for the goods and pay the sum which had been named:—Held, that these facts amounted to a waiver by the wharfinger of his lien for his general balance, and that he could not detain the goods after a tender of the sum he had previously named.*

Trover for a log of mahogany.—The cause was tried before the Lord Chief Baron, at the Spring Assizes 1828, for the county of Derby, when the following appeared to be the principal facts.

The plaintiffs were timber merchants, and in a course of dealing with one Gam-

(1) 5 Bing. 270; 7 Law Journ. C.P. 58.

ble, had consigned to him the log of mahogany in question. It was directed to Gamble at a place called Shottle Gate in the county of Derby; and in the course of its carriage, by a canal, it came to the wharf of the defendant, who was a wharfinger, at a place called Chase Wharf a few miles from Shottle Gate. After the mahogany had arrived at the defendant's wharf, but before its arrival was known, Gamble wrote to the plaintiffs informing them that he should not be able to keep up his payments, and saying that he should prefer their stopping the log, and selling it to another customer. About six weeks afterwards, one of the plaintiffs called at the defendant's wharf: saw the log, and stated that he came to take it away; the defendant stated that there was 17*s.* due upon it; the plaintiff produced a one pound note and offered it to the defendant; the latter was not able to give the change, and it was agreed that the log should be sent for. The defendant told the plaintiff he might then take it if he liked. The plaintiff gave the defendant his card and requested the defendant to nail it on the log, which he accordingly did. When the plaintiff sent afterwards for the log, with the 17*s.*, the defendant refused to give it up unless the whole balance due from Gamble to him were paid.

The Lord Chief Baron, in leaving the case to the jury, observed, that, it was necessary for the plaintiffs to shew a property in the mahogany. There was no doubt that originally they had such property; but, as soon as he sold it and launched it on the canal, it became the property of Gamble, and they were creditors of Gamble for the price. The defendant contended that when the mahogany arrived at his wharf it was Gamble's property; and that he the defendant had a lien upon it for all the money which Gamble owed him. "A wharfinger," the learned Judge continued, "has a general lien; and if it is a necessary part of his business to pay the freight, I think the lien applies to that, as well as to the wharfage. At all events, he has a lien for the general balance due to him for wharfage. But there is another part of this case to which it is necessary that I should draw your attention. Supposing for the present, that the defendant had a lien

upon this mahogany for his general balance as a wharfinger, he might, if he pleased, waive that lien; and it was for you to say, from all the circumstances, whether he intended to do so." The learned Judge, then recapitulated the facts, respecting the consent of the defendant to give up the mahogany on being paid 17*s.*; the going off from that arrangement for the want of change; and the nailing of the plaintiff's card upon the mahogany by the defendant at the plaintiff's request. And he told them, that if they were of opinion that the defendant did intend to waive his lien, the plaintiffs were entitled to a verdict. The jury found a verdict for the plaintiffs; and, a rule having been obtained by *Mr. Clarke* calling upon them to shew cause why that verdict should not be set aside,—

Mr. Denman and *Mr. Langslow* appeared to shew cause; but, upon the report of the learned Judge being read, the Court called upon the defendant's counsel to support their rule; and accordingly,

Mr. Clarke and *Mr. Clinton*, in support of the rule.—A wharfinger has a general lien for his balance.

[*Mr. Justice Parke*.—Surely, not against a person who has a right of stoppage in *transitu*.]

The *transitus* was here at an end. The goods remained for six weeks after their arrival at the defendant's wharf, before any claim was made by the plaintiffs. If they had perished, the loss would have fallen upon Gamble, and not upon the plaintiffs. The case in respect of the *transitus* resembles that of *Rome v. Pickford* (1), where the consignee had no warehouse of his own; and the *transitus* was held to be at an end on the arrival of the goods at the waggon-office. Here, the *transitus* must be considered as being at an end on the arrival of the goods at the defendant's wharf.

[*Mr. Justice Bayley*.—In that case there was no place of direction on the goods. The principle upon which that case went was, that, if it is the habit of a trader to let the goods remain at the waggon-office, until he gives them a direction, the *transitus* is at an end on their arrival there, unless the consignor gives them an ulterior direction.]

(1) 1 Moore, 526; 8 Taunt. 83.

[*Mr. Justice Parke.*—And even if you are entitled to a general lien, you cannot insist upon it against the right of the consignee to stop the goods *in transitu*. That was held in the case of *Oppenheim and another v. Russell* (2).]

That was the case of a carrier.

[*Mr. Justice Bayley.*—Be it so. Still a wharfinger who sets up a lien for his balance against the consignee, must rest upon the rights of that consignee.]

But the *transitus* is not to last for ever.

The goods would scarcely be said to be *in transitu*, after they had been six weeks at the wharf. In the case of *Richardson v. Goss* (3), the contract was rescinded before the arrival of the goods; and *Mr. Justice Chambre* observed, that, "if a man be in the habit of using the warehouse of a wharfinger as his own, and make that the repository of his goods, and dispose of them there, the journey would be at an end when the goods arrived at such warehouse."

[*Mr. Justice Bayley.*—But you have not that fact in this case; and if you had, you would be under this difficulty: you told the plaintiff the freight was but 17*s.* and that upon payment of that, he might have away the mahogany. Your lien, if you had any, was therefore waived.]

The plaintiff made no tender of the money. Besides, the defendant does not appear then to have been aware of the extent of his claim. The case of *Boardman v. Sill* (4) appears to be the only one in which the question of waiver of lien has been discussed. The person claiming the lien was there held to have waived it, because, when the goods were demanded, he claimed to hold them as his own property; setting up a ground for retaining them perfectly inconsistent with his lien.

Mr. Justice Bayley.—I think that, in this case, the *transitus* of the goods was not at an end. In the case of *Rove v. Pickford* the consignee had no warehouse of his own; and the goods themselves had nothing about them from which an ulterior destination could be inferred. The facts were altogether different from those of the present case. In *Richardson v. Goss*, the

facts were also very different. There the goods were nominally left at the warehouse belonging to the wharfinger, until they were sent for by the consignee. That fact does not appear in this case; but there is a fact which goes the other way: for it appears that the goods were addressed to Gamble at Shottle Gate; and, until the contrary appears, they must be considered as being on their way to Shottle Gate as long as they remained at the wharf. This was the principle laid down in *Oppenheim v. Russell*. But, upon the second point, I should be of opinion, that the plaintiff was entitled to recover, even if the defendant in the first instance had any lien. That lien was waived by what passed between the plaintiff and the defendant at the wharf. The defendant had no right to lull the plaintiff into a supposed security as to these goods. He told the plaintiff that he might have the mahogany on paying the 17*s.*; and the plaintiff's card, with the assent of the defendant, was put upon the goods. This, I think, amounted to a waiver of the lien.

Mr. Justice Littledale.—I am of the same opinion. There was no evidence to shew that Gamble was in the habit of using the defendant's warehouse as his own; and therefore Shottle Gate must be understood to be the place of their destination. The *transitus* was consequently not at an end. Upon the other point, I am also of opinion, that the conduct of the defendant amounted to a waiver of his lien if he had any.

Mr. Justice Parke.—I concur in opinion with my learned Brothers upon both points.

Rule discharged.

1828. }
Nov. 8. } ALLAN v. HARRISON.

Stamp—Joint and several Liability.

Where an instrument, if executed by one person only, would require but one stamp, the circumstance of its being executed by several, for one common purpose, will not render it necessary that there should be more than one stamp, although the interest of the different persons may not be the same.

(2) 3 Bos. & Pul. 42.

(3) Id. 127.

(4) 1 Campb. 410, note.

Accordingly, where several persons, members of an insurance club, executed a power of attorney, to underwrite policies of insurance on their account, one stamp on the instrument was held to be sufficient, although some of the members themselves insured with the club for their own ships.

Action on a policy of insurance. The defendant, with others, being the members of an insurance club, had authorized the signing of the policy by a power of attorney which had the usual stamp. It was contended, on the part of the defendant, that, as the persons who executed the power did not fill any joint character, but were authorizing the entering into an engagement which would make them separately as well as jointly liable, there should be a separate stamp for each person who executed the power. Subject to this point, the plaintiff obtained a verdict.

Mr. C. Cresswell now renewed the objection. He admitted, that, in the case of *Davis v. Williams* (1), it had been held, that where the subject-matter related to one common fund, although it was separate as to the share of each, one stamp was sufficient. But here there was a difference, inasmuch as where any of the members of the club assured in respect of their own ships they were the assured; and they would not then have a common interest with the assurers. But by—

The Court.—One stamp is sufficient. There is community of purpose; and, to a great extent, community of interest.

Rule refused.

1828. } THE KING v. THE MAYOR AND
Nov. 10. } JURATS OF RYE.

Corporation—Custom—Freeman's Son.

Where the custom of a corporation was, that "EVERY FREEMAN'S SON born in the town after his father was a freeman, should be admitted a freeman on attaining his age of twenty-one years;" and no instance appeared since the time of Queen Elizabeth, of more than one son of a freeman having been ad-

mitted in right of his father:—Held, that the expression "Every freeman's son," when construed by the usage, did not mean "EVERY SON of a freeman;" and that the custom was satisfied by one son of a freeman being admitted.

The question in this case was raised in the form of a mandamus directed to the defendants, commanding them to admit as a freeman of the town of Rye, a person who claimed to be a freeman thereof. The mandamus recited a custom, the existence of which was denied by the defendants in their return to the mandamus. Issue was joined on the return; and the cause came on for trial, before Lord Tenterden, at the Middlesex Sittings after last term.

The issue was,

Whether there was a custom, that "every person being the son of a freeman of the town, born within the same after the admission of his father as such freeman, and having attained his age of twenty-one years," had a right, in respect thereof, to be admitted a freeman.

The facts relative to Thomas Barry, the present claimant, were, that he came within the above description; namely, he was the son of a freeman, born within the town after his father was admitted a freeman, and he had attained his age of twenty-one years. But then came the fact upon which the case was to turn. He had had an elder brother, which brother had been admitted a freeman, and had died. From this the corporation contended that the custom of the borough, as it really existed, had been satisfied.

The facts relative to the borough, as regards this cause, appeared to be as follows:—

Rye was a borough by prescription. The books of the corporation did not carry the proceedings with accuracy to a date earlier than the reign of Elizabeth.

The following were some of the entries:—

9th March—4th Elizabeth.—And further it is agreed that all men born within the town, shall be made free, paying therefore 20s., and every freeman's son to be made free as of old and ancient time hath been accustomed.

(1) 13 East, 232; 1 Phil. on Ev. 490.

9th Eliz.—*Item*—That touching making of freemen's sons, to be used therein as heretofore hath been accustomed, *without fee*.

12th Elizabeth.

1. From henceforth, no person *not born* in the town shall be made free under the pain of 20s.

2. Every person and persons *born* in the town, *not* being a freeman's son *at the time of his and their birth*, shall be made free under the sum of 10l.

3. *Every* freeman's son born in the town shall be free by his father's copy, as of old and ancient time hath been used.

The town clerk, who produced the books, stated, that he was himself a freeman; that his father had been a freeman; that he (the town clerk) had three brothers who were not freemen; and that he knew of no instance of more than one son of a freeman having been admitted a freeman in right of his father.

Lord Tenterden hereupon intimated his opinion, that the expression "every freeman's son," must be understood, with reference to the usage, to mean, that one son of a freeman should be admitted in right of his father; and that the expression could not be construed to mean *every son* of a freeman, since it could never be supposed that since the time of Elizabeth, whence the records were kept regularly, that the different sons of freemen would not have enforced their right if right they had.

There was an instance in the time of Elizabeth, of an admission thus:—

28th Aug.—10th Eliz.—Robert Bennett and John Bennett made free by virtue of *their father's copie*, according to the custom.

But it was not proved that Robert and John were brothers.

It was stated in the opening for the prosecution, that there were two other instances in the reign of Elizabeth, of different sons of the same freeman being admitted; but this fact was not proved.

And, upon the opinion above expressed by Lord Tenterden, a verdict was found for the defendants.

Mr. Adam now moved for a new trial; contending, that the expression "every

freeman's son," in the class No. 3. above mentioned, meant "every son of a freeman." That this construction was necessary; otherwise all the freeman's sons but one would be deprived, under the classes No. 1. and No. 2., of the benefit of admission without paying fines. Thus, none of the sons of the freemen came within either of the classes No. 1. and 2.; because they would be born in the town, and would be the sons of freemen at the time of their birth; and yet if they did not come within the class No. 3., they could not be admitted without paying fines; and that this would be against the plain meaning of the rules, which evidently meant to confer a benefit on freemen's sons. But—

The Court were of opinion, that, under the circumstances, the construction given by Lord Tenterden was the correct one, and

Refused the rule.

[For the history of this borough, see *Oldfield's Representative History*, part 2., vol. 3. p. 418.]

1829. } RICKETTS AND OTHERS, ASSIG-
Jan. 22. } NEES, v. TOULMIN.

Bill of Exchange—Waiver of Notice of Dishonour.

Where the plaintiff, in an action against the drawer of a bill of exchange, does not prove express notice given in due time of the dishonour of the bill, but relies upon certain facts in the defendant's own conduct subsequently, as shewing that he had notice, and knew that he was liable to pay, those facts must be left to the jury; and the Judge at Nisi Prius will not pronounce upon their legal effect without submitting the case to the jury.

This was an action of assumpsit, upon several bills of exchange and notes, of which the plaintiff was either drawer or indorser to the bankrupts, who had been bankers.

Plea—The general issue.

The cause was tried, before Mr. Justice Park, at the last Assizes for Bristol.

The plaintiffs did not prove express notice to the defendant of the dishonour of

these bills and notes; but they offered in evidence a number of circumstances, shewing that the defendant must have known of their being dishonoured, and that he dealt with them as being his own, although they remained in the custody of the bankrupts. One of the facts in question was, that the defendant gave to the bankrupts an order upon the executors of one of the parties to the bills and notes, in which he desired them to pay to the bankrupts the dividend which they, the executors, were about to pay in respect of the debts of their testator. In this order the defendant used the expression "my dividends," when speaking of the dividends on the bills in question, which had then been long over-due. The circumstances combined, appeared to be so strong in favour of the plaintiffs, that the learned Judge observed to the jury, they must find a verdict for the plaintiffs, unless they supposed the defendant had been taken in and cheated.

The officer of the Court thereupon announced a verdict for the plaintiffs; no question having been, in point of form, left for the consideration of the jury.

A rule having been obtained, calling on the plaintiffs to shew cause why the verdict should not be set aside,—

Mr. Manning and *Mr. Follett* shewed cause; contending, that the evidence abundantly shewed that the defendant knew he was liable, and acted under that knowledge.

Mr. Serjeant Merewether and *Mr. Serjeant Bompas*, contra.—Whatever may be the supposed weight of the facts in question, or their probable influence upon the minds of the jury, the question should have been left to them. If due notice was not given, it does not follow that every circumstance indicating an implied promise is to bind the drawer. The case of *Borradaile v. Lowe* (1) is an authority that the promise must be express; and whether there has been such a promise or not, is a question for the jury.

Lord Tenterden.—The conclusion at which I should have arrived upon these facts is that which appears by this verdict. The defendant's own conduct shewed that he knew he was liable. But I cannot say

that, if I had tried the cause, I should not have left the case to the jury.

Mr. Justice Bayley.—I think the defendant's own conduct clearly shews that he knew he was liable; but I think with my Lord that the case should have been left to the jury.

Mr. Justice Littledale and *Mr. Justice Parke* concurred.

Rule absolute.

See *Lundie v. Robertson*, 7 East, 231.

Stevens v. Lynch, 12 East, 38.

1828.—Dec. 19.}

1829.—Feb. 18.}

GALLIERS v. MOSS.

Devise—Mortgage—Residue.

1. *Where a testator was mortgagee in fee, and devised all his freehold estates under certain limitations which could be applicable only to property which was his own:—Held, that the devise did not pass his legal estate as mortgagee.*

2. *Where that testator in another part of his will devised all his stock in trade, cotton-mill, machinery, cupola furnace, mineral tools, implements and utensils, ready money, and SECURITIES FOR MONEY, DEBTS, personal estate and effects, upon trust that the trustees, their heirs, &c. should dispose of the stock, get in the debts, and lay out the produce in the purchase of freehold property, upon certain trusts:—Held, that this devise did not pass the testator's legal estate as mortgagee.*

This was an action of replevin.—Nothing turned upon the pleadings. The cause was tried, at the last Assizes for Hereford, before *Mr. Justice Park*, when the defendant, who justified the distress in question, obtained a verdict. Whether he was entitled to retain that verdict or not, depended upon the construction of a will, which will be hereafter stated.

The will was of *Peter Nightingale*, dated the 6th of May 1803, who was mortgagee in fee of the place in question. He appointed as his executors, certain persons, "his good friends," *John Toplis, esq.*, *Thomas Saxton*, and *John Alsop*; it was under these persons that the defendant justified. The testator then proceeded to de-

wise a certain portion of his real estate, consisting of a mansion which he inhabited, and a mansion-house contiguous to it, to a person of the name of Mary Brown, with certain remainders over. Then, after giving specifically certain other parts of his estate to other parties, and having charged his real estates generally with an annuity, he proceeded to devise thus :—

“And, subject to the payment of the said several annuities and pecuniary legacies, I give and devise all my manors, farms, messuages, lands, tenements, tythes, hereditaments, and real estate, situate and lying in the parish of Matlock and Ashover aforesaid, and in the parish of Crick in the said county of Derby, or elsewhere in England (save and except my said mansion-house at Woodend aforesaid, and the said several closes and hereditaments hereinbefore given and devised to the said Mary Brown, her executors, administrators and assigns, for the term aforesaid,) unto the said John Toplis, Thomas Saxton, and John Alsop, their heirs and assigns, until such time as the said William Edward Shore shall attain his age of twenty-one years, or in case of his death, before he shall attain that age without leaving issue male of his body lawfully begotten, then, until such time as his said sister Mary Shore shall attain her age of twenty-one years, in trust, nevertheless, that the said John Toplis, Thomas Saxton, and John Alsop, or the survivor of them, or the heirs or assigns of such survivor, as shall apply and dispose of the rents and profits arising from my said real estates hereinbefore devised to them, upon such trusts and for the same purposes, as are hereinafter expressed and directed of and concerning the same, and also of and concerning such parts of personal estate as is hereinafter given and bequeathed to them, my said trustees ; but it is nevertheless my mind and will that my said trustees, or the survivor of them, or the heirs or assigns of such survivor, shall have a discretionary power of selling and disposing of such part of my said real estates as are hereinafter directed to be sold and disposed of ; and when, and so soon as the said William Edward Shore shall have attained his age of twenty-one years, then I give and devise unto him and his assigns all and singular my said manors, messuages, farms, lands,

tenements, tythes, hereditaments, and real estates, and parts and shares of manors, messuages, farms, lands, tenements, tythes, hereditaments, and real estates, in the parishes of Matlock, Ashover, and Crick aforesaid, or elsewhere (save and except as hereinbefore mentioned and excepted) ; and when and so soon as he shall have attained his age of twenty-five years, then I also give and devise unto him and his assigns all that my said mansion-house at Woodend aforesaid, and the said several closes and hereditaments hereinbefore given and devised to the said Mary Brown for the term or time aforesaid ; to hold the same respectively unto the said Wm. Edward Shore, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste, other than voluntary waste in pulling down buildings which he shall not re-edify.”

On the trial, the defendant relied upon the part of the will just cited, as being sufficient to carry the mortgaged premises in question to the trustees. But it was afterwards admitted, on the argument, that that part of the will was not sufficient for that purpose, inasmuch as the estate (whatever it was) of the trustees determined at the time William Edward Shore attained his age of twenty-one years, which he did before the time mentioned in the defendant's cognizance. The words upon which the defendant's counsel afterwards relied, as giving the legal estate in these mortgaged premises to the trustees, were the following :

“Also, I give and bequeath all my stock in trade, cotton-mill, machinery, cupola furnace, mineral tools, implements, and utensils, ready money, and *securities for money, debts*, personal estate, and effects of what nature or kind soever and wheresoever, (not hereinbefore specifically bequeathed,) unto the said John Toplis, Thomas Saxton, and John Alsop, their executors, administrators and assigns, upon trust that they, the said John Toplis, Thomas Saxton, and John Alsop, or the survivor of them, or the *heirs*, executors, administrators or assigns respectively of such survivor, do and shall, as soon as conveniently may be after my decease, sell and dispose of my said stock in trade, cotton-mill, machinery, cupola furnace, mineral tools, implements, and utensils, personal estate and ef-

fects, and collect in and receive all such sum and sums of money as shall be due and owing to me at the time of my death, and lay out and invest the same, and also the rents and profits of my real estates (during the respective minorities of the said William Edward Shore, and his said sister), and likewise the purchase-mones arising from the sales, which they, my said trustees, are hereinbefore directed or empowered to make, from time to time, as the same sum and sums of money shall respectively be got in and received, in the purchase of freehold lands, tenements, or hereditaments, situate or lying in that part of the said United Kingdom called England, or in the United States of North America, and convey, settle, and assure the said lands, tenements, or hereditaments, so to be purchased as aforesaid, to such uses, and for such estates, and with and subject to such powers and provisos, as are hereinbefore limited, created and expressed of and concerning my said manors, messuages, farms, lands, tenements, tythes, hereditaments, and real estates, and parts and shares of manors, messuages, farms, lands, tenements, tythes, hereditaments and real estates, hereinbefore given and devised to them, my said trustees, their heirs and assigns, for the term or time, and upon the trusts aforesaid."

The case was argued by *Mr. Talfourd* for the defendant, and by *Mr. Serjeant Russell*, and *Mr. E. V. Williams*, for the plaintiff. The substance of the arguments is all that it may be necessary to give, as the judgment went fully into the arguments themselves, as well as into the authorities which bore upon the point.

For the plaintiff.—The words in the will giving the "securities for money," &c. are sufficient to give the legal estate in these mortgaged premises to the trustees. The words of the trust are, that they or their "heirs" and so on, shall collect the money and then invest it for the purposes of the trust. The use of the word "heirs," in this part of the will, shews that the testator had the disposition of freehold interest in his contemplation.

The question as to what words in a will are sufficient to pass the legal estate in mortgaged premises, has been the subject of frequent consideration in a court of equity ;

though a few of the cases have occurred in courts of law. All that took place previous to the case of *Lord Braybrooke v. Inskip* (1), are in that case reviewed. The manner in which the question has arisen in courts of equity, has been chiefly where the point has been, whether the heir, or the person who would be the trustee of the mortgagee under the statute 7 Anne, c. 19, should be directed to convey ; and those cases were generally disposed of by particular expressions in the will ; and the heir and the trustee united in the conveyance. In the case of *Lord Braybrooke v. Inskip*, Lord Eldon noticed this circumstance, and observed, he thought it not right that the law should be in that state ; and he therefore entered into a review of the cases which had been brought before the courts of equity up to that time. The question in the case was, whether the legal estate, which was in Sir Rowland Alston as trustee, passed by his will to Lady Alston. The words of the devise were "all my real estates, whatsoever and wheresoever, unto my wife the said Dame Gertrude Alston, her heirs and assigns for ever. He also gave all his personal estate to his wife, appointing her and another person executors. The then Master of the Rolls having declared his opinion to be that the legal estate did pass by the will, Lord Eldon observed,—"I am disposed in this case to concur with the opinion of the Master of the Rolls ; meaning rather to state my judgment, that the rule is not, that in every case where general words are used the property shall or shall not pass ; but that in each case you must look at every part of the will for the intention with regard to such property. I do not know in experience any case, in which the proposition is laid down so strong, one way or the other, as it was laid down in *The Attorney General v. Buller* (2). I know no case which states as the rule, that trust estates shall not pass under general words, unless an intention that they should pass appears ; and I incline to think they will pass, unless I can collect from expressions in the will, or purposes or objects of the testator, that he did not mean they should pass. In this case there is no circumstance,

(1) 8 Vesey, 417.

(2) 5 Id. 339.

except one, that I shall observe upon, denoting any special intention. It is the case of a dry trust; all the debts and legacies being long paid, as I now understand. There was therefore a pure legal estate in this testator; nothing remaining to be done but to re-convey. There is no one circumstance in this will to cut down the general effect upon any notion of intention, unless it can be said, that, where he meant to create a trust, viz. as to the personal estate, he joins another person with his wife; giving the real estate to her alone. But that is too thin an evidence of intention to afford much inference. The result is this: a will containing words large enough, and no expression in it authorizing a narrower construction than the general legal construction, nor any such disposition of the estate as is unlikely for a testator to make of any property not in the strictest sense his—as complicated limitations; nor any purpose at all inconsistent with as probable an intention to vest it in his wife, as devisee, as to let it descend.—I know of no case, in which a mere devise in these general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose or objects, or the person of the devisee, has been held *not* to pass the trust estate. If there was any such case, I would abide by it: but I do not feel strong enough upon authority or reasoning to dissent from the decision of the Master of the Rolls—Lady Alston, therefore, has in her the legal estate.” In the subsequent case of *Ex parte Morgan* (3), Lord Eldon expressed himself very strongly to the same effect. The question there was, whether a trust estate would pass by words of general devise, confined by objects appearing upon the will to be *inconsistent* with an intention that it should pass; and, looking to the question of intention, Lord Eldon held, that it did not pass. The other side may probably rely upon the case of *Doe d. Reade v. Reade* (4), where it was held that a trust estate did not pass under a residuary clause in a will. But that case, which was before Lord Eldon in *Lord Braybrooke v. Inskip*, turned upon the particular expressions used in the will, as clearly shewing an

intention that it should not pass. Speaking of the residuary clause, Lord Kenyon said, “That clause is relied upon for this purpose by the defendant; and undoubtedly the words are sufficiently comprehensive to pass this fourth, if it can be collected from the will that the devisor intended that it should thereby pass. In *Chester v. Chester* (5), it was holden, that a remote reversion passed by a general residuary clause, it appearing to be the testator's intention that it should pass. But all this doctrine was fully considered by this Court, and afterwards in the House of Lords, in the case of *Strong v. Teate* (6), where it was determined that the general words in a will may be restrained, in cases where it appears that the devisor did not intend to use them in their general sense. Now in this case the trustee (the devisor) had no beneficial interest in himself; he was a mere naked trustee, though the use was executed in him; and when he set about to make a disposition of his property by his will, he used general words in the residuary clause, giving all his estates, ‘after payment of his debts, legacies, and funeral expenses.’ Now these latter govern and restrain the general effect of the former words, and shew that he only meant to give that in which he had a beneficial interest, and which he had a power of charging with the payment of his own debts. But it is clear that he could not subject the estate in question to his own debts; this satisfies me that he had no idea of disposing of the trust estate.”

There was a case of *Martin v. Mowlin* (7), the marginal note of which is “Mortgage is a charge upon the land; and whatever words in a will would give the money, will carry the land along with it.” And there was a very early case of *Crips v. Grysil* (8), where a devise “of all my mortgages” was held to convey lands mortgaged in fee to the testator. In *Silbercshildt v. Schott* (9) there is a dictum of Sir William Grant, then Master of the Rolls, supporting the principle laid down in *Crips v. Grysil*. The facts of the case were, that a mortgages in fee of estates in Lancashire had obtained

(3) 10 Ves. 101.

(4) 8 Term Rep. 121.

(5) 3 P. Wms. 55.

(6) 2 Burr. 912.

(7) 2 Burr. 969.

(8) Cro. Car. 37.

(9) 3 Ves. & B. 49.

a decree of foreclosure, and afterwards made his will, by which he gave the *interest* or *proceeds* of certain farms in the county of Lancaster, mortgaged to him for 2500*l.*, to his wife for life; and after her decease he gave one third part of the principal money to each of three of his children therein named. The bill was filed, insisting, that, by the terms of the will, the estates in Lancashire were to be considered as part of the testator's personal estate. The Court held, that, if the will was duly executed, the land passed by it: and Sir William Grant put the case hypothetically—"If it had been a mortgage, there is no doubt that it would have passed the land." The present is not the case of a bare trust, like some of the cases which have been cited; but is one in which the party has a substantial and a beneficial interest. So far it is analogous to the cases of lands; for the mortgagee is trustee for the mortgagor; but the trustee here has also that, which for a great number of purposes is considered as personal estate. This sum, if recovered, would be assets in the hands of the executor, and the money in equity would have gone to the trustees, who have the character of executor; but the testator does not leave it there, but gives it specifically to three persons, under whose control it is placed. The money, when recovered and gotten in, is to be laid out in the purchase of real estates, for the benefit of certain persons; which estates are to be subject to the trusts inserted as to his real estate. If, therefore, the question be treated as one of intention, it is impossible to have a stronger proof that the testator intended to dispose of the whole of his property, real and personal, to the trustees during the minority of William Edward Shore, and that, during his minority, they should superintend the whole of his real and personal estates. Can the Court therefore resort to so violent a supposition, as that it was the intention of the testator that the heir should have the legal estate in these mortgaged premises, while the trustees should have an interest in the money recovered by the security?—that he meant to give the fund to the trustees, but the legal remedy to recover it to a person who would have no interest to get it in?

For the defendant.—The proposition of the plaintiff is, that the words "securities Vol. VII. K.B.

for money," will in this case pass the land. With the exception of the case of *Crips v. Grysil*, there is no case which at all tends to the support of such a proposition; and even that case is not in point; for there the expression was "mortgages." Among conveyancers, it would never be supposed that the trustees took the legal estate in the mortgage in question. In the case of *Lord Braybrooke v. Inskip*, the words were abundantly sufficient to describe and to carry real property; and therefore that case is inapplicable. The case itself turned upon words which were admitted to be sufficiently strong in themselves to pass real estates. Lord Eldon, after stating the case, and previous to his giving the judgment cited by the other side, made the following observations:—"Upon the remaining question I give an opinion with a good deal of hesitation and difficulty, upon this consideration: either the legal estate is in Lady Alston as devisee, or in two infants and a married woman, the heirs-at-law. The case therefore raises the question, whether the greater quantum of convenience is on the one side or the other: it must be determined; for it is unseemly, because there are doubts in which party it is, to have the money paid into court, and the infant to convey when of age, as has been done in other cases. It is better to decide it than to bring such doubts upon the record; the point is under circumstances which make it highly expedient, that some principle should be laid down. Upon the cases it is very difficult. The case of *Ex parte Sergison* (10) leaves the question in very considerable doubt: upon that case this observation occurs,—that the real estate being in mortgage, and the mortgage-money being given to the infant himself, it is very different from a case in which the mortgage-money is not given to the infant himself, but to the executor generally, for those entitled to the personal estate. The deviser is much less likely to intend to give a mere naked trust to an infant, having no interest, than if the property secured by the estate is also given to the infant; and Lord Alvanley's ground was not that he thought the mortgaged estate did not pass, but that the infant was not a dry, naked trustee, as he had an interest in the

money secured by the mortgage. Lord Rosslyn did not decide it, but, the heir offering to join, directed him to join, and, the money being the infant's, made a convenient arrangement, thinking it reasonable that he, when of age, should join. That case, therefore, is not a decision one way or the other. The case of *The Duke of Leeds v. Munday* (11), must be attended to with due regard to what is stated in the note to *The Attorney General v. Buller*. In the former case, there is a circumstance aiding much to the decision, as evidence of intention, that the deviser did not mean his estates, in the legal sense, as the estate of a mortgagee in a court of law. The testator had given 'all his estate and effects whatsoever and wheresoever,' subject to the payment of his debts and an annuity. Could he mean the legal estate, that he had as mortgagee, should be so charged? That charge is a circumstance at least of evidence, that he did not intend that under that will those estates should pass.

"The distinction taken, in the argument of *The Attorney General v. Buller*, is this:—on one side it is asserted, that trust estates shall pass by the general words, if there is not something upon the face of the will confining it, and the direct contrary is stated on the other. Where the latter position was collected, I do not know; no authority was stated for it. With regard to the Lord Chancellor's assertion, the difficulty of acceding to either of those propositions, as a statement of an unquestionable fact, is, that the recent authorities shew plainly that no such settled understanding exists; and all that doubt and arrangement shew it: and the quantum of convenience can only be estimated with regard to each will. Upon a limitation of real estate in strict settlement, a vast number of limitations over, contingent remainders, executory devises, powers of jointuring, leasing, raising sums of money, it is impossible to say the intention could be, to give a dry trust estate; for this question attaches upon that, just as much as upon a mortgage. Yet, if you take the simple case of a testator, having an heir-at-law, under circumstances in which you cannot get him to execute, abroad; or if the testator did not

know him, or, as in this instance, two infants, and a feme covert, who must levy a fine,—there the argument of convenience is all the other way, if he gives a mere dry trust estate to an individual competent to do the acts, and at hand to do them, as Lady Alston is.

"The last case was *Ex parte Brettell* (12), and I certainly did not mean to be understood to put anything, as I am now understood at the bar to have done, upon the expression that it was given 'to the use and behoof' of the party. I perfectly agree that giving to a man, 'his heirs and assigns,' is precisely the same. But I meant, that I thought I could collect that the testator intended to give to that individual a property which he could enjoy as beneficially as that property that was his own. I desire, therefore, not to be understood to put that opinion upon any such words, except so far as I could collect the intention from the will, calling in aid the particular situation of the devisee. My meaning was only that it may be a circumstance upon the intention, that the testator did not mean a mere dry trust estate, and not in a beneficial sense altogether his, should pass as his under general words; when, if it did, it was incapable of such a large species of enjoyment as upon the whole will be intended to give in every part of the property."

Lord Eldon, having thus expressed himself, he then, and not until then, goes on to say, as quoted by the other side—"I am disposed in this case to concur with the opinion of the Master of the Rolls," &c. So that the whole of that case is, that trust estates will pass by words sufficient of themselves to pass the freehold, unless an intention to the contrary appear. There is no desire in this case, on the part of the defendant, to dispute that proposition. The next case relied upon by the plaintiff is, that of *Ex parte Morgan*. The case was this: John Williams, a mortgagee in fee, by his will, dated the 25th of June 1794, devised as follows:—"I give and devise all and singular my messuages, tenements, lands, hereditaments and premises, and all my real estate, of what nature, kind, or quality soever, and wheresoever the same

are situate and being, unto my niece Ann Williams, daughter of my brother Edward Williams, of Caerbon, tinman, to hold to her, the said Ann Williams, her heirs and assigns, for ever; subject nevertheless, and charged and chargeable with the payment of one clear annuity, rent-charge, or sum of 20*l.* to be issuing out of my said real estates, and payable to my said brother, Edward Williams, by his said daughter Ann Williams, her heirs and assigns, by yearly payments, for the term of his life."

Now the giving of that annuity was considered, by the then Lord Chancellor, as preventing the general words, "all my real estate," applying to the mortgaged estate; being that out of which he could not grant an annuity. The case goes on to state—

The testator appointed Ann Williams his executrix, and died seised of several freehold estates in July 1794, leaving his nephew Charles Williams his heir-at-law, who, by his will, dated the 30th of November 1795, made the following devise:—"I do hereby give, devise, and bequeath, unto my said trustees, Henry Crump and John Wood, their heirs and assigns for ever, all such real estates as are now vested in me by way of mortgage, the better to enable them, my said trustees, and the survivor of them, and the executors and administrators of such survivor, to recover, get in, and receive the principal monies and interests which may be due thereon."

This testator appointed the trustees executors, and died in October 1801, leaving his wife pregnant, who afterwards was delivered of a son, his heir-at-law. The mortgagor having contracted to sell the premises, an inquiry was directed, whether the infant was a trustee or mortgagee, within the statute 7 Ann. c. 19. The Master, by his report, stated his opinion, that the infant was not a mortgagee or trustee, within the act; to which report an exception was taken. That brought the question before the Court, whether the estate in this original mortgage to John Williams had got into this infant. In the argument in support of the exception, that is, against the opinion of the Master, that the infant was not a mortgagee, they noticed the fluctuation as to authority upon the point, and they noticed the case of *Lord Braybrooke v. Inskip*, as having settled it.

The Lord Chancellor said—"I think this infant is a trustee within the statute. The late cases have taken this turn: that where general words are used, and upon the will the testator makes a disposition inconsistent with the disposition of that which is not his own, you confine the general words. By the first of these wills, every thing is charged with an annual outgoing of 20*l.*, which might last longer than the mortgage. From that circumstance, there is inconsistency enough to shew he did not mean to charge his real estate, as real estate; and it is not charged upon his personal estate. Then, as to the other will, the more reasonable construction is, that the deviser gave his mortgages to these two persons, who are his executors, in order that they might use their title under his will, to get in that money, which by virtue of that will they were to distribute as executors." So that when the whole of that case is considered, with reference to the question of intention, it is an authority rather in favour of the defendant than of the plaintiff. Another case relied upon by the plaintiff was that of *Crips v. Grysil*. It is a singular case altogether, and seems not to be supported upon any principle on which it has been usual to consider the disposition of real property. The subsequent case of *Williamson v. Merryland* (13) was in direct contradiction to it. The case of *Martin v. Monlin*, which is also relied upon by the plaintiff, was, for all purposes of the present argument, a mere dictum, attributed to Lord Mansfield. The doctrine itself there laid down is applicable to the beneficial interest in the subject-matter of the devise, and not to the legal estate. The case of *Roe d. Reade v. Reade*, which has been mentioned by the other side, is one of the same class; the whole being a question of intention, where the words are themselves sufficient to carry the freehold. In the case of *Scilberschildt v. Schiott*, there is undoubtedly a dictum ascribed to the very learned Judge who heard it; but as it was only a dictum, and an observation made hypothetically, it will not receive that attention which it would if it had been an express decision. The cases of *The Attorney General v. Meyrick* (14), *The Duke of Leeds v.*

(13) Cro. Car. 449.

(14) 2 Vesey, sen. 44.

Munday (15), *Silvester v. Jarman* (16), and *Ex parte Horsfall* (17), are against that dictum; for they lay down, that, by a devise of the mortgage debt, the legal estate in the mortgage did not pass. The case of *Fletcher v. Swinton* (18), and that of *Tilley v. Simpson*, which appears in a note to the former, are authorities to shew the limited meaning given to those general words where they are not in themselves adequate to carry the freehold.

The Court took time to consider; and, on the 18th of February 1829, at the Sittings after Hilary term, the judgment was delivered in the following terms by—

Mr. Justice Bayley.—After stating the pleadings, the learned Judge observed—The question was, whether the *locus in quo*, which was mortgage property, passed under the will of Peter Nightingale to these trustees. There were two clauses in the will, under which it was at different times contended that the property passed: one, which conveyed the property which was the subject of that clause, contained words sufficiently large to have included the property in question, but it conveyed that property afterwards to the trustees, for the use of certain persons in strict settlement, and with a great variety of peculiar limitations, which were not properly applicable to mortgage property, but were more properly applicable to property of which the party making the disposition was the sole and exclusive owner; and, upon the principles of the cases which are to be found applicable to mortgage property, we are of opinion that it did not pass under that devise. There was then another clause of the will, by which the testator gave all his money, goods, and *securities for money*. It was insisted, that the mortgage property passed under the words "*securities for money*;" it was given to his executors, administrators, and assigns. There were no words of inheritance applicable to that description of property, but there was afterwards a direction as to the manner in which

the property was to be disposed of; and in one part of it there was a direction that the heirs should deal with the property to which that part of the will was applicable, and for some time the Court had a very strong impression upon their minds, that, by the use of the word "*heirs*" there, they might, under the general words "*securities for money*," consider the mortgage in fee as passing; for otherwise, it was supposed that the word "*heirs*" would have had nothing upon which it could have operated: but, on carefully looking at the will, it turns out that the property which had been originally given, not in that clause, but in an earlier clause of the will, to the trustees, was given to them, their heirs and assigns; and they were, during the infancy of particular persons, to appropriate those rents and profits to the uses which were specified in that case: and the word *heirs*, as it appears to us, in the latter part of the will, would apply to the control which the trustees, their heirs and assigns, would have over the property until some person should come of age, in order to take a beneficial interest under the will in question. It appears to us, therefore, looking at the whole of the will, that no advantage can be taken, and no inference drawn from the use of the word "*heirs*," in that part of the will. Now, if we cannot draw any inference from the use of the word "*heirs*" in that part of the will, it then stands upon the general devise of money, goods, chattels, *securities for money*, and *personal estate*, given to the trustees, their executors, and administrators; and, upon looking at those words, it is the opinion of the whole Court that they are insufficient to pass the mortgage property. The general rule, with respect to mortgage property, I take to be this—(it is to be collected from *Roe v. Read*; and also from the case of *Lord Braybrooke v. Inskip*, and a case also to be found in Mr. Price's Reports): that you must in the first place have words sufficient in order to pass the mortgage property. In the next place, you must not limit it to such uses as are properly inapplicable to mortgage property. Therefore, we think, it does not pass under the first clause; because then it is limited to uses not properly applicable to mortgage property; and, we think, that it does not pass under the latter clause, because there

(15) 3 Vesey, 348.

(16) 10 Price, 78.

(17) 1 M'Clel. & Younge, 292.

(18) 2 Term Rep. 656.

are not words adequate to the passing of such property. There was a case of *Crips v. Grysil*, in *Croke Charles*, 37, which was relied upon; in which the words certainly were very similar to those in the case in question, but, on looking at the record of the special verdict in that case, it turns out that there *were* words there going greatly beyond the report in *Croke Charles*. The report of the case in *Croke Charles* mentions the gift of the testator's goods, chattels, mortgages, and securities for money. The question was, whether that would pass a mortgage in fee. Now, on referring to the record of the special verdict in that case, it turns out that the language of the will, which was an inaccurate will, and very short, was this: the testator begins "In the name of God, Amen." Then, "I give the residue of my goods not bequeathed," (he having made no disposition of anything prior to that period of time) "my chattels, bonds, mortgages and securities for money, to my son Robert Kaye, and I do make him my full and sole executor; yea, and also my heir of this freehold." Now, the special verdict states the indenture of mortgage, which was a feoffment and mortgage in fee; and it does not appear that the testator had any other property but that freehold estate of which he could have been considered as making Robert Kaye heir: it is true that he afterwards limits that to Robert Kaye, so long as he shall have heirs male of his body; and if he should cease to have heirs male of his body, then it is limited to another Robert Kaye, (I take it not his son, but the son of another child of the testator,) to him and his heirs male also; but I think the distinction between this case and the case in *Croke Charles*, and that which prevents its being an authority to say that the words in the present will are adequate to convey the property in question, is this: that there, not only he uses the words mortgages and securities for money, and makes him executor, but he also makes him heir, "yea, and also my heir of this freehold estate." For these reasons, we are of opinion, that that case is not an authority to say, that the words "goods and securities for money," when limited to his executors, administrators, and assigns, and that when there is nothing else in the whole of the will to shew any intention in that part of

the will to pass freehold property, are not adequate to pass freehold estate, and consequently that the mortgage in question did not pass to these trustees, and therefore, that the avowry which is made under them cannot be supported.

Rule absolute.

[The following cases, which occurred in November last, could not be given earlier for want of the papers in the causes.]

1828. }
Nov. 7. } HELPS v. GLENISTER.

Game—Sale of Pheasants.

The buying of pheasants is, in all cases, prohibited by the statute 58 Geo. 3. c. 75; and consequently a contract for the sale of live pheasants, though for the purpose of breeding, is void.

This was an action of trover for live pheasants.

Plea—The general issue.

At the trial, before Mr. Justice Holroyd, at the Summer Assizes for the county of Bucks, it appeared, that, in the month of October 1827, the plaintiff, who was a dealer in pheasants residing at Bayswater, applied to the defendant, a breeder of pheasants residing in Buckinghamshire, to purchase some live pheasants, which were kept in pens. It was agreed, that the plaintiff should purchase twenty-seven old birds, at the rate of 5*l.* 10*s.* per score; he paid for them, and the defendant agreed to keep them at 2*d.* per head per week, until the plaintiff should take them away. The plaintiff afterwards agreed to buy one hundred young birds, at 4*l.* per score, and paid 2*s.* 6*d.* as a deposit, and the defendant agreed to keep them at the same rate, until the plaintiff could conveniently take them away. Three fourths of the young birds were hens, which bear a higher price than cocks, being more valuable for breeding; and the price was calculated accordingly. The plaintiff afterwards took away the twenty-seven old pheasants, and thirteen young ones, and subsequently demanded the remaining eighty-seven; and tendered

the defendant the price agreed upon. The defendant refused to deliver them.

The learned Judge was of opinion that the buying of these pheasants was prohibited by the statute 58 Geo. 3. c. 75, and that no property passed to the plaintiff by the contract of sale. The plaintiff was therefore nonsuited.

Mr. B. Monro now moved to set aside the nonsuit; he conceded, that if the purchasing of these pheasants had been prohibited by the statute 58 Geo. 3. c. 75, the plaintiff could not maintain the action. But he contended, that, by former statutes for the preservation of game, the selling of game was prohibited only in certain cases, and the statutes on this subject were passed in order to prevent the destruction of game. The purchasers of live pheasants for the purpose of breeding, are not within those statutes; the 2 Jac. 1. c. 27. s. 4. enacts, that "every person who shall sell, or buy to sell again, any deer, hare, partridge, or pheasant, (*except* partridges and pheasants reared and brought up in house or houses, or brought from beyond seas) shall forfeit for every deer, hare, or pheasant so bought 20s.

The statute 5 Anne, c. 14, after reciting that the existing laws were insufficient to prevent the destruction of game, by reason of the multitude of higlars and chapmen, who encouraged idle persons to neglect their employment to destroy the same, enacted by sec. 1, that all the laws then in being for preservation of game, not thereby repealed, should continue in force. Sec. 2. prohibits any higlar, chapman, &c. from selling any pheasants, &c.; the exception in sec. 4, 2 Jac. 1. c. 27, not being repealed, was therefore continued by the express words of sec. 1. of 5 Anne, c. 14. The statute 28 Geo. 2. c. 12. was passed to remove doubts as to the meaning of the word "*chapman*," and left the law in other respects as it was before. If that were so, the selling of pheasants reared in houses was not prohibited before the statute 58 Geo. 3. c. 75. Now that statute is entitled, "An act for the more effectual prevention of offences connected with the unlawful destruction and sale of game." This statute, for the first time, makes the buying of a hare, pheasant, &c. an offence. It recites, that selling game was already prohibited,

and proceeds to subject the party buying to a penalty. But the buying is only made an offence in those cases where the selling would have been an offence before; and the selling pheasants reared in houses was not prohibited.

[*Lord Tenterden*.—I want to see the evidence that the defendant *did* rear them.]

It was proved that the defendant was a breeder of pheasants, and that the pheasants in question were openly exposed for sale by him in pens. It was therefore fair to presume, that they were reared in a house by him. But supposing the purchase in this instance to have been within the words, it was not within the spirit of the statute, which was passed to prevent the destruction of game; whereas the object of the parties here was its *preservation*,—the pheasants having been purchased for breeding, and a higher price paid for the hen birds with that view. In *Bridger v. Richards* (1), it was held, that the 3 Jac. 1. c. 12, which prohibits persons from "willingly taking, destroying, or spoiling any spawn, fry, or brood of any sea-fish whatsoever," did not comprehend shell-fish; and if it did, it meant a taking for destruction, and not a taking of oyster spawn for the purpose of removing it to beds for further growth and maturity, to make it marketable. That case therefore shews, that the spirit and object of the act will be taken into consideration in construing the words.

Lord Tenterden.—I think the exception in the statute of 2 Jac. 1. c. 27. s. 4. is not incorporated in the statute 5 Anne, c. 14, or the 28 Geo. 2. c. 12, which statutes prohibit the selling and offering to sale of any game; or in the statute 58 Geo. 3. c. 75, which makes the buying of game an offence. The language of 58 Geo. 3. c. 75. is general; and the exception in the statute 2 Jac. 1. c. 27. seems to be done away with. But if it could be engrafted on the statute 58 Geo. 3. c. 75, it would have been incumbent on the plaintiff to have proved at the trial that the pheasants purchased by him had been reared in a house, or brought from beyond the seas. There was no proof at the trial to bring the case within the words of that exception. I think, there-

(1) 2 Maul. & Selw. 568.

fore, that, in either view of the case, the nonsuit was right; and I think that upon the evidence there is reason to believe that, although the defendant kept the hens, he got the eggs out of the woods.

Mr. Justice Bayley.—I think it is penal in any person to buy, as the plaintiff charges that he did upon this occasion.

Rule refused.

1828. } *DOE d. LIDGBIRD v. WILDING*
Nov. 10. } *AND LAWSON.*

Fine—Seisin—Relation back.

Where a party is not in actual possession, and his right is disputed: and subsequently he is paid rent for the period during which his right was in dispute,—that subsequent acknowledgment of his right does not relate back so as to give effect to a fine levied by him, between the time of the dispute and the time of the receiving of the rent.

This was an ejectment for lands in Kent. At the trial, before Lord Tenterden, at the Summer Assizes in 1828, for that county, the following appeared to be the material facts:—

The lessor of the plaintiff claimed the premises in question as heir-at-law of Francis Lidgbird, who died seised thereof in Oct. 1820. The defendant claimed as devisee of Henry Wilding; and the main question was, whether the lessor of the plaintiff, or Henry Wilding, was the heir-at-law of Francis Lidgbird. The lessor of the plaintiff having proved his pedigree, and thereby established that he was the heir-at-law of Francis Lidgbird, the defendant set up a fine levied by Henry Wilding in Hilary term 1821, with proclamations made in that and the three following terms; and, in order to shew that Henry Wilding, the party levying the fine, was at that time seised of an estate of freehold in the premises in question, proved, that Wilding, in April 1821, having distrained upon the tenant of the premises in question for half a year's rent due at Lady-day 1821, the tenant replevied; and, there being other actions depending between Wilding and other tenants of lands, of which F. Lidgbird died seised, in which it was intended to try the question

—whether the lessor of the plaintiff or Wilding was the heir-at-law of the person last seised, it was agreed between the respective attornies, that one cause only should be tried; and that the rents should be paid in to a banker's, to abide the event of that cause. In pursuance of that agreement, the half year's rent due at Lady-day 1821, was, in March 1822, paid in to a banker's; and it was agreed that it should remain there until after the trial of the cause, and then be paid to Wilding, the defendant in replevin, in case a verdict should be found for him, or otherwise to the plaintiff. That cause was tried at the Summer Assizes 1823, and a verdict was found for the defendant; and the rent was then paid over to the executors of Wilding, he having died in the meantime. It was insisted, on the part of the defendants, that, as the rent which became due on the 25th of March 1821, had been paid to the executors of Wilding, he must be taken to have been seised of a freehold by relation from the time of the death of Lidgbird in October 1820; and, consequently, that he was so seised in Hilary term 1821, when the fine was levied; and that an entry ought therefore to have been made to avoid it. The counsel on the other side relied upon *Lord Townsend v. Ashe* (1), as an authority to shew, that a fine levied before any receipt of rent by a person who had taken possession by wrong, has no effect; and that perception of the rent after the levying of the fine, though for a period antecedent to the fine, was no evidence of a seisin, even at the time when that rent became due. Lord Tenterden was of opinion, that Wilding, not having actually received any rent at the time when the fine was levied, had no seisin.

A verdict having been found for the lessor of the plaintiff,—

Sir James Scarlett now moved for a new trial.—It is clear that if Wilding had received the rent at the time when he levied the fine, he would have had a sufficient seisin. This appears from the case of *Lord Townsend v. Ashe*. Now, he ultimately did receive the half year's rent, which accrued due at Lady-day 1821. F. Lidgbird died in October 1820. The rent received at Lady-day 1821, was in respect of the pre-

ceding half year; the payment of that rent to him was an acknowledgment by the tenant of a right in him accruing at the death of F. Lidgbird. The perception of that rent by him was evidence of a seisin in him, commencing in October 1820, when F. Lidgbird died. It follows then, that Wilding was seised in Hilary term 1821, when the fine was levied. In *Doe on the demise of Osborn v. Spencer* (2), Lord Ellenborough intimated, that the receipt of rent due after a fine levied, for a period antecedent to such fine, was *prima facie* evidence of the party's possession of the premises, by his tenant, during the period for which the rent was received.

The Court took time to consider, and on the 24th of November,—

Lord Tenterden delivered the judgment of the Court.—The case of *Lord Townsend v. Ashe* was cited at the trial to shew that the fine, under the peculiar circumstances of this case, did not operate, because the party who levied it had not then any seisin; and that case seems to be in point. There the fines were levied of shares in the New River, which shares are real property. The fines were levied in Hilary term 1733; at that time the parties who levied the fine had not received any profits of those shares; but, on the 23rd of February 1733, they received from the New River Company the first payment, which was due on the 25th of December preceding; and they afterwards continued receiving the rents till 1740. It was contended, that, as no profits had been received till after the fine had been levied, there was no disseisin, and consequently that the fine did not operate. To this it was answered, that the first payment, though not received till February, was due at Christmas, and that the receipt should relate to the time when the money was due. Upon this point Lord Hardwicke said, "The answer given on the plaintiff's part was, that no rent was received by the defendants till after the fines levied; and this I think a full answer, for till then there could be no disseisin. The profits were in the hands of the Company at the time of the fines levied, and they must be considered as received by them for the party who

had a right, and not for a wrong-doer. Nor can the subsequent payment have relation to the receipt before that time; for fictions and relations in law are good to support right, but not to work wrong." Now that case is an authority to shew that the payment in 1823, of the rent which became due at Lady-day 1821, was no evidence of a seisin in Wilding, even at the time when the rent became due. Here it was insisted that it was evidence of a seisin in Wilding in Hilary term 1821, before it became even due. Upon the authority of that case, we think that Wilding was not seised when he levied the fine; and consequently that the fine did not operate, and was no bar to the present action.

Rule refused.

1828. }
Nov. 28. } PITT v. NEW.

Practice—Affidavit of Debt.

An affidavit of debt, stating that the defendant is indebted to the plaintiff in so much money, for money paid, laid out, and expended by the deponent, to and for the use of the defendant; without adding "at his instance and request," is defective in the King's Bench.—Semble, that in the Common Pleas it is sufficient.

The defendant had been arrested. The affidavit of debt stated, that John New was indebted to the deponent in the sum of 6400*l.* "for money paid, laid out, and expended by the deponent, to and for the use and benefit of the said John New," but it did not allege it to have been paid at the request of New.

A rule having been obtained to discharge the defendant out of custody,—

Mr. Campbell now shewed cause.—In Durnford v. Messiter (1), it was undoubtedly decided, that an affidavit of debt for money lent, and for goods sold and delivered, and for work and labour, is irregular, if it omit to state "at the instance and request of defendant," although it state that it was "to and for his use, and on his behalf;" but

in *Bliss v. Atkins* (2), *Eyre v. Hewlton* (3), and *Berry v. Fernandes* (4), the Court of Common Pleas held, that an affidavit of debt for money paid for a defendant, and advanced to him, need not state "that the payment and advance were at the defendant's request."

Lord Tenterden.—We cannot but feel very great respect for the opinion of the Court of Common Pleas; but we are bound to exercise our own judgment on every case submitted to our consideration. The fact of one man's having paid money to the use of another, does not (unless it has been paid at the request of that other) give him any cause of action against that other; because, a man cannot of his own will pay another man's debt, and thereby convert himself into a creditor. It is perfectly consistent, therefore, with the facts stated in the affidavit, that the plaintiff may not be entitled to recover. The affidavit, consequently is insufficient, and this rule must be made absolute.

Rule absolute.

1828. }
Nov. 28. } MICHLAM v. BATE.

Costs—Non Pros.—Abatement.

A defendant is not entitled to costs upon a judgment of non pros. for not entering the issue, where the issue grows out of a plea in abatement.

In this action, issue in law was joined upon demurrer to a plea in abatement. The plaintiff omitting to enter that issue, judgment of *non pros.* was signed by the defendant for not entering the issue. The defendant's attorneys taxed the costs of judgment of *non pros.*, which the plaintiff refused to pay. The defendant then issued a *ca. sa.*; and the plaintiff, in order to prevent an arrest, paid the money to the sheriff. A rule nisi had been obtained, by *Mr. John Jervis*, to set aside the *ca. sa.* and all subse-

quent proceedings for irregularity, and to have the sum paid to the sheriff restored.

Mr. Follett shewed cause.—According to the general rule, a defendant who obtains judgment of *non pros.* is entitled to costs: *Davis v. James* (1). Even an executor is liable to costs on a judgment of *non pros.*: *Hawes v. Saunders* (2). The books of practice are in conformity with this doctrine.

Mr. Campbell and *Mr. J. Jervis*, contra.—The defendant who obtains judgment of *non pros.* is entitled to costs under the statute 4 Jac. 1. c. 3, whereby it is enacted, "that if any person shall commence any action in any court wherein the plaintiff or defendant might have costs, in case judgment shall be given for him, and the plaintiff after appearance, be nonsuited, or a verdict pass against him, then the defendant shall have his costs." Now, the defendant, having pleaded in abatement, would not have been entitled to costs if judgment of the Court had been given for him after the argument; for the statute 8 & 9 W. 3. c. 2, which enacts, "that if any person shall commence an action, where in demurrer, either by plaintiff or defendant, judgment shall be given by the Court against the plaintiff, the defendant shall have judgment to recover his costs," has been held not to extend to demurrers on pleas in abatement: *Thomas v. Lloyd* (3)—nor to any action where the defendant would not have been entitled to costs upon a nonsuit or verdict: *Thrale v. the Bishop of London* (4).

Lord Tenterden.—If the plaintiff had entered the issue, and the judgment of the Court had been against him, he would not have been liable to pay costs. Here he forbore to enter the issue, and thereby rendered it unnecessary for the defendant to incur the expense of arguing the demurrer. As the plaintiff would not have been liable to pay the costs if the Court had given judgment against him, we think he ought not to be subject to costs, by reason of his having omitted to enter the issue, and thereby

(1) 1 Term Rep. 371.

(2) 3 Burr. 1584.

(3) Comb. 482; 1 Salk. 194; 1 Lord Raymond, 336.

(4) 1 H. Bl. 530.

(2) 5 Taunt. 756.

(3) Id. 704.

(4) 1 Bing. 389.

rendered the expense unnecessary. If we were to hold otherwise, we should place the defendant in a better situation than he would have been in, if the cause had gone on to judgment in his favour after verdict. The rule must therefore be made absolute.

Rule absolute.

1829. }
Jan. 20. } *DOE d. THOMPSON v. CLARK.*

Ejectment—Adverse possession—Evidence.

Evidence, that, within twenty years, a person in possession surrendered up the possession pro forma, and took it again, being told at the same time that he was to hold only so long as the person to whom he gave up the possession pleased,—is evidence to go to the jury, that the whole of the possession, though for many more than twenty years, was permissive, and not adverse; although there be no evidence of payment, or demand of rent, or any other recognition of title.

This was an action of ejectment, in which the lessors of the plaintiff claimed as devisees and mortgagees of John Blackburn, deceased, who had been the owner of an estate in the parish of Bradley, and lord of the manor of Bradley. The cause was tried, before Mr. Justice Park, at the Summer Assizes for the county of Hants, 1828, when it appeared that the action was brought to recover possession of a cottage which stood in the corner of a meadow next adjoining the high road, in the village of Bradley. A hedge and high bank separated the cottage from the meadow; there was no waste in the village, but there was waste at the extremity of the manor. The land on both sides of the road belonged to the lessors of the plaintiff. It appeared, that the cottage had been first occupied by one Weston, fifty-four years ago; and afterwards by one James Phillips. The latter occupied it forty years, till his death, at the age of eighty, in 1827, when it was sold by his son to the defendant. One Holloway, who had been gamekeeper to Mr. Edward Blackburn, in his manor of Bradley, proved, that in 1813 he went with the Rev. Henry Blackburn, who was the

clergyman of the parish of Bradley, and brother of E. Blackburn, the then owner of the estate, to Phillips's house; that H. Blackburn told Phillips and his wife, that he, on behalf of his brother, had come to take possession of the house, and desired them to get another cottage as soon as they could, as his (H. Blackburn's) brother wished to pull it down. Phillips's wife, in the presence of her husband, said she had as much right to be there as Mr. Blackburn; for they had never paid any rent. H. Blackburn told them, it would be better for them to give up quiet possession. The husband said to his wife, "It is of no use making a piece of work; we had better go out at once." Phillips and his wife then went out into the road, without the garden gate, and were asked for the fastenings or keys; they said they were in the habit of fastening their house only on the inside. Phillips was then asked if there was not a fastening; he said there was a chain, which Holloway looked for, but did not find. Holloway then went to his cottage, forty yards off, for a chain, and left H. Blackburn and the others on the road. He brought a chain, put it round the wicket, and locked it. H. Blackburn and Holloway then went into the house, where they remained for a few minutes, and then unlocked and locked the gate. H. Blackburn then told Phillips and his wife, "if he let them in again, it would be during his brother's pleasure;" and then delivered the key to Phillips. It appeared further, that Phillips never paid any rent afterwards. Witnesses were called, on the part of the defendant, to impugn the evidence of Holloway. The learned Judge told the jury, that an uninterrupted possession of land for twenty years was conclusive of the right in ejectment; but that if, during the twenty years, the party in possession had made any acknowledgment that he occupied by the permission of another, that occupation was to be deemed permissive, and not adverse; that payment of rent within twenty years was conclusive evidence, that he who paid occupied with the permission of him to whom he paid it; and that if the occupier made such acknowledgment, otherwise than by payment of rent, it was evidence that he held by permission of another. His Lordship then

desired the jury to consider, whether they believed the evidence of Holloway; and if they did, then, whether Phillips did not, in 1813, acknowledge that he occupied the cottage by permission of E. Blackburn. If they believed the evidence of Holloway, the lessors of the plaintiff were entitled to their verdict.

The jury having found for the plaintiff, a rule *nisi* for a new trial was obtained; against which—

Mr. Selwyn and *Mr. Follett* now shewed cause.—The case of *Doe v. Wilkinson* (1) is precisely in point. The defendant there had enclosed a small piece of waste land by the side of a public highway, and occupied it for thirty years, without paying any rent. At the expiration of that time, he paid on three several occasions 6*d.* rent, and it was held that that, in the absence of other evidence, was conclusive to shew that the occupation of the defendant began by permission, and entitled the plaintiff to a verdict. In this case the circumstance of Phillips, in 1813, having given up the possession to the agent of Edward Blackburn, was evidently an acknowledgment that the premises had been occupied by the permission of the owner of the estate.

Mr. Serjeant Merewether and *Mr. Greenwood*, contra.—The authorities undoubtedly establish, that where the facts are such as to shew that the relation of landlord and tenant exists between the parties, the possession is not adverse. The case of *Doe v. Wilkinson* is very distinguishable. There the house was built upon the waste; the defendant had occupied during thirty years, but during that time no rent was paid. It was afterwards demanded and paid on three several occasions. The payment of rent was an acknowledgment that the defendant held as tenant to the person to whom he paid rent. That was conclusive evidence to shew that the commencement of the occupation was by permission of the person to whom he paid the rent. In this case no rent was ever paid by the defendant, and there was no proof that the cottage was built on the waste of the manor. The plaintiffs produced no title deeds to shew

that the land on which the cottage was built was the property of Blackburn. It appeared that Weston occupied fifty-four years ago. Phillips succeeded him, and continued in possession forty-two years; there was no interruption of the possession except for a few minutes.

[*Mr. Justice Bayley*.—H. Blackburn, in 1813, came to the cottage, and, on behalf of his brother, demanded possession, and Phillips reluctantly gave up the possession.]

That was not a recognition by Phillips that he held as tenant of Blackburn; and no evidence of Blackburn's title was given. Unless the Court come to the conclusion, that, in 1813, Phillips intended to admit that the cottage was the property of Blackburn, there is no pretence for saying that the latter is entitled to recover.

Mr. Justice Bayley.—I think that the rule for a new trial ought to be discharged; there was no evidence to shew under what circumstances the cottage was built. It may have been built by, and afterwards occupied adversely to, the former lord of the manor, or it may have been built and afterwards occupied by Phillips, by the permission of the lord. There must be an adverse possession for twenty years to give title. Phillips was eighty years of age when he died. He probably knew under what circumstances he occupied the cottage, and whether he lived there by the permission of Blackburn. Now Phillips, while living there, in 1813, did an act which was evidence of an acknowledgment by him that he occupied by the permission of the then owner of the estate. The question is, whether the jury were warranted in concluding from that act that he did occupy by such permission. It appeared, that E. Blackburn, under whom the lessors of the plaintiff derived title, then claimed the cottage, and that his claim was reluctantly acquiesced in by Phillips and his wife, for they surrendered the possession to him. H. Blackburn then told Phillips, that he should come there in future, only by the permission of his brother E. Blackburn; and Phillips was let into possession on those terms. It was a question for the jury, under those circumstances to say, whether he remained in the cottage by adverse title

(1) 3 Barn. & Cress. 413.

or by the permission of Blackburn. There certainly was not in this case any payment of rent; the case therefore may not be so strong as that of *Doe v. Wilkinson*; but there was a case for the consideration of the jury. If Phillips, in 1813, had refused to give up possession, and an ejectment had been brought, it is possible that the then owner of the estate might have been able to prove by witnesses, that Weston and Phillips came into possession, and occu-

pied the cottage by permission. I cannot say the jury came to a wrong conclusion, and therefore, I think that the verdict ought not to be disturbed. This rule therefore must be discharged.

Mr. Justice Littledale and Mr. Justice Parke concurred.

Rule discharged.

END OF MICHAELMAS TERM, 1828.

CASES ARGUED AND DETERMINED

IN THE

Court of King's Bench,

COMMENCING

IN HILARY TERM, 10 GEO. IV.

1829. } COTTON v. JAMES, GENT.
Jan. 26. } ONE &c.

Bankrupt—Act of Bankruptcy—Fraudulent Delivery.

1. *A fraudulent delivery of goods by an agent of the trader, will not be an act of bankruptcy in the trader, unless it be made by his authority, or receive his subsequent assent.*

2. *The delivery of goods to a person for mere safe custody, and to prevent their being seized by a creditor, is not an act of bankruptcy, although the person to whom they are delivered happen to be also a creditor.*

3. *"A delivery," to be within the meaning of the 6 Geo. 4. c. 16. s. 3, must be such a delivery as will give some right of property in the goods to the person to whom they are delivered.*

This was an action of trespass for breaking and entering the plaintiff's house; staying there for a long space of time, and taking his goods.

The defendant justified, under a commission of bankruptcy against the plaintiff, the proceedings in which were set out in the plea. The replication took issue on the act of bankruptcy.

The cause was tried, before Lord Tenterden, at the Westminster Sittings before the present term, when the following appeared to be the principal facts upon the question afterwards argued in court (1).

The defendant relied upon an act of bankruptcy committed by the plaintiff, in respect of that which he contended, was a "fraudulent delivery or transfer" of his goods within the meaning of the 6 Geo. 4. c. 16. s. 3.

It appeared that the plaintiff was employed by the defendant to build upon the defendant's land. There was a dispute between them as to the interpretation which ought to be given to the building contract. According to the interpretation contended for by the defendant, the plaintiff would be considerably indebted to him by reason of certain advances made by the defendant. The plaintiff's son was the person who principally managed the building work; and he, apprehensive that the defendant would seize certain goods on his premises to secure the amount of the claim, removed them off the premises, and conveyed them to the premises of one of the persons who was supplying some of the materials which were used in the course of the work. For

(1) The report of the trial at Nisi Prius will be found in *Moody and Malkin's Reports*, p. 273.

the purpose of the argument it was assumed, that this person, to whose premises the goods were removed, was a creditor of the plaintiff; but it did not appear that he had ever made any claim of lien on the goods afterwards. The goods consisted of sashes, and other materials of that nature. The building works were by this means discontinued on the defendant's premises. There was evidence that the plaintiff knew of the discontinuance of the works, and that he approved of it. But there was no direct evidence of his having authorized or assented to the removal of the goods beyond that which was to be inferred from the fact of his son being entrusted by him with the management of the work, and having written to his father, the plaintiff, informing him how he intended to dispose of the property. These letters were found among the plaintiff's papers by the messenger under the commission.

The plaintiff's counsel contended, that these facts did not amount to a fraudulent delivery within the 6 Geo. 4. c. 16. s. 3.

Lord Tenterden inclined to this opinion. His Lordship observed, that, although the word "delivery" in sect. 3, was one of very general signification, yet, connected as it was in that section with the words "gift or transfer," he thought it must be confined in meaning to transactions of that nature. Supposing this to be the proper meaning, there was nothing in the present case to which the section would apply. But his Lordship thought that the question did not arise; inasmuch as the transaction itself was not brought home to the plaintiff; and it was an established principle that a man should not be held to have committed an act of bankruptcy merely by the conduct of his agent. This being his opinion, he considered that the act of bankruptcy relied upon was not proved; and that the plaintiff was entitled to a verdict. The jury gave 400*l.* damages.

Mr. F. Pollock now moved for a rule to shew cause why the verdict should not be set aside, and a new trial granted; on the ground, first, that the facts did not amount to an act of bankruptcy; secondly, that the damages were excessive. Upon the first point, he contended, that, under the particular circumstances, the removal of the

goods shewed an intention to delay the defendant, the plaintiff's creditor.

[*Lord Tenterden*.—Put the case as favourably as possible for your client. Suppose he was an execution creditor, and that the goods had been removed to avoid his execution, would that be an act of bankruptcy?]

The defendant contends that it would.

Lord Tenterden.—Upon the point of excessive damages, I think the defendant should have a rule to shew cause. But, upon the other point made by *Mr. Pollock*, I think, there is no ground for treating the facts in question as amounting to an act of bankruptcy. The act done was not the act of the plaintiff, but of his son; and there was no evidence of authority or recognition of the act by the plaintiff himself. But even if it had been shewn to be the act of the plaintiff himself, I do not think it would be an act of bankruptcy under the section which has been referred to.

Mr. Justice Bayley.—It was incumbent on the defendant to shew that this was the act of the plaintiff himself, and was done fraudulently, and to defeat or delay the creditors. There was no evidence of this. On the contrary, the removal of the goods, seems to have been for the purpose of securing them.

Mr. Justice Littledale.—I am of the same opinion. I think that a delivery of goods, to be within the meaning of this act of parliament, should not be a delivery for mere custody; but that it should be that which will convey to the person to whom the goods are delivered, a lien, or some right of property in them.

Mr. Justice Parke.—I concur in opinion with my Brother Littledale, that a delivery of goods is not a delivery within the meaning of this act, unless it convey some right of property in the goods to the person to whom the delivery is made. The present case is, in this respect, different from the statute of James (2), which required that such a fraudulent delivery or transfer should be by deed. There is here no evidence that the act was done fraudulently and with intent to delay creditors.

Rule refused, except as to the excessive damages.

(2) See *Eden's Bankrupt Law*, 24.

1829. }
Jan. 27. } CROSSLEY v. BEVERLY.

Patent—Specification.

A patentee is bound to state in his specification any matter which has occurred to him between the date of the patent and the enrolling of the specification, the making known of which will tend to effect the desired object with greater facility,

This was an action on the case, for the infringement of a patent for making an improved gas apparatus.

Plea—The general issue.

The cause was tried, at the Sittings after last term, before Lord Tenterden; when the following appeared to be the material facts. (1)

The patent, which was dated December 9, 1815, had been granted to Samuel Clegg, and by him assigned to the plaintiff. The specification, which was dated June 8, 1816, stated as follows:—"My improved gas apparatus is for the purposes of extracting inflammable gas, by heat, from pit-coal, tar, or any other substance, from which gas or gases capable of being employed for illumination can be extracted by heat; for purifying the gas so obtained, and for measuring it out, and distributing it to lamps, lights, or burners, where light or heat is to be produced by the combustion of the said gas." The specification then described a horizontal flat retort; a purifying apparatus, a gauge or rotative gas meter; and a self-acting governor.

The inventor, Clegg, was called on behalf of the plaintiff; and he stated, on his cross-examination, that he had invented some of the mechanical parts of the apparatus which were described in the specification, at times subsequent to the taking out of the patent. He however added, that before the patent was taken out, he had in his mind a general idea of the whole apparatus.

A verdict having been found for the plaintiff, Mr. Brougham now moved to set it aside, and argued as follows:—

The invention was for "an improved gas apparatus, which consisted of four

parts—a retort, a purifier, a rotatory meter, and a self-acting governor. The question arises on the meter. The gist of the invention consisted in this—that a hollow drum was divided into compartments, and being placed in water, the gas was made to pass through it, and by agitating the water, to cause a rotatory motion: so that each revolution measured a certain quantity of gas. The action was brought by the assignee of the patent, and the patentee was put into the box,—an advantage seldom possessed. On his cross-examination, he admitted, that, although he had conceived the subjects of the patent in his mind, yet he had not reduced them all to writing, nor had he made models of all of them. He had a correct notion of a rotatory meter, and he had made a model of a meter, as represented in fig. 12. of the specification; but he had much improved upon that meter by another, also described in the specification at fig. 10. Now the principal parts of this last meter, which was the one imitated by the defendant, consisted of certain hoods (on which great reliance was placed) for the emission of the gas; hollow spiral axes for its admission; and little buckets which took up water, and occasionally sealed those hollow axes. The patentee admitted that he invented the whole of those three things (except a part of the axis,) between the date of the patent and the date of the specification. Now, I submit, that, although it may not be necessary for a man to make a model of his invention, or to reduce it to writing, yet he ought to have the whole machine in his mind, and not merely a rough idea of it, before he applies for a patent. He ought to know the manner of performing or using his subject, as well as the principle or notion of it. The patent is granted only for that which the inventor knows at the time of obtaining it, and he deceives the King by specifying other things which ought to be the subjects of other patents for improvements: and being bad for a part, by including too much, is void for the whole: *Hill v. Thompson* (2), and *Brunton v. Hawkes* (3).

(2) 8 Taunt. 375; s. c. 2 B. Moore, 456; Godson on Patents, 53, et seq.

(3) 4 Barn. & Ald. 455; Godson on Patents, 60, et seq.

(1) See the Nisi Prius Report of the case in Carr. & Payne, 513.

Lord Tenterden.—The question in this case is, whether or not a patentee may describe in his specification any improvements of the subject of the patent which come to his knowledge between the date of his patent and that of his specification. I think that he may; for in this specification the patentee described two machines for accomplishing the object of his patent—the measurement of gas: the one more complex than the other, but both on the same principle. Suppose that another person had discovered the simpler mode of making a machine before the patentee had signed his specification, then undoubtedly the patent would be void; but that is a risk which the patentee runs by including it: but if the whole be his own, I cannot see why he should not have the benefit of it. It is most beneficial to the public that he should give the best method which he knows. Why is time given to the patentee, if he be not allowed to improve on his original idea until he puts in his specification?

Mr. Justice Bayley.—The patent and the specification are always considered as one instrument; and by the patent, the Crown often gives six months for enrolling the specification. Now, it is clearly most beneficial to the public, that the patentee should describe the best method of using his invention which he knows at the time when he is making his specification. I think, not only that he is at liberty, but that it is his bounden duty, to give the invention to the public in the best manner within his knowledge: and that his patent would be void for not giving all the knowledge which he possessed on the subject at the time of his specifying his invention. If not, then he might keep the improvement to himself; and it would be left to chance, whether it ever came to the knowledge of the public.

Mr. Justice Littledale.—The patentee had a correct idea of his invention at the time he obtained his patent; but a better mode of applying or using the machinery occurs to him before he enrols his specification. If these alterations did not come within the description of the title of the patent, a very different question would arise; but it is admitted that they accord with the title. This patentee might have been called on immediately to describe it, and he would have

given what he then knew. It is a mere technical rule which says, that if a patent be void as to part, that it is void as to the whole; and I know of the technical rule which requires a patentee to specify only that part of his invention which he knew at the date of his patent. Here there was not any deception attempted; everything was done *bonâ fide*. His mind was in an improving state, and he honestly states all that he knew. It would be very hard to punish him for describing his best improvement, and I know of no rule of law which compels us to do it.

Rule refused.

1829. }
Feb. 13. } *Ex parte* LEEK, A BANKRUPT.

Bankrupt—Commitment.

1. *A warrant of commitment of a bankrupt, under the 5 Geo. 2. c. 30. s. 16. or 6 Geo. 4. c. 16. s. 36, for refusing to sign his examination, need not set out the examination itself.*

2. *Such a warrant should in its conclusion limit the imprisonment until the thing should be done, for the not doing of which the bankrupt is committed.*

Accordingly, where a warrant committing a bankrupt for refusing to sign his examination, concluded directing his imprisonment until he should make satisfactory answers to such questions as should be put to him, AND sign his examination,—it was held that such warrant was bad.

Leek, a bankrupt, had been committed by the commissioners under a commission of bankrupt against him. The cause of the commitment, as stated in the warrant, was for not signing his examination (he not having any lawful objection allowed by the commissioners); and the warrant concluded by authorizing his imprisonment until he should full answers make, to their satisfaction, to such questions as should be put to him, and sign and subscribe such examination. This was under the 5 Geo. 2. c. 30. s. 16, which is incorporated in the 6 Geo. 4. c. 16. s. 36.

The bankrupt applied to the Court of Exchequer to be discharged from custody

under this commitment; it being objected on his behalf,—

First—That the examination should have been set out in the commitment.

Secondly—That the commitment professed to authorize an imprisonment for which no cause appeared; inasmuch as there appeared to be no complaint that he had not fully answered, but only that he refused to sign his examination: whereas the warrant was, until he should full answers make, to the satisfaction of the commissioners, and sign and subscribe his examination.

The majority of the Judges of the Exchequer held the commitment to be good. Whereupon the bankrupt applied (to this Court) for, and obtained a rule to shew cause why a writ of *habeas corpus* should not issue to bring him up in order to his being discharged; the same objections being repeated.

Mr. Tomlinson now shewed cause.—The Court of Exchequer decided this to be a good commitment. The power given by the statute to commit is in the copulative. It is to make full answers *and* sign the examination. In the case of *Nobes v. Mountain* (1) it was held, that, where a bankrupt had refused to be sworn; and the commitment was, that he should be imprisoned until he took the oath *and* made sufficient answer to such questions as might be put to him, it was a good commitment.

[*Mr. Justice Parke*.—In that case the present objection was not discussed.]

It was not, certainly. The argument can be carried no further in support of the commitment on this point. But, as to the setting out the examination,—the 17th section of the act in question (5 Geo. 2. c. 30.) shews, that the setting out of the examination is necessary only in cases where the refusal is a refusal to answer proper questions. In those cases it provides that the question shall be specified. But here he has answered; and there is no complaint in that respect. He is committed for refusing to sign his examination. There can be no reason for setting it out. He made no objection to the examination, whatever it was; but he merely refused to sign it. Supposing, however, that the Court should think it a formal defect in the warrant, they

have the power, by the 18th section, of remanding the bankrupt under a proper commitment.

Mr. Humfray, contra.—The defect at the close of the commitment is one of substance; and the Court have not therefore the power of re-committing. The case of *Nobes v. Mountain* was thought by Mr. Baron Hullock, when this question was discussed in the Exchequer, to be a case in point; but it is submitted that it is not. In *Ex parte James* (2) it was decided, that, “if one of the reasons for the commitment be illegal, and the party to continue in custody until the thing so illegally required of him be done, the whole commitment is nought.” The commitment in the present case should have pursued the words of the act, and having stated the thing which ought to be done by the bankrupt, should commit until he did it. If the Court should be of opinion with the bankrupt on this point, it may not be necessary to proceed to the other.

[Here he was stopped.]

Mr. Justice Bayley.—At present, I think, it was not necessary to set out the examination in this commitment for not signing it. But, on the other point, I think the commitment is bad. I mean, that if, in its terms, it would call for a longer imprisonment than is warranted, it cannot be maintained. This was decided so long since as *Yateley's* case, which is in *Carthew*, 291. There, the commitment was, by the Secretary of State, under the statute 35th Elizabeth, for refusing to answer whether he was a Jesuit; and, on *habeas corpus*, it appeared that he was committed “until he should be thence discharged by due course of law;” and the Court held the commitment to be ill, because it should have been “until he answered.” Indeed, all the earlier cases were well considered in that of *Groome v. Forrester* (3). There, a person was convicted under the 17 Geo. 2. c. 38. The subject matter was a complaint by overseers of a parish against the late overseer, for refusing to deliver up a particular book belonging to the parish, called *The Bastard Ledger*. The commitment of the defendant was, that he should be kept in gaol until he delivered

(1) 3 B. & B. 233; 7 Moore, 39.
Vol. VII. K.B.

(2) 1 P. Wms. 611.
(3) 5 Mau. & Sel. 314.

up all and every the books concerning his said office of overseer belonging to the parish. There the commitment went beyond the subject matter of the conviction. So, in *Ex parte James* (4), where a person was committed for insulting magistrates in the execution of their office, the commitment was, "until he should be discharged by due course of law," and it was held to be bad, because it should have been for a time certain. Now, the act of parliament in question imposes three things upon the bankrupt, in default of performing either of which, he is liable to be committed: First, if he refuse to be sworn; secondly, if he make not full and satisfactory answers to the questions propounded to him; and, thirdly, if he refuse to sign his examination. The last part of the clause applies to all of these. If then he had completed two of the steps required,—if he had been sworn; and had fully and satisfactorily answered; but had refused to sign his examination,—surely the commitment should have been confined to that part which was the specific offence of which he was guilty. Here, he ought (according to the offence for which he was committed) to be discharged upon signing his examination; but the terms of that part of the warrant which applies to the time of detaining him, would hold him longer. The case of *Nobes v. Mountain* appears to me to be clearly distinguishable from the present; for there the bankrupt had refused the very first of the three required steps. The commissioners were, therefore, justified in committing him until he performed all of them.

Mr. Justice Littledale.—I am of the same opinion. The bankrupt has complied with all the requisites of the 16th section of this act, except the signing of his examination; and the commitment should, therefore, have been confined to that with which he had refused to comply. If he had made any objection to the examination itself, it might have been necessary to set it out; but, as he was committed merely for refusing to sign it, I think it was not necessary to set it out.

Mr. Justice Parke.—I think it was not necessary to set out the examination in this commitment. That appears to be necessary

only where the person refuses to answer. But, on the other objection, I think the defendant is entitled to be discharged. He is committed until he shall do that, for the not doing of which there appears to have been no previous default in him. The case of *Nobes v. Mountain* is, I think, very distinguishable from the present. There, the bankrupt had refused to do that which was necessary as a preliminary to the whole; namely, the being sworn. He was, therefore, rightly committed until he performed the whole, which would include the preliminary.

Rule absolute.

Mr. Tomlinson then applied to the Court to re-commit the bankrupt under the 18th section of the statute in question, and cited the case of *Ex parte Page* (5), where the Court remanded the bankrupt, there appearing to be a sufficient cause of commitment, although the commitment itself was defective in form.

Mr. Justice Bayley.—At present we are only ordering the *habeas corpus*. Nothing can be decided upon, until he be brought before us.

1829. }
Jan. 26. } VINCENT v. COLE.

Stamp—Written Contract—Extra Work.

Where work has been done under a written contract, and the plaintiff seeks to recover for extra work, which, as he contends, is beyond the contract, he must offer the written contract in evidence, properly stamped, in order that it may be seen whether the contract includes the work in question or not. The Judge at Nisi Prius will not look at the contract for that purpose unless it be stamped.

This was an action for work and labour.
Plea—The general issue.

The case was tried, before Lord Tenterden, at the Sittings before the present term, when the following appeared to be the principal facts:—

(4) 5 Barn. & Ald. 894.

(5) 1 Barn. & Ald. 568.

The plaintiff was a builder, and had performed work for the defendant under a written agreement; but he sought by this action to recover a sum of 91*l.* for extra work, done, as he contended, over and above the agreement in consequence of new orders from the defendant. The statement made on behalf of the plaintiff in the opening was, that the defendant had employed the plaintiff to re-build a house under a contract at the price of 525*l.*; and that he had been paid this sum; but that the plaintiff had also pulled down a shed and made certain excavations which were not included in the contract. It was also stated, that the plaintiff was entitled to recover the remainder of the expense of building a party-wall; only half of which was provided for by the contract.

The surveyor, who proved that the work had been done, proved that a written agreement had been drawn up and signed by the parties. The agreement was not stamped.

Sir James Scarlett, for the defendant, then objected, that, whether certain works were within the terms of the written agreement, could be proved only by the evidence of the agreement itself; and as it could not be received in evidence for want of a stamp, the plaintiff must be nonsuited.

Mr. Gurney, for the plaintiff.—The written agreement is no part of the plaintiff's case. He is not suing upon it. The Court may, if it be thought necessary, look at the agreement though it be not stamped, in order to see whether the work, which is the subject of this action, was included in it. For this the case of *The King v. Pendleton* (1) is an express authority.

Sir James Scarlett, in reply.—In the case of *The King v. Pendleton*, the objection was not taken in the court below to the reception of the evidence; but the evidence having been received without objection, the question became merely as to the weight and effect of the evidence. This was expressly noticed by *Mr. Justice Le Blanc* in that case.

Lord Tenterden said, he thought the best course would be to exclude the written agreement, as it had not been stamped; and to nonsuit the plaintiff for not having properly given it in evidence.

(1) 15 East, 449; 2 Phil. on Ev. 502; Roscoe on Ev. 105.

The plaintiff was accordingly nonsuited; and now—

Mr. Gurney having moved for a new trial, repeating the arguments which had been urged at *Nisi Prius*,—

The Court held, that, the course taken by Lord Tenterden was the right one; and—
Refused the Rule.

[See also *Churchill v. Day*, ante, p. 78, on the subject of work performed out of an estimate.]

1829. { THE KING v. THE COMMISSIONERS
May 26. { OF SEWERS FOR THE LIMITS OF
THE TOWER HAMLETS.

Sewers Rate.

No person is chargeable to the sewers rate in respect of a sewer from which he derives no benefit; although it may be within the jurisdiction and under the controul and management of the commissioners, who may legally rate him for another sewer or sewers.

This was a rule for a *certiorari* to remove certain presentments; and a rate made thereupon. In effect it raised the question as to the legality of a rate made by the Commissioners of Sewers for the Tower Hamlets. The following were the principal facts which bore upon the question:—

The Tower Hamlets, for which the Commissioners were appointed by His Majesty's commission, included several parishes; and among them that of St. John, Hackney (1). From the earliest period the Tower Hamlets have been considered to contain six different levels, or lines of large leading sewers; and all the early presentments and rates appeared to be made with reference to this mode of division. Each level had a distinct leading sewer, with branches of sewers leading into it. The presentments and rates had been separate as to each of them, down to the year 1821; and the

(1) As to the general powers and duties of the Commissioners of Sewers, see *Callis on Sewers*; and *Rex v. the Commissioners of Sewers for Bognor*, 6 Law Journ. K.B. 338; s.c. 8 B. & C. 355; and *Rex v. the Commissioners of Sewers for Notting-ham*, 5 Law Journ. M.C. 92.

amount assigned upon each had from time to time varied. One of these was called The Hackney and Bow Level, or Hackney Level Sewer, which applied to the parish of St. John, Hackney; but only a part of the parish had been assessed in respect of that level. In fact, the parish drainage was effected at a slight expense by means of a brook which communicated with the river Lea. The accounts, in respect of the different levels, had been kept distinct until 1815; when the Commissioners made an order in the following words:—

“Court of Sewers, Tower Hamlets.

“13th May 1815.—Resolved and ordered, that, from this time forth, until a new rate or rates be made, the accounts of this commission be kept under one general head, without any distinction of levels or sewers, to agree with the account kept at the Bank of England; and that the money now in hand be applied to the exigencies of the whole district, and the incidental expenses of the commission.”

In pursuance of this order, all the accounts were kept in one general account.

In 1821 the Commissioners, for the first time, made one general and equal rate of one shilling in the pound on the rental of the whole of the Tower Hamlets; and in 1824 they made another and a similar rate. The inhabitants of the parish of St. John, Hackney, objected to this mode of rating; as it subjected them to the bearing of a portion of the expenses of repairing the sewers belonging to the other levels, which had no communication with their own; and in respect of which repairs they obtained no benefit.

The matter had been several times before the Court in different forms; but the main question in dispute had never been disposed of. That question was now raised by the present rule; and was argued by *Sir James Scarlett*, *Mr. Gurney*, and *Mr. Chitty*, in favour of this mode of rating; and by *Mr. Solicitor General*, *Mr. Campbell*, and *Mr. Broderick*, against it.

The authorities are given fully in the judgment.

The Court took time to consider; and on the 1st of June the judgment was delivered in the following terms by—

Lord Tenterden.—This was an application to the Court for a *certiorari* to remove a rate made by the Commissioners of Sewers for the Tower Hamlets. The rule was applied for at the instance of the inhabitants of the parish of Hackney, and the objection made to the rate was this—that the rate was imposed upon the whole district under the jurisdiction of these Commissioners, namely, the whole district of the Tower Hamlets rateably and proportionably; whereas it was contended, that the rate ought not to be made generally upon the whole district, but that it ought to be, *as until a very late period indeed it had been*, so far as the books and the records of the proceedings of the Commissioners go, a rate separately upon *several distinct parts of this district*, called or usually denominated levels. And it appeared by the affidavits, that the parish of Hackney, except a very small portion, was so situate as that its drainage was into a brook which communicated with the river Lea, so that the drainage of that district could be carried on, and had been carried on hitherto, at a very moderate expense. The other parts of the district, which lay nearer to the river Thames, and which were more populous, and great parts of them entirely covered with houses, were drained by means of covered sewers, erected and maintained at a very great expense; and, it was said, it was unjust to charge the inhabitants of Hackney, who derive no benefit from those expensive sewers, with the maintenance of them, but that they ought to be separately rated as they previously had been, in which case the burthen on them would be much lighter: whereas the present rate had the effect of charging them with the maintenance of sewers from which they derive no benefit. In support of the rate, it was contended, not that the fact was not as alleged by the parties applying; but that, by law, the Commissioners of Sewers of this district, called the Tower Hamlets, could not do otherwise than make an equal pound rate upon all the land, and all the tenements within the district of their commission; that by law they were bound to do so.

Now, it is obvious, that if any such obligation did exist by law, the law would in this case, and probably in many others also, work considerable injustice. It further

appeared (it was suggested to us at the bar, —the two cases that I shall mention were instances of it,) that in many other districts the rate is not made upon the whole district, but that, under the authority and jurisdiction of the Commissioners, the district is divided into several parts, which are usually denominated levels; and the inhabitants of each particular level are charged with the maintenance of the sewers within that level, which are the only sewers from which they derive benefit. If, therefore, we should hold this rate, we should not only overturn that practice which had prevailed in this district, called the Tower Hamlets, for many years up to a very recent period, but we should also be deciding in all the other cases in which separate rates are made for separate and distinct levels, that all those rates are wrong and ought to be quashed. It appeared to us very important, at least, that we should be sure we did right before we came to such a decision, and we therefore took time to consider of it; and, upon consideration, we are all of opinion, that the law is not, as it was contended, in support of the rate: but that it is competent to persons acting under this commission to do that which was formerly done in this instance, and in this place, and still continues to be done in many other districts; namely, to subdivide their districts and rate the inhabitants of separate parts separately; so that the inhabitants of each part may contribute to the expense of maintaining those works by which they derive benefit. That is perfectly analogous to the principle that has always been laid down and acted on generally. I do not speak now with reference to this particular question, which is now raised for the first time. The principle has always been laid down and acted on, that no person is to contribute to the expense except those who derive profit and benefit from it. That is the general principle; that principle is very distinctly mentioned in *Rook's case*, reported in 5th *Coke*, folio 99, b. The point that is now before the Court was not the point in question there: the point there was, whether a particular person, the owner of particular land, the seven acres which had usually maintained a particular bank, was alone bound to repair the bank; or whether the obligation

to repair should be cast upon the owners of a district containing about 800 acres, which was said to be within the same level. The point decided was, that it ought to be upon the occupiers of all the land of those 800 acres that were within this place. That was the point. It was said a reference was then made to the statute of 6 Hen. 6. c. 5, which is one of the old statutes of sewers prior to the statute of Hen. 8; and the language of that statute is somewhat different from the language of that of Hen. 8, and, perhaps, shews more distinctly the power of the Commissioners as well as their duty; for their powers and their duties are equivalent; the power of the Commissioners to rate separately according to the maintenance of the particular works or sewers by which the parties derive benefit. The direction in the statute is, "No person shall be exempt from the rate, whatever his estate or condition may be, he shall contribute to it, whether he be rich or poor, or whatever condition, estate or dignity he may be, he who derives or receives defence, profit, or protection, from the aforesaid walls, ditches, gutters, barriers, causeways," and so on, shall be charged. Not that all who derive benefit from the work within the district, but all who derive benefit from the particular things that are there mentioned, shall be chargeable to it. This case (*Rook's case*) also furnishes an instance, and is one of those to which I allude, of the Commissioners of a large district subdividing their rates into parts on particular levels; for the rate in that case was made by Commissioners who had a commission to survey all walls and so forth in the river Thames in the counties of Kent and Essex. Now, if they had been bound to make one whole rate, the inhabitants of the county of Kent on one side of the Thames might be charged with repairs of sewers and drains that were in Essex on the other side; it is quite impossible to suppose that any thing of that kind should have taken place. There is another case which it may not be improper to mention, the case of *Stafford and Hamston* (2). That was a rate made by the Commissioners of Sewers for the City of Westminster; and the parish of St. Margaret was rated to a

(2) 2 B. & B. 691; 5 Moore, 608.

separate rate by those Commissioners, being one of the parishes within their jurisdiction. The sewer, towards the expense of which the plaintiff was assessed, is in the parish of St. Margaret. The plaintiff was an inhabitant of Kensington, and it appeared that the plaintiff derived no benefit from the sewers in the district to which she was charged ;—it was held, it was competent for her in an action of trespass, brought against the person acting under the warrant of the commission, to prove that fact ; and evidence of that fact having been rejected on the trial, the Court ordered a new trial. And, in the case of *Masters v. Scroggs* (3), it was conceded that the person assessed was not liable unless he derived a benefit from the works. There, the Commissioners of Sewers had assessed a person in respect of drains which communicated with other drains that fall into the great sewer ; but, in point of fact, the level of his drains was so much above the sewer that the stopping of the sewer could not possibly throw back the water so as to injure his premises ; and therefore as he was not, and did not appear likely to be, benefited by the work, he was held not liable to the assessment. For these reasons therefore, without going further into it, we are of opinion that the Commissioners have done wrong in making the rate for the whole district, which would work the injustice I have alluded to. It is competent for them by law to rate separate parts within their jurisdiction and authority in the same manner as has been previously done. A great deal of reliance was placed in the argument, on the word "level," which is found in the report of *Rook's* case, and in which it is said all who be within the "level" were to contribute ; that is very true, but the question is, what is the meaning of the word "level" in that case ? Now, the word "level" does not occur in the act of parliament—it does not occur in the commission ; if we are to attribute to the word "level" the sense sought to be attributed to it in this argument, you will make it an artificial division of the land, whereas the natural import is not an artificial division of the land, but denotes the particular character and situation. So understood, all

those cases, and all those expressions, which were, that the rate is to be made equal upon all the inhabitants of the level, will stand untouched by our decision. The rule therefore for the *certiorari* must be made

Absolute.

1829. } DAVENPORT AND OTHERS v.
Feb. 6. } THOMSON.

Buyer and Seller—Principal and Agent.

1. *Where a person sells goods to another, not knowing at the time that the buyer is an agent, the seller, upon afterwards discovering the principal, may resort to him for payment, although he had debited the agent ; and he may recover against the principal, unless the latter has, in the meantime, paid the agent.*

2. *But, where the principal in such a case is living abroad, and the seller debits the agent, he will not in general be allowed afterwards to resort to the principal ; it being presumed, until the contrary appear, that the seller gave credit to the English agent, and would not have done so to the foreign principal. Whether, for this purpose, the fact of the principal residing in Scotland is to be considered as a foreign residence,—*Quære.**

3. *Where the seller knows that the buyer is an agent, but does not know the name of his principal, he may afterwards, on discovering who the principal is, compel payment from the principal, unless payment has been made to the agent in the meantime.*

4. *Where the seller, with a full knowledge of both facts, that there is a principal, and who that principal is, debits the agent as the person to whom he gives credit, he cannot afterwards resort to the principal, although the latter may not have paid the agent.*

Error from the Borough Court of Liverpool.

The declaration was for goods sold and delivered.

Plea—The general issue.

The cause being tried in the Borough Court, a verdict was found for the plaintiffs ; but the facts were found specially ; and a bill of exceptions was tendered against the charge given to the jury in the Borough Court. The following were the facts disclosed by the record.

One Thomas M'Kune, being called as a witness on the part of the plaintiffs, deposed as follows:—

"That he, the said Thomas M'Kune, was established in Liverpool as a general Scotch agent, and, amongst others, acted as agent for the defendant, who resided in Dumfries. That, in March 1823, he received from the defendant a letter, containing an order to purchase various goods, and amongst others a quantity of glass and earthenware; which letter, with the order, was produced by the plaintiffs' attorney, and was read in evidence, as follows:—

(Copy Letter.)

"Dumfries, March 29, 1823.

"Mr. Thomas M'Kune, Liverpool.

"Dear Sir,—Annexed is a list of goods which you will procure and ship per *Nancy*. [Here follows other matter not material.]

(Signed) "John Thomson."

Memorandum (inclosed in the letter) of goods to be shipped.

12 crates of Staffordshire-ware.

Crown window glass, 10 qr. boxes,
&c. &c.

[Here follows enumeration of other goods.]

That the said Thomas M'Kune provided himself with the goods mentioned in this letter; and that he got the glass and earthenware from the plaintiffs, who were glass and earthenware dealers in Liverpool. That, at the time he ordered the glass and earthenware, he saw the said plaintiff Mountford Fynney himself, and to the best of his recollection, told him that "he (M'Kune) had an order to purchase some goods, and that they were for the same house for whom he had purchased goods from the plaintiffs the preceding year;" and he also stated, to the best of his recollection, "that as he was a stranger to the nature of the goods, he hoped the plaintiffs would let him have the same as before, to save him from blame by his employer." But the said Thomas M'Kune did not shew the plaintiffs the letter containing the order, nor did he mention the name of any principal. That he then either gave the said plaintiff, Mountford Fynney, a copy of the order, or produced to him the original order, that Fynney might himself take a copy; but he rather thought the former was the fact, and that the plaintiff Fynney did not see the original order, though he could not say positively. That

the plaintiff accordingly furnished the glass and earthenware, the amount of which, deducting the discount, was 193*l.* 7*s.* 8*d.*, but, adding the discount, 219*l.* 10*s.*, and rendered invoices thereof to M'Kune, headed thus—

"Mr. Thomas M'Kune

Bought of John and James Davenport"
(which was the plaintiffs' firm).

That M'Kune entered the nett amount, 193*l.* 7*s.* 8*d.*, to the credit of the plaintiffs in an account with them in his books; and charged the same sum, with the addition of two and a half per cent. for his commission, to the debit of the defendant in an account with him, which was according to his invariable course of dealing; and that he sent to the defendant a general invoice of all the goods purchased, comprising the glass and earthenware, but not mentioning the plaintiffs' names. That, afterwards, in April 1823, and before the credit for the goods had expired, M'Kune became insolvent; though, up to the day of his stopping payment, he was in good credit, and could have bought goods on trust to the amount of 20,000*l.*—Whereupon the said mayor and bailiffs, by the said recorder, after stating the evidence, then and there told the jury, that, from the distance of time since the sale took place, there was some uncertainty in the evidence of M'Kune as to the precise words used by him to the plaintiffs, at the time he gave them the order for the goods; but it appeared to him (the said recorder) upon the evidence, that the name of the defendant as principal was not then communicated or known to the plaintiffs, and then and there directed the jury, that if they were opinion, that the defendant's name as the principal *was mentioned* by M'Kune to the plaintiffs at the time the order was given, or that the plaintiffs then *knew* that the defendant was the principal, their verdict ought to be for the defendant: but if they were of opinion that the defendant's name as the principal *was not mentioned* by M'Kune to the plaintiffs at the time of the order being given, and that the plaintiffs did not then know that the defendant was the principal; and they did not think, upon all the said facts of the case, that the plaintiffs, at the time of the said order being given, knew who the principal was, so that they then had a power of electing whether

they would debit the defendant or M'Kune, they ought to find a verdict for the plaintiffs; and that, although the plaintiffs at the time of the sale might think that M'Kune was not buying the goods upon his own account, yet, if the name of his principal was not communicated or made known to them, that circumstance ought to make no difference in the case;—and thereupon the jury aforesaid, after finding it as a fact, that the letter containing the order was never shewn or made known to the plaintiffs, then and there gave their verdict for the said plaintiffs, and 21*l.* 10*s.* damages; and Henry Hall Joy, esq., the counsel, learned in the law, for the said defendant, then and there, and before the giving of the said verdict, did, on behalf of the said defendant, except to the said opinion and direction; and then and there insisted, that part of the direction to the said jury ought to have been, that if they were satisfied that the plaintiffs, at the time of the order being given, knew that the said T. M'Kune was buying the goods as an agent, even though his principal was not communicated or made known to them, the plaintiffs, by afterwards debiting the said Thomas M'Kune, and so rendering the said invoices, had elected to take him for their debtor, and had precluded themselves from calling upon the defendant for payment; and that in such case the verdict of the said jury ought to be for the defendant.

The record, with the bill of exceptions, being removed to this Court by writ of error, the defendant assigned errors reiterating the objection taken in the bill of exceptions. The plaintiffs joined in error; and the case was now argued. (The description "plaintiff" and "defendant" will be used in the argument, as it was used in the court below.)

Mr. Joy, for the defendant, contended for two propositions:—

First,—If a seller, knowing the buyer to be an agent, though buying in his own name, elects to give credit to the agent, he cannot recover afterwards against the principal.

Secondly,—If the seller be ignorant of the fact, that the agent is buying for another, that other may afterwards be sued, unless the seller has abandoned his right to do so.

The other side will contend, that this is a

middle case. But, I say, it is a case within the first proposition; or, if not, that it falls within the condition of the second proposition;—that the right to sue the principal has been abandoned. The facts in the present case are, that the sellers elected to treat the agent as their debtor. They did not choose to inquire who was his principal. He had told them, he was engaged for a house in Glasgow. They knew, therefore, that there was a principal in the transaction. If, then, this had been the case of a foreign merchant, there would have been no doubt on the subject; and there appears to be no sound distinction between the case of a foreign and that of a home merchant. This, in the case of the principal being a foreign merchant, was laid down in the case of *Paterson v. Gandasequi* (1), which has always been treated as a leading case on the subject. The doctrine laid down in that case was confirmed in the case of *Addison v. Gandasequi* (2). There are dicta of Lord Kenyon and Lord Ellenborough to the same effect; the former in *Maans v. Henderson* (3), and the latter in *Moore v. Clements and others* (4).

Mr. Patteson, for the plaintiffs.—The agent in this case said he was buying for the same house for which he had bought in preceding years. The letter, which he had at the time he gave the order, was not shewn to the plaintiffs; and therefore the plaintiffs could have no knowledge of any party to whom they were giving credit. M'Kune was a general Scotch agent, and not a merchant. The present is certainly a middle case; but approaching nearer to the second, than to the first proposition laid down by the defendant's counsel. The proposition should be qualified by the words "for another, known by name;" and then it would be unobjectionable. The cases cited do not bear upon the present question. In *Paterson v. Gandasequi*, the principal and agent went together to the seller. The principal was a foreigner, and the seller did not choose to trust him, and, with a knowledge of the principal, elected to deal with, and to give credit to the agent. Nor does it appear in this case that the state of the account

(1) 15 East, 62.

(2) 4 Taunt. 574.

(3) 1 East, 335.

(4) 2 Campb. N.P. 22.

between M'Kune and the defendant was afterwards affected by the circumstance of M'Kune taking credit for these goods. The case of *Seymour v. Pychlam* (5) goes very far to shew the principle which should govern this case, and to lay down that M'Kune could not be considered as the seller of the goods to the defendant; and that he could not maintain any action for their amount, as upon a contract for goods bargained and sold by M'Kune to the defendant. The same may be collected from the case of *Railton v. Hodgson*, which is mentioned in the argument of the case of *Paterson v. Gandasequi*.

Lord Tenterden.—I think the direction given in this case to the jury was right, and that their verdict was also right. The general rule is, that where a person sells goods to another, who is, in point of fact, an agent at the time, but with which fact the seller is then unacquainted; the seller may afterwards, on discovering the principal, sue that principal; but that his doing so must be subject to the state of the account between the principal and the agent. On the other hand, if the seller knows at the time that the person to whom he is selling is an agent, and knows also *who* the principal is, and yet, with this knowledge, chooses to make the agent his debtor, he cannot afterwards turn round and charge the principal. This, I think, has been properly stated to be a middle case. The seller knew that the goods were not for M'Kune, but for another; though he did not know *who* that other was. He had therefore no means of making an election as to which he would trust—the principal or the agent. He might have inquired who was the principal; and if he had done so, the material fact might have been supplied. But at present it stands, that the principal was not known at the time; and therefore the case falls within the general rule. There is, however, another point of view in which this case might have been considered.—A general rule is, that where a British merchant is buying for a foreign merchant, it shall be presumed, that the seller gives the credit to the English merchant, until the contrary appear. Here, the defendant

was living at Glasgow. Scotland, for many purposes, is not considered as a foreign country; but, as it is out of the reach of English process, it may be doubtful whether such a case, when presented in that way, does not fall within the general rule I have last mentioned.

That, however, is not the question raised in this case. It was here said, that the debiting M'Kune was the making of an election by the plaintiffs to give credit to him, and not to his principal; but the defendant's case was not so put on the trial, but on the ground, that the principal lived in a foreign country; nor is it necessary now so to consider the question. The judgment ought therefore to be affirmed.

Mr. Justice Bayley.—It may often be, that by the course of trade the seller is confined, in the seeking of his remedy, to the agent. It is so, in general, where the agent buys for houses abroad. It might be so perhaps where the principal lives in Scotland; but that is not the question raised in the present case. I think the direction to the jury was right. In common cases, if the principal has paid the agent, that fact would be an answer to the action. But, where the seller knows who the principal is, and yet debits the agent, he is considered as having made his election which of the two he will make his debtor. There are, however, cases in which the agent is personally liable, although the principal is also liable. Here, it is known at the time that there is a principal; but that does not destroy the right of the seller to sue the principal as soon as he knows *who* is the principal. His not asking who was the principal was at his peril. If the principal had paid the agent in the meantime, the seller could not compel him to pay again. This is the rule of law; and it seems to me to be conformable with justice; for justice requires that the principal who has had the goods should pay the seller for them unless he has already paid somebody else. I think, therefore, that the buyer in this case, the principal, has been properly held liable to pay to the plaintiffs, and not to M'Kune's estate.

Mr. Justice Littledale.—In general, a seller, who does not know at the time that there is a principal behind, may resort to him for payment when he discovers him.

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(5) 1 Barn. & Ald. 14.
VOL. VII. K.B.

But if, with a *full* knowledge at the time, he debits the agent, he is said to have made his election, and he cannot afterwards charge the principal. This, however, is neither of those cases. It is known at the time that there is a principal, but it is not known *who* that principal is. The seller therefore could not at that time debit any principal. I think he was not bound to inquire as to this, if he chose to run the risk, either of not finding out the principal, or of the principal, in the meantime, paying the agent. The question which might arise upon the fact that the principal lived in Scotland, was not raised on the trial; and it is therefore not necessary in this case to decide it.

Mr. Justice Parke, having been engaged as counsel in the cause, gave no opinion.

Judgment affirmed.

1829. }
Jan. 23. } SLARK v. BAILEY.

Bill of Exchange—Indirect Notice of Dishonour.

Where the defendant was sued as the DRAWER of a bill; the acceptance of which made the bill payable at the defendant's own house; and the words which so made it payable were in the handwriting of the defendant; and the bill when due was presented at the house of the defendant, and the answer given was, "no effects:"—Held, that this was evidence to go to the jury, in the absence of proof of positive notice, to satisfy them that the defendant knew the bill was not paid by the acceptor; and, the jury having found a verdict for the plaintiff, the Court refused to set it aside.

Assumpsit by indorsee against the drawer of a bill.

Defence, that the defendant had no notice of the dishonour by the acceptor.

The plaintiff gave no direct evidence that the defendant had notice; but he relied on all the circumstances as sufficient to warrant the jury in believing that he had notice. Those circumstances were as follows:—

The bill was drawn by the defendant in his own handwriting. The acceptor made it payable at the house of the defendant, the drawer; and the words after the acceptance,

making it so payable, were in the handwriting of the defendant. The bill when due was presented at the house of the defendant; and the answer was, "no effects." The acceptor had paid a part of the bill; and the present action was for the balance.

Upon these facts it was submitted to the jury, not only that there was evidence sufficient to shew that the bill was accepted for the accommodation of the defendant, but to shew also that he must have known that it was not paid, when presented at his own house. The jury having found a verdict for the plaintiff,—

Mr. Campbell now moved for a rule to shew cause why the verdict should not be set aside. The evidence was not sufficient in point of law, and ought not to have been allowed to go to the jury. The answer given at the defendant's house would not have shewn it to be an accommodation acceptance, even if the answer had been given by the defendant himself. But all inference upon this subject is resisted by the fact, that the acceptor actually paid a part of the amount; which it is not to be supposed he would have done had it been an accommodation acceptance.

Lord Tenterden.—Unless it had been an accommodation bill I do not see why the defendant, the drawer, should have made the bill payable at his own house. There was enough to go to the jury; and I do not see any reason to be dissatisfied with their verdict.

Mr. Justice Bayley.—The acceptor did not live in the defendant's house. The bill was made payable, in the defendant's handwriting, at his own house; and the answer there given is "no effects." How can it be said that this was not enough to go to the jury, to satisfy them that the defendant knew the bill was not paid by the acceptor?

The other Judges concurring,—

Rule refused.

[Upon the question of the necessity of giving notice of the dishonour to the drawer, although the bill be an accommodation acceptance, see *Norton v. Pickering*, 8 B. & C. 610, s. c. 7 Law Journ. K.B. 85.]

1829. } FERGUSON AND ANOTHER v.
Jan. 24. } CARRINGTON.

Buyer and Seller—False Pretences.

1. *Where goods are obtained by false pretences under a contract to pay at a given time, whether the seller, upon discovering the false pretences can maintain an action of trover for the goods against the buyer before the time for credit has expired—quære.*

2. *But it is clear that under such circumstances he cannot maintain an action for goods sold and delivered, before the time of credit has expired; because the form of the action admits the whole transaction to be matter of contract, and that the property passed to the buyer.*

Assumpsit for goods sold and delivered.
Plea—The general issue.

The cause was tried, before Lord Tenterden, at the Guildhall Sittings, before this term. The principal facts were as follows:

The sale and delivery of the goods were admitted by the defendant, who shewed, that they were sold at a certain credit; that the plaintiffs drew upon him certain bills according to the agreed credit, which he accepted; and that the action was brought before either of the bills became due. To get rid of the effect of this evidence, the plaintiffs offered to go into evidence shewing, that the purchase by the defendant was fraudulent; that the goods had been obtained under false pretences; and that shortly after the purchase he sold the goods at an under price. This description of evidence was objected to by the defendant's counsel; who contended, that the form of the action treated the transaction as a sale of goods; and that if it was intended to rely upon the whole being a fraud, the form of action should have been trover.

Lord Tenterden.—I think the whole contract must be treated as null and void *ab initio*; or you must stand to the contract. You cannot treat it as a contract on one hand, and as a fraud on the other.

The plaintiffs were accordingly nonsuited.

Mr. F. Pollock now moved for a rule to shew cause why the nonsuit should not be set aside. He submitted, that, as a general rule, where you are entitled to sue in tort,

you may waive the tort, and maintain assumpsit.

Mr. Justice Bayley.—How can a contract be implied out of facts which, as you contend, shew a fraud?

Mr. Justice Littledale.—The whole is contract; or the whole is fraud. You cannot imply a different contract out of matter, which, as you contend, was not contract, but fraud.

Mr. Justice Parke.—The form of proceeding affirms the whole as contract.

Lord Tenterden.—The case of *Parker v. Patrick* (1) was relied upon by the plaintiffs; as shewing, that, under the circumstances which they were about to prove, trover for their goods would lie. But it must not be taken for granted that that case is law. It seems to lay down as a proposition, that, where goods are obtained under false pretences, no property passes to the buyer. But it is not necessary, in the present case, to dispose of that question; as here the plaintiffs have treated the whole as matter of contract.

Rule refused.

1829. } HILL AND ANOTHER, ASSIGNEES
Jan. 24. } OF HOLMES, v. FARNELL.

Bankrupt—Payment without Notice of Act of Bankruptcy.

1. *Where a sale of goods takes place after an act of bankruptcy committed by the seller, but not known to the buyer, and the buyer bonâ fide pays the amount to the seller, against whom a commission of bankrupt issues within two months afterwards, the payment made by the buyer is protected by the 6 Geo. 4. c. 16. s. 82.*

2. *But, whether the assignees are in such a case entitled to repudiate the contract, and, upon tendering to the buyer the amount of such payment, to have the goods back—quære.*

This was an action of trover, brought for the recovery of a parcel of books; and the declaration contained two counts. In the first count the books were laid to be the property of the bankrupt, before his bank-

ruptcy; and in the second court, they were stated to be the property of the plaintiffs, as assignees, after the bankruptcy. To which declaration the defendant pleaded the general issue of Not Guilty.

The cause came on to be tried, before Lord Tenterden, at the second Sittings in Michaelmas term 1827, at Guildhall, when a verdict was found for the plaintiffs for 1000*l.* damages, and costs 40*s.*; the damages, however, to be reduced, and entered for 1*s.* only, upon the defendant's delivering up the books to the plaintiffs or their attorneys, in the event of the plaintiffs being entitled to hold the verdict; subject to the opinion of the Court upon the following—

CASE.

On the 9th of August 1826, a commission of bankrupt issued against the above-named Nathaniel Reynolds Holmes, under which commission he was duly declared a bankrupt; and the plaintiffs were chosen his assignees; and an assignment of all his estate and effects was made to them on the 8th of September in the same year.

Before and up to the time of the commission, the bankrupt carried on the business of a hop-merchant in the city of London; and, in the course of his business, he had contracted some very considerable debts; and, having afterwards become greatly embarrassed in his circumstances and unable to meet his creditors, he had, during the months of June and July in the year 1826, and before, committed acts of bankruptcy by absenting himself, and beginning to keep house. There was no question as to the sufficiency of the trading, act of bankruptcy, or petitioning creditor's debt, which was on a bill of exchange.

In the month of April 1826, Mr. Joseph Watson was at the house of the bankrupt in London, about the purchase of some hops, but which he did not buy; and, whilst looking at his library there, the bankrupt asked him if he wanted to purchase some books,—saying, that if he did, he should have those in his library cheap, as he had bought them so; but had not time to read them, and had other books at his residence in the country. Mr. Watson, however, declined becoming the purchaser of the books, but took a list of them; and about three months afterwards he mentioned the

circumstance to the defendant, and introduced him to the bankrupt, on or about the 24th of July 1826; the defendant having previously laid the list of books before a bookseller to settle the price for him; and Mr. Watson's nephew, a book collector, having also been consulted upon it. The defendant then went to the house of the bankrupt, and bought his library of books for the sum of 120*l.*, and paid him that sum by a cheque on his banker to that amount. Mr. Watson had no reason to suppose that the bankrupt was in difficulties, or that he had committed any act of bankruptcy whatsoever; nor had Mr. Watson seen or heard of him, between his first interview and the time of the sale.

The defendant having been examined before the commissioners under the commission, the plaintiffs read his deposition at the trial as part of their evidence, in which the defendant deposed as follows,—that is to say, on the 24th of July 1826, "I purchased some books from the bankrupt; I was introduced to him by Mr. Watson; I never before had any dealings with Mr. Holmes. At the time I made the purchase I received an invoice, or list of the books, and I paid for them the same day by a cheque on Messrs. Child & Co. The way I came to make the purchase was as follows: Mr. Watson knew that I was desirous of purchasing a library of books, and about the middle of July 1826, addressed a letter to me, informing me, that he knew where I could make a purchase, and that he would introduce me to the party who wished to dispose of the books; and in consequence, upon the 17th of July, as near as I can recollect, I met Mr. Watson at the Corn Market, and accompanied him to Mr. Holmes's house, in Fenchurch-street. I saw Mr. Holmes's books, and then had a list of the books given to me. I considered of the purchase during the week, and on the following Monday I concluded the purchase. The books were removed in a day or two afterwards. At the time I made the purchase, I understood Mr. Holmes carried on business as a hop-merchant; I had no reason to believe he was a bookseller; I did not know at the time, that Mr. Holmes was in embarrassed circumstances; I had not heard that he had stopped payment."

Previous to the action being commenced,

viz. on the 14th of February 1827, the plaintiffs, as assignees, demanded the books in question of the defendant; but he refused to deliver them up to the assignees; and, in consequence of such refusal, the present action was brought.

The question for the opinion of the Court was, whether or not the plaintiffs, as assignees, were entitled to recover. If the Court should be of opinion that they were, then the verdict to stand, subject however to the damages being reduced to the nominal sum of 1s. upon the defendant's delivering up all the books. But if the Court should be of opinion that the plaintiffs were not entitled to recover, then a nonsuit to be entered.

The case was argued in Easter term 1828.

Mr. Comyn, for the plaintiffs.—The defendant must rely upon the 81st or the 82nd section of the 6 Geo. 4. c. 16. He can scarcely rely upon the 81st section; because, although he is not fixed with the knowledge of any prior act of bankruptcy, the commission was issued within two months after the transaction in question. The 82nd section may raise a different point. That section protects payments made *bonâ fide* before the date of the commission. The case of *Cash v. Young* (1) will be relied on for the defendant; but that case is very distinguishable from the present. The case of *Cash v. Young* was a case of goods sold, in the ordinary course of the bankrupt's trade, openly in his shop; and the goods were paid for a few days afterwards. So that, according to the statute of James, which was then in force, (and which is incorporated in the present Bankrupt Act,) there was a *bonâ fide* payment of an existing debt—a debt contracted in the ordinary course of trade. This is not the case on the present occasion; the statute does not protect sales within the limited time of two months. Here is a sale of property, which by relation is the property of the assignees, not openly in the shop, and not according to the ordinary course of the bankrupt's trade. There was no debt due from the defendant at the time of this transaction: it is impossible, therefore, to treat the payment as the payment of a debt. The case of *Bishop and others v. Crawshaw*

(1) 2 B. & C. 413; 3 D. & R. 652; 2 Law Journ. K.B. 72.

and others (2), which occurred subsequently to the case of *Cash v. Young*, is similar to the present, as shewing that the payment cannot be protected. There, the defendants accepted bills upon the faith that their orders to the bankrupt for a quantity of iron, would be executed; but as there was no debt due at the time, it was held, that the payment of those bills would not entitle the defendant to hold the goods, as against the assignees. The case of *Cash v. Young* being distinguished from the present, this case falls within the principle of that of *Saunderson and others, Assignees of Probert, v. Gregg* (3). There, a sale of goods on the day when, by relation, an act of bankruptcy was committed, was held not to be protected by the statute of James. The present Lord Chief Justice there said, that the statute of James protected payments only, and not sales; and the assignees were held to be entitled to recover. That opinion was acquiesced in; for the verdict was not sought to be disturbed. That case is therefore an express authority in favour of the plaintiffs.

Mr. Serjeant E. Lawes, contra.—The case of *Cash v. Young* is in point for the defendant; and it has not been distinguished from the present in any important circumstance. The case of *Saunderson v. Gregg* was a case in which it was by no means clear that there was a *bonâ fide* sale at all. The Lord Chief Justice, in the report of the case, is made to say, that "the evidence was sufficient;" and the evidence had been directed to the question, whether the sale was *bonâ fide*. But it is argued by the other side, that there was no debt due from the defendant at the time he paid this money; and therefore, that it was not a payment within the meaning of the statute. It so happens that the word "debtor" is left out in the present act; probably to provide for cases where it was doubtful whether the sum paid was a debt or not; and to extend protection to those cases;—but the words actually left in the statute are equal to this case. The defendant buys the goods, and he pays for them. Even if it were necessary to contend that there was a debt due from the defendant for these

(2) 3 B. & C. 415; 5 D. & R. 279; 3 Law Journ. K.B. 65.

(3) 3 Stark. N.P. 72.

goods, the facts would go more to warrant that proposition, than the very extreme and refined one which is put by the other side, in order to shew that there was no debt at the time. The case of *Bishop v. Crawshay* is very clearly distinguishable; as there the bills were not accepted for any debt, or in anticipation of any specific debt; but to assist the bankrupts with a sum in round numbers, not applicable to the order for the goods then in question. The defendant is therefore entitled to the protection given by the 82nd section of the act.

The Court took time to consider; and on this day the judgment was delivered in the following terms by—

Lord Tenterden.—The transaction between the bankrupt and defendant was *bond fide*; but it was within two months of the date of the commission; and the plaintiffs, the assignees, sought to impeach the transaction upon an act of bankruptcy by relation. The case of *Saunderson v. Gregg* was cited on the part of the plaintiffs. The opinion I gave on the trial of that case was acquiesced in without argument; but probably the transaction there was not a *bond fide* one. The facts would lead to the inference that it was not. The defendant in the present case relied upon the 82nd section of the present Bankrupt Act, 6 Geo. 4. c. 16, which protects all payments really and *bond fide* made to any bankrupt before the commission, where the person who makes the payment has no notice of a prior act of bankruptcy. The case of *Cash v. Young* was referred to as shewing the exposition which had been given to this provision, which was the same, in point of substance, under the old law. There, the payment was made while the bankrupt was carrying on business openly in his shop; and that was also the case in the present instance. We think the rule of law should be the same in both cases. One ground upon which we can give effect to this part of the act, without breaking in upon the rights of the assignees, is, by holding that the defendant in this case has a right to retain the goods until the assignees repudiate the bankrupt's contract, and offer to the defendant to pay his money back. What effect that may produce as to the legal rights of the assignees on one hand, and the defen-

dant on the other, we need not now decide. If the assignees choose to try the question by making a tender to the defendant of his money, and demanding back the goods, we will decide the question when it be brought before us. At present, the defendant is entitled to judgment of nonsuit.

Postea to the defendant.

1829: }
Feb. 3. } OLDFIELD V. LOWE.



Contract—Transfer of Chose in Action.

Two parties entered into a contract, by which one was to supply the other with certain machinery; after the machinery had been partly worked, the manufacturer of it by deed assigned it, in its then state, to a third person. The deed was shewn to the party for whom the machinery was intended, who told the assignee to go on with the work, and he would see him paid. The work was accordingly finished by the assignee:—

Held, that he might maintain an action in his own name for the whole amount of the contract.

This was an action in debt for goods sold and delivered; work and labour done and performed; materials found and provided; money paid, laid out, and expended; money lent and advanced; money had and received; and upon an account stated:—tried at the Summer Assizes for the county of Nottingham, 1827, before Mr. Justice Holroyd, when a verdict was found for the plaintiff for the damages in the declaration; subject to the opinion of the Court on the following

CASE.

The defendant, who is a silk-throwster, in December 1825, agreed with Messrs. Hickson and Stringer, of Macclesfield, machine-makers, for them to make part of the machinery necessary for carrying on his business. Some time after the work was begun upon, Hickson and Stringer, by deed, bearing date the 5th of February 1826, assigned all such work and machinery to the plaintiff for a valuable consideration. At this time the work was in an unfinished state; but money had been paid to Hickson

and Stringer on account. The plaintiff, immediately upon the execution of such assignment, entered upon the work and finished it in the month of April following. Before the plaintiff entered upon the work, the assignment was shewn by him to the defendant, who desired him to get on with the work, and told him that he would see him paid. From the time the plaintiff entered upon the work, the wages of the workmen were regularly paid by him, and such parts of the machinery as had not been prepared by Hickson and Stringer were provided by him. In the month of May 1826, a commission of bankrupt issued against Hickson and Stringer, under which they were found bankrupts. The act of bankruptcy, upon which the commission issued, was alleged to have been committed on the 2d of February 1826; but no evidence was offered to prove an act of bankruptcy except the depositions taken under the commission.

During the time the plaintiff was finishing the work left unfinished by Hickson and Stringer, he also performed other work for the defendant on his (the said plaintiff's) own account; and after the whole was finished, the plaintiff delivered to the defendant two bills, one for the work so done on his own account, headed "Mr. Lowe to Matthew Oldfield," amounting to 9*l.* 12*s.*; the other headed "Mr. Lowe to Matthew Oldfield, assignee of Stringer and Hickson, amounting to 528*l.* 0*s.* 4½*d.*" On the 16th of May 1826, the defendant received from the plaintiff the following letter, dated—

"Macclesfield, May 5, 1826.

"Sir,—I once more take the liberty of writing respecting my own account with you. To a bill delivered, 9*l.* 12*s.*; five pulleys, 3*l.* 12*s.*, runner, &c. 8*s.*: £3. 15*s.*; the cleavers I sent you were on my own account, as they were entered to your account in my book, although Mr. Clark erred in putting them down in the wrong bill. I particularly charged my brother to deliver them to you on my account, and he has a letter to that effect.

"N.B. I hope you will take into consideration the state your machinery was in when I engaged in it, as the parties had then drawn more considerably than what was then actually on the premises, as you well know yourself; and as I am likely to be a great sufferer in the end, being com-

pelled as soon as I arrived at home to pay the men their wages, therefore, I hope, Sir, you will not fail in remitting me the above, as the creditors have nothing whatever to do with that.

"I remain, &c.

"Matthew Oldfield."

The defendant not having answered the above letter, he received the following letter from the plaintiff's attorney:—

"Sir,—Unless the money you owe to Mr. Oldfield, of this place, is immediately paid into my hands, together with the costs of this application, I have positive instructions to proceed against you forthwith for the recovery thereof without farther notice.

"Thomas Parrott."

"Macclesfield, May 25, 1826."

The money not being paid, an action was soon after commenced by the plaintiff against the defendant; and the sum of 28*l.* 5*s.* 7*d.* paid to the plaintiff's attorney, Mr. Parrott, for the debt thereon.

The costs were afterwards paid.

On the 5th of May 1826, notice was given by the assignees, under Hickson and Stringer's commission, to the defendant, not to pay the money for the work done by the plaintiff, in completion of that begun by Messrs. Hickson and Stringer, to any person but them; and the balance due for the work, materials, and wages done, found, and paid in the execution of the work and machinery, as well by the plaintiff as by Hickson and Stringer, was, in July 1826, paid by the defendant to their assignees.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover. If he was, then the verdict was to stand; but if not, then the verdict was to be entered for the defendant.

Mr. Clinton, for the plaintiff.—There can be no question against the plaintiff upon the alleged prior act of bankruptcy of Hickson and Stringer, inasmuch as no act of bankruptcy was proved except by the depositions. Those were not evidence against the plaintiff, the action not being brought either by or against the assignees: *Doe d. Mawson v. Liston* (1). The bankruptcy should have been proved, although no notice to contest it had been given. The

remaining question is the principal one,—whether the action against the defendant has been properly brought by the plaintiff. It may be admitted, that the assignee of a chose in action cannot sue in his own name (2), but this is a question of contract; and where the defendant has notice of the arrangement between the plaintiff and Hickson & Stringer, he adopts what has been done, and tells the plaintiff to go on with the work, and that he will see him paid. This makes the case *not* an assignment of a chose in action, but a contract between the plaintiff and the defendant. The defendant, with the power of rejecting the arrangement if he pleased, thought proper to adopt it. Neither can it be said that the promise to pay was within the Statute of Frauds, for it was his own debt; and he was liable to pay some person, at all events. The letters written subsequently do not alter the nature of the transaction or the legal rights of the parties.

Mr. Reader, contra.—The contract between the defendant and Hickson & Stringer, was not adopted by the plaintiff. The defendant, in case of a breach of the contract by the plaintiff, could maintain no action against him, as there was no privity of contract between them. It follows, that the defendant cannot be liable to the plaintiff upon a contract which cast no liability upon the plaintiff towards the defendant. If the debt due from the defendant to Hickson and Stringer had been extinguished, according to the facts of the case in *Lacy and another v. M'Neile* (3), the case might be different; but it seems to be clear, from that case, that unless the contract, as regards Hickson and Stringer, were extinguished, the plaintiff can maintain no action, for the right of action in Hickson and Stringer remains. The letters which passed afterwards may not vary the rights of the parties, but they serve to shew what were those rights in the contemplation, and by the acts, of the parties themselves. From those letters it appears evident that the plaintiff considered the defendant as his debtor only in respect of the private debt. Besides, the undertaking of the defendant to pay the plaintiff, being by parol, was

void by the Statute of Frauds, according to the case of *Anderson v. Hayman* (4).

Mr. Clinton, in reply, was stopped.

Lord Tenterden.—I think the plaintiff is entitled to recover. It may be admitted, that the assignment from Hickson & Co. to the plaintiff, *alone* would not entitle the plaintiff in his own name to sue the defendant. But the defendant, with a knowledge of the assignment, makes no objection to the arrangement, but says, "Go on with the work, and I will see you paid." This surely is an adoption of what had been previously commenced, and was evidence of a contract between the plaintiff and the defendant. As for the letters which passed afterwards, I consider them as having nothing to do with the question as to what was the legal effect of that which had passed previously between these parties. If a man's erroneous confidence as to his legal rights is not to serve him (and we know it is not), I do not see why his erroneous doubts are to prejudice him.

Mr. Justice Littledale.—I am of the same opinion. I do not think the assignment to the plaintiff was the assignment of a chose in action. There was, at that time, no right of action against the defendant in Hickson and Stringer. The work was unfinished, and something remained to be done. The defendant then adopted the arrangement between the plaintiff and Hickson & Stringer, and desired the plaintiff to go on with the work. I do not see how this can be treated as anything but a contract between the plaintiff and the defendant, and certainly not an engagement within the Statute of Frauds. And, with reference to one of the objections relied on by *Mr. Reader*, I think, that, after what passed between these parties, an action might have been maintained by the defendant against the plaintiff if he had failed to perform the work.

Mr. Justice Parke.—I also think that the plaintiff is entitled to recover. The principle laid down in the case of *Atkinson v. Bell* (5) shews, that, at the time this deed was made between the plaintiff and Hickson & Stringer, there was no property in the machines in the defendant, but that the property in them passed to the plaintiff by the

(2) But see *Seaman v. Price*, 4 B. & C. 525; 7 D. & R. 14; 4 Law Journ. K.B. 3.

(3) 4 Dow. & Ryl. 7.

(4) 1 H. Bl. 120.

(5) 8 B. & C. 277; 6 Law Journ. K.B. 258.

assignment. The subsequent recognition of what had passed by the defendant, was evidence of a contract between him and the plaintiff; and the defendant has had from the plaintiff, and from him alone, the benefit of the subject matter of the contract, all that he contracted for. This alone, I think, is sufficient to entitle the plaintiff to recover; without reference to the question, whether the defendant could have maintained any action for nonfeazance against the plaintiff.

Postea to the plaintiff.

1828. }
Dec. 17. } HOLLAND v. DEAKIN.

Prescription—Extinguishment—Costs.

A prescriptive right to the use of water flowing through certain closes, for the purpose of supplying a water-mill, is not extinguished by unity of possession of the mill and such closes.

Where, in trespass, issue is joined on a plea of the general issue, and upon other issues, but judgment goes by default upon a new assignment, and a general verdict is found for the plaintiff, but a new trial granted on the whole record by reason of some one or more issues being improperly found for the plaintiff, the plaintiff will not be entitled to the costs of the first trial in respect of the judgment by default on the new assignment.

Trespass.—The first count stated, that the defendant broke and entered a close of the plaintiff's, called the Pipe Meadow, and one other close of the plaintiff's in Eccleshall, in the county of Stafford, damaged the grass, &c., and cut down, forced up, broke up, broke to pieces, damaged and spoiled divers banks, mounds, dams, boards, pounds and sluices, in and upon the said closes, and converted the said materials thereof, &c.; and cast and threw large quantities of earth, and stones, &c. upon the said closes, whereby he prevented the plaintiff from having the use, benefit, and enjoyment of the said closes, in so large and ample a manner as he might, and otherwise would have had, and from having the use, benefit, and enjoyment of divers large

quantities of water, which before, and at the time of removing the said mounds, &c. had been, and was impounded and kept back by the same, and which by reason thereof had run and flowed over, into, upon, and along divers lands and premises in the holding and occupation of the plaintiff, &c.

Second count—Trespass on the closes named in the first count, damaging and spoiling grass, &c.

Third count, an asportation of goods and chattels.

First Plea—The general issue.

Secondly, to the first count, alleged that the defendant was seised in his demesne as of fee of a certain water-mill, and prescribed, for himself, and those whose estate he hath, their tenants and occupiers of the said water-mill, for the use, benefit, and enjoyment of the water of a certain stream or watercourse running and flowing through the several closes in which &c. through divers other closes, and from thence unto the said water-mill of the said defendant, for the supplying of the said water-mill with water, for the working thereof; and justified the entry and trespasses complained of in the first count, by reason that the mounds and banks, &c. were wrongfully placed across the stream or watercourse upon the said closes, and forced and penned back the water and prevented it from flowing to the defendant's mill.

The Third Plea stated, that the defendant was seised of a water-mill, near and adjoining to another stream or watercourse, and lower down the last-mentioned stream than a certain other water-mill, in the possession of one William Heath, and prescribed for so much of the water of the said stream or watercourse as should not be used or employed by the said William Heath; and justified the trespasses as in the second plea.

The Fourth Plea alleged a seizure of a water-mill, as in the third, and prescribed for a right to enter the closes in which, &c. to cleanse and scour the channel of the watercourse as often as necessary.

The replication joined issue on the first plea, and traversed the rights prescribed for in those subsequently pleaded. The plaintiff then newly assigned other and different trespasses, &c.

Issue joined upon the points traversed

in the replication, and judgment by default to the new assignment.

At the trial, before Mr. Justice Park, at the Spring Assizes for the county of Stafford, it appeared in evidence that the closes in which the trespasses were alleged, as well as the defendant's mill, had both belonged immemorially to the Lord Bishop of Litchfield and Coventry for the time being, in right of his bishopric, as lord of the foreign of the manor of Eccleshall, but had been sold, under powers given by the act 38 and 39 Geo. 3.; and it was thereupon objected that the pleas, as they all claimed easements by prescription, could not be sustained, inasmuch as the unity of possession within time of memory, operated as an extinguishment of the right. The plaintiff's counsel admitted the validity of this objection as to the right claimed in the third plea, which they abandoned, but contended that there was a distinction between rights to water and other easements. The learned Judge, however, thought the objection good; and, under his Lordship's direction, a verdict on all the issues was found for the plaintiff.

A rule to set this verdict aside, and for a new trial, having been obtained, now—

Mr. Campbell and Mr. R. V. Richards shewed cause.—The second and third pleas, on which the defendant relies, claim a right to the water in the plaintiff's closes, which never could have existed by prescription. The sufficiency of this justification may be tried by the question, whether the owners of the closes intervening between the *locus in quo* and the defendant's mill, could have granted the right now set up. It is clear they could not, as such a grant would have been to the injury of the rights of the plaintiff and those whose estate he possesses. But, as he had an entire right over the whole of the water, independently of the argument, that the right claimed in these pleas never could legally have existed, it may be met by the objection urged at the trial, that if it ever did exist it has been destroyed by unity of possession, subsisting so lately as the year 1804, when the mill and the closes first came into the hands of different owners. There is no plainer principle of law, than that a man cannot prescribe for an easement in his own soil; and therefore, unless the defendant alleges

a grant capable of being supported by evidence, he can make out no justification.

Mr. Jervis, Mr. Taunton, and Mr. Justice, contra.—The pleas are good, and the prescription sustainable. Had the mill alone remained in possession of the bishop, he might have prescribed for the use of the water, and the defendant is entitled to set up the same right. The doctrine of extinguishment is not here applicable, inasmuch as an easement of this nature, being *jure naturæ*, is not extinguished by unity of possession. Thus, it has been held, that "if there hath been used, time out of mind, &c. a water-course to run from a river over a close called the Hop-yard, to a watering-place for the watering of the cattle of the occupiers of a rectory, and for other necessities of the said occupiers, and after there is a unity of possession in fee of the place from which, and of the hop-ground over which, and of the rectory and watering place to which, in King Henry 8, and after by him severed again, this watering-place shall be revived, because it is a thing of necessity, and also the water-course is natural:" *Surey v. Pigot* (1). A grant could not have been pleaded or supported by the defendant.

The Court took time to consider, and now—

Mr. Justice Bayley.—Upon looking more carefully into the question relative to the nature of the prescription here set up, than we had done before the argument, and into the cases to which our attention was directed, more especially to the judgment of *Surey v. Pigot* in *Popham*, we are disposed to think, that in strictness such a prescription is valid, and capable of being supported by evidence. Whether such evidence as will support the prescriptive right set out in the pleas can be adduced at the second trial, is deserving of the defendant's consideration; but I think that pleas might, without much difficulty, be framed so as to be free from the verbal objection offered in the argument. It is for the defendant to decide, whether he will again go to trial upon the pleas as they now stand in the

(1) 2 Car. 11 Vin. Abr. 446, tit. "Extinguishment"; 20 Jo. 145; 2 C. 3 Bulst. 339; 1 Bos. & P. 374, n. c.

record, will amend them, or will frame others claiming an immemorial right, or a right within time of memory. It is our opinion that there ought to be a new trial, and that the defendant, if he think fit, should be permitted to amend his plea on payment of costs.

Mr. R. V. Richards then submitted that the plaintiff was entitled to the costs of the former trial: he cited *Booth v. Ibbotson* (2), and the cases there cited, but—

Mr. Justice Bayley.—The ground on which we grant the new trial is, that there have been issues found for the plaintiff which ought not to have been found for him: in the cases referred to, there was no such finding. I have no doubt, that if there be many issues, and all but one be rightly found for the plaintiff, but that one wrongly, the whole record must go down again, and the defendant will not be liable to pay the costs of the former trial. The record must go back in toto, and we cannot impose any terms respecting the costs incurred at the previous trial.

Mr. Justice Littledale.—The new assignment is only required if the defendant should get a verdict on his plea. I do not see how the judgment by default can be insisted upon as a ground for claiming the costs of the trial; and I, therefore, think that the only costs to be paid by the plaintiff should be the costs of amendment, if he think proper to amend, but that the costs of the first trial should abide the event of the new trial.

Mr. Justice Parke concurred.

Rule absolute.

1829. }
Jan. 26. } CLOWES v. CHALDECOTT.

Bill of Exchange—Notice of Dishonour.

Notice of the dishonour of a bill by the acceptor, may be given to the other parties, on the same day that the bill has become due: although the dishonour by the acceptor may have been not an absolute refusal, but a mere neglect to pay on presentment.

Indorsee against the drawer of a bill of exchange.—The cause was tried, at the

Middlesex Sittings after last term, before Lord Tenterden. The question was, whether the defendant had had a proper notice of the default in payment by the acceptor. The following were the facts:—

On the day the bill became due, it was presented by a Notary's clerk at the house of the acceptor; where he saw, not the acceptor himself, but his son; who told him to take it to the drawer (the defendant) for payment. The clerk accordingly went to the defendant on the same day; saw him, and acquainted him with what had passed. The defendant said, he had nothing to do with it; and that the witness had better take it back to the acceptor.

Upon this evidence, *Lord Tenterden* was of opinion that the defendant had had due notice of the dishonour of the bill by the acceptor; and accordingly the plaintiff obtained a verdict.

Mr. Denman now moved for a rule to shew cause why the verdict should not be set aside. The acceptor had the whole of the day to pay the money; and there was no refusal by him at the time when the communication was made to the defendant. I admit you may take out a commission of bankrupt against the acceptor, upon a refusal to pay; and that payment afterwards on the same day will not purge the first delay. But, as regards the drawer and the holder, the acceptor has the whole of the day; unless the acceptor has given an unqualified refusal. In the case of *Burbridge v. Manners* (1), notice was allowed to be good, though given on the same day, but there was in that case an absolute refusal by the maker of the promissory note; and that seems to be the reason given by Lord Ellenborough for allowing the notice. And in *Hartley v. Case* (2), which seems to resemble the present, a letter addressed to the defendant on the same day the bill became due, demanding payment, but not stating in terms that payment had been refused by the acceptor, was held to be insufficient. Here, the acceptor had not refused; the point in that case, as to the notice being given on the same day, was made; but no opinion was given upon it;—the

(1) 3 Campb. 193.

(2) 3 Barn. & Cress. 339; 6 D. & B. 505; 3 Law Journ. K.B. 263.

(9) 1 Young & Jer. 354.

Court being of opinion that the letter was insufficient in not stating as a fact, that the acceptor had refused payment.

Lord Tenterden.—I continue to be of opinion, that the notice in the present case was sufficient.

Mr. Justice Bayley.—I think, that, as it is the duty of the acceptor to pay on presentment, notice of his making default may be given immediately, though on the same day the bill becomes due. If, in this case, the Notary's clerk had promised to go back to the acceptor, it might have been different.

Mr. Justice Littledale and Mr. Justice Parke concurred.

Rule refused.

1829. } *PELLEW v. HUNDRED OF WON-*
Feb. 6. } *FORD, DEVON.*

Hundred, Action against—Notice—Examination—Reversioner.

1. *A person who was not the occupier, but was entitled to the reversion, of premises feloniously set on fire, held entitled to recover damages against the hundred under 9 Geo. 1. c. 22.*

And semble, that the occupier might also maintain an action; each party recovering not more than 200l.

2. *Where the fire took place on Saturday, and the notice directed by the above act, was given on Monday:—Held, that the notice was properly given within "two days" after the damage, as required by the statute.*

3. *Where the person entitled to the reversion had no servant in the care of the premises on his behalf:—Held, that he was the proper person to give in the examination required by the above act, although he was not on the spot at the time of the fire.*

4. *Where the person who gives in such an examination has, at the time, a suspicion of a particular individual, but does not know who is the person that committed the offence, it is not necessary for him to state in his examination, his suspicion of that individual.*

[This case, which established the above points, will be found among the Cases relating to the Duties of Magistrates, p. 84.]

1829. }
Feb. 11. } *FREAKLY v. FOX.*

Executor—Debtor and Creditor.

If the maker of a promissory note be appointed one of the executors of the person to whom it is payable, the right of action upon the note is discharged.

This was an action by the indorsee, against the maker of a promissory note. The note was payable to one Robert Reeves, or order. Reeves died, appointing several persons, and among them the defendant, his executors. The other executors indorsed the note to the plaintiff, who thereupon, as indorsee, sued the defendant; and the question was, whether, by this mode of dealing with the note, the defendant, although he was executor of the payee, could be forced at law to pay the amount.

The declaration contained several counts, but two only became material.

The first count stated the making of the note in the ordinary form. It then averred, that Reeve, the payee, afterwards made his will, and thereof appointed Edward Cope, Charles Cope, Edward Arthurs, and Edward Fox (who in point of fact was the present defendant; but the declaration made no mention of the identity), his executors; that he afterwards died, and that all the executors proved the will; that afterwards Charles Cope died; and that the said Edward Cope, Arthurs and Fox, as surviving executors, indorsed the note to the plaintiff. It then concluded in the usual form;—stating as a legal conclusion from these facts, that the defendant became liable to pay to the plaintiff; and that, being liable, he promised payment.

The second count was the same as the first, except that it made no mention of the death of either of the four executors; and that it averred the note to be indorsed by only one of the executors: namely, Edward Arthurs. It from those facts averred a legal liability in the defendant, and a promise, as in the first count.

The defendant among other pleas, pleaded in bar as follows:—

"That the said Robert Reeves, the said testator, in his lifetime, to wit, on the 20th of January 1817, at Stafford aforesaid, in the county aforesaid, duly made and pub-

lished his last will and testament in writing, and thereof constituted and appointed the said defendant, together with the said Edward Cope, Charles Cope, and Edward Arthurs, joint executors of his said last will and testament; and afterwards, to wit, on the 20th of January 1817, at Stafford aforesaid, in the county aforesaid, the said Robert Reeves died, without altering or revoking his said last will and testament; and that afterwards, and after the death of the said Robert Reeves, to wit, on the same day and year last aforesaid, and before the said supposed indorsement of the said promissory notes, or either of them, in the said first and second counts of the said declaration mentioned, to the said plaintiff, *he the said defendant duly proved the said will of the said Robert Reeves, deceased, and took upon himself, together with the said Edward Cope, Charles Cope, and Edward Arthurs, the burthen of the execution of the said will, to wit, at* &c. And the defendant there concluded his plea in bar.

The replication to this plea was as follows:—

“That the said Robert Reeves, by his said will, after giving and bequeathing divers legacies to divers persons therein named, gave all the residue of his personal estate to the said Edward Cope and Charles Cope, their executors, administrators and assigns, in equal shares; and that the said Robert Reeves did not, in or by his said will, forgive the said defendant the said debts due to him, upon and by virtue of the said promissory notes, or either of them; and that he, the said Robert Reeves, did not, in or by his said will, or in or by making the said defendant one of his executors thereof, release, or intend to release, to him, the said defendant, the said debts, or either of them; and that the said several sums of money in the said promissory notes mentioned, being and remaining respectively due, owing, and unpaid, the said defendant, after the death of the said Robert Reeves, and before the said indorsements of the said promissory notes, or either of them, to the plaintiff as aforesaid, to wit, on the 1st of June 1820, at Stafford aforesaid, in the county aforesaid, recognized and confirmed the said notes as valid and subsisting, outstanding, and unpaid promissory notes of him the said defendant; and thereupon then and there

paid to the said co-executors certain sums of money, as and for, and then and there being interest accrued on the said sums of money in the said promissory notes respectively mentioned, to wit, the sum of 200*l.*, as and for, and then and there being interest accrued on the said sum of money in the said note in the said first count mentioned, and the sum of 200*l.*, as and for, and then and there being interest on the said sum of money in the said note in the said second count mentioned; and that, after such payments so made, as and for interest on the said several sums of money in the said notes respectively mentioned; and the said several sums of money still being and remaining wholly due, owing and unpaid, to wit, at the times in the said first and second counts in those behalves mentioned, the said Edward Cope, Edward Arthurs, and the said defendant indorsed the said notes in the said first count mentioned, to the said plaintiff; and the said Edward Arthurs indorsed the said note in the said second count mentioned, to the said plaintiff, in manner and form,” &c.

To this replication there was a demurrer; and it was assigned for special cause, that the replication averred, and sought to put in issue, immaterial and collateral matters.

The case was argued this term, by *Mr. F. Pollock*, for the plaintiff; and *Mr. Campbell*, for the defendant.

It had been previously called on for argument in Michaelmas term, when *Mr. Parke* (now *Mr. Justice Parke*) appeared for the plaintiff, and the case was then partly heard.

Mr. F. Pollock, for the plaintiff, now admitted, that the replication could not be supported, and that the case must be argued upon the sufficiency of the defendant's plea.

Mr. Campbell, for the defendant.—In the first count, the defendant is charged as the maker, not as the indorser, of the note. I contend, that the moment the payee made the maker his executor, the note was extinct. This is clearly laid down, even in the Year Books; all the cases on this subject are collected in the case of *Cheetham and others, Executors, &c. v. Ward* (1); and the rule laid down in that case, (after a con-

sideration of all the earlier authorities,) was, that if the obligee in a joint and several bond, make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors.—Then, as to the second count. This does not state that the defendant indorsed. The right of action is founded upon the custom of merchants; and there is surely no custom to warrant such a proceeding as the present.

Mr. F. Pollock, contra.—The debt is not extinguished in this case by the mere fact of the defendant being made executor. In equity it remains as a debt, and the executor is made accountable for it. For this position, the case of *Berry v. Usher* (2) is but a confirmation of several previous authorities. The reason given in the early Text Books for the doctrine, that, in general, the debt is extinguished, is, that the executor cannot bring an action against himself (3). But in the case of the obligor making the obligee his executor, Lord Coke adds, "but the dutie remains, for the which the executor may retaine so much goods of the testator." All these cases speak of a debt which is not transferrable; and as to which the inconvenience which is spoken of would remain. But, where the subject-matter of the debt is transferrable, there is no case laying it down that it may not be transferred. All the reasoning on the subject entirely fails of application in the present case. In *Comyns's Digest*, it is said, that a release by one is good for all. If so, surely an indorsement by one will be sufficient, and in that case the defendant would be liable. But, at all events, the defendant is liable upon the second count, as indorser. *Mr. Campbell* says, that the defendant is not charged as indorser; but if the facts shewing the legal liability are stated, that is sufficient. It is stated, that the defendant became liable to pay according to the tenor and effect of the note and of the indorsement; and that, being liable, he promised to pay. Besides, it is not to be taken, without any qualification, that a testator releases a debt due to him by making his debtor his executor. No man is bound to accept a release; and if he do not accept it, the debt remains.

(2) 11 Ves. 90.

(3) Co. Litt. 264, a.

Mr. Campbell, in reply.—To the last point. The defendant's plea, and his resisting this action, shew that he accepts the release.

The Court took time to consider, and, this day, the judgment was delivered in the following terms, by—

Lord Tenterden.—(After stating the facts) The defendant contended that the effect of his being made executor, was the extinguishment of the note as a debt at law; and that an indorsement even by himself would be of no avail; and we are of that opinion. The cases are all collected in the case of *Cheetham v. Ward*, which was cited in the argument. We have looked into the earlier authorities, particularly that in the 21st of Edward the 4th, 81, b.; which was recognized in the case of *Wankford v. Wankford* (4), and we find it to be laid down clearly and unqualifiedly, that the debt is gone for ever by an appointment of the debtor to be executor to the creditor. It is considered as if the debt had been paid; because it must be known to the testator that the executor cannot sue himself. Our judgment must therefore be for the defendant.

Judgment for the defendant.

1829. }
Feb. 10. } BOORMAN v. NASH.

Bankrupt—Effect of Certificate—Pleading—Special Damages.

1. *Where a contract was entered into for the sale of a quantity of goods, to be delivered and paid for at a future day; and, between the time of the contract and the day stipulated for the delivery of the goods, the buyer became a bankrupt, and afterwards obtained his certificate:—Held, that the seller could not prove under the commission; and that the certificate was no bar to an action at the suit of the seller to recover damages for the breach of contract in not accepting and paying for the goods.*

2. *Where the plaintiff declares upon a contract for the sale to the defendant of goods; and charges a breach in not accept-*

(4) 1 Salk. 300.

ing and paying for them, it is not necessary for the plaintiff to aver, as special damage, a loss upon the re-sale of the goods. Such damage is considered as a necessary consequence of the breach by the defendant.

This was an action of assumpsit. The declaration contained the following special counts:—

First—That, heretofore, to wit, on the 7th of November 1825, at London, the defendant bargained for, and bought of the plaintiff, and the plaintiff at the special instance and request of the defendant, then and there sold to the defendant a large quantity, to wit, twenty five tons, of linseed oil, at a certain rate or price, to wit, the rate or price of 24*l.* 5*s.* for each and every ten thereof; usual allowances; to be free delivered, half in the month of February then next, and the remainder in the month of March then next; and paid for from each delivery in ready money, allowing 2*l.* 10*s.* per centum discount: half of the said oil to be delivered in the last fourteen days in February then next; and the other half to be delivered in the last fourteen days in March then next: and, in consideration thereof, and that the said plaintiff, at the like special instance and request of the defendant, then and there undertook, and faithfully promised the defendant to deliver the said oil to him, the defendant, at the times and in manner aforesaid, he, the defendant, undertook and then and there faithfully promised the plaintiff to accept the said oil of and from the plaintiff, and to pay him for the same on the delivery thereof to him the defendant as aforesaid;—and although the plaintiff afterwards, and at the times in the said contract in that behalf mentioned, to wit, on the 28th of February 1826, at London aforesaid, was ready and willing to deliver one half of the said oil to the defendant, and afterwards, to wit, at the other time in the said contract mentioned, to wit, on the 31st of March 1826, was ready and willing to deliver the residue of the said oil to the said defendant (usual allowances being made as aforesaid), and although the plaintiff was always ready and willing to allow such discount as aforesaid; of which premises the defendant at those respective times there had notice, and was requested by the plaintiff to receive and pay for the said oil as aforesaid:

yet, the said defendant, not regarding, &c. did not, nor would, at those times, or at any other time, accept the said oil, or any part thereof, of or from him the said plaintiff; or pay him for the same, or any part thereof, as aforesaid, but then and there wholly neglected and refused so to do. By means whereof, the said plaintiff incurred a large expense, to wit, an expense of 20*l.*, in and about the warehousing, keeping, and taking care of the said oil, for a long time, to wit, two months, after the said respective times when the said oil ought to have been so accepted by the defendant as aforesaid, to wit, at London aforesaid.

Second—That, heretofore, to wit, on the 7th of November 1826, at London aforesaid, the defendant bargained for and bought of the plaintiff, and the plaintiff, at the special instance and request of the defendant, then and there sold to the defendant another large quantity, to wit, twenty-five tons of other linseed oil, at a certain rate or price, to wit, at the rate or price of 24*l.* 5*s.* for each and every ton thereof; usual allowances; to be free delivered (by the plaintiff to the defendant), one half in the month of February then next, and the remainder in the month of March then next, and paid for from each delivery in ready money, the plaintiff allowing the defendant 2*l.* 16*s.* per cent. discount: and that in consideration thereof, and that the plaintiff, at the like special instance and request of the defendant, then and there undertook, and faithfully promised the defendant, to deliver the said last-mentioned oil to him, the defendant, in manner aforesaid, he, the defendant, undertook, and then and there faithfully promised plaintiff to accept the said last-mentioned oil of and from him the plaintiff, and to pay him for the same as last aforesaid;—and although the plaintiff afterwards, in the said month of February next after the making of the said contract, to wit, on the 28th of February 1826, at London aforesaid, was ready and willing to deliver one half of the said last-mentioned oil to the defendant; and afterwards, in the month of March next after the making of the said contract, to wit, on the 31st of March 1826, was ready and willing to deliver the residue thereof to the defendant (usual allowances being made as aforesaid), of which the defendant at those times respectively, there

had notice; and was then and there requested to accept and pay for the said last-mentioned oil accordingly: yet, the defendant, not regarding, &c. did not, nor would, at those times, or at any time before or afterwards, accept the said last-mentioned oil, or any part thereof, of or from him the plaintiff, or pay him for the same, or any part thereof, as aforesaid; but so to do, altogether neglected and refused, and still does neglect and refuse. By reason whereof, the plaintiff incurred a large expense, to wit, an expense of 20*l.*, in and about warehousing, keeping, and taking care of the said oil for a long space of time, to wit, the space of two months, after the said respective times when the said oil ought to have been so accepted by the defendant as aforesaid; and has been, and is otherwise greatly injured and damaged, to wit, at London aforesaid.

The *Third* was a count somewhat similar; and upon the terms of which nothing turned in the argument. It charged, as special damage, the loss as before, occasioned by warehousing and keeping the oil.

The defendant pleaded,—*First*, Non assumpsit; and *Secondly*, a general plea of bankruptcy; and upon these pleas issue was joined; and the cause came on to be tried, before Lord Tenterden, at the Sittings after Trinity term last, when a verdict was found for the plaintiff, subject to the opinion of this Court on the following

CASE.

The plaintiff is a seed-crusher, doing business under the firm of J. H. Boorman & Co.; and the defendant was a partner in the bank of Hollick & Co. at Cambridge, and also carried on business on his own account in the oil trade.

On the 7th of November 1825, the plaintiff and the defendant entered into a contract in writing, and duly signed by an authorized agent of both parties, of which the following is a copy:—

“London, Nov. 7, 1825.

“Bought this day, by order of Thomas Nash, of J. H. Boorman & Co., twenty-five tons of linseed oil, at 24*l.* 5*s.* per ton, (usual allowances) to be free delivered, half in the month of February next, and the remainder in the month of March next; and

paid for from each delivery ready money, allowing 2½ per cent. discount.

“Half the above to be delivered in the last fourteen days in February, and the other half to be delivered in the last fourteen days in March next.

“Stephen Cleasley, broker.”

On the 28th of February 1826, twelve and a half tons of oil, being one-half of the said linseed oil mentioned in the said contract, were duly tendered by the plaintiff to the defendant, and payment demanded for the same, and discount offered to be allowed, at the rate of 2½ per cent.; but the said defendant would not receive and pay for the said twelve and a half tons of the said oil, then tendered as aforesaid.

On the 31st of March, a like quantity of the said linseed oil was duly tendered by the plaintiff to the defendant, and payment demanded for the same, and 2½ per cent. discount offered to be allowed; but the said defendant refused to accept and pay for the said last-mentioned twelve and a half tons of linseed oil then tendered.

On the 31st of March, the plaintiff caused a notice in writing to be served on the defendant, that in consequence of his not having cleared and paid for the twenty-five tons of linseed oil according to the contract, the same would be re-sold, and the said defendant would be held liable to all difference in price, charges, interest of money, and every other expense that might arise in consequence of the non-fulfilment of the said contract.

And the said entire quantity of linseed oil was re-sold on different days in April at 17*l.* 10*s.* per ton, of which notice was given to the defendant; such 17*l.* 10*s.* per ton, being a fair market price at the time of such re-sales.

Shortly after the re-sales were completed, that is to say, on or about the 29th of April 1826, an invoice and an account of sales was rendered by the plaintiff's agent to the defendant, by which it appeared that a loss had occurred on such re-sales of 170*l.* 3*s.* 2*d.*

A commission of bankrupt under the Great Seal of Great Britain, bearing date the 7th January 1826, was awarded and issued against the said defendant, together with Ebenezer Hollick, William Searle, and Thomas Nash the younger, under which

they were duly found and declared bankrupts, and the said defendant hath since obtained his certificate of conformity.

On the 7th of January 1826, the oil might have been sold in the market at 21*l*. 10*s*. per ton.

The question for the opinion of the Court was, whether the defendant's bankruptcy and certificate were a bar to the plaintiff's recovering in this action⁽¹⁾; and if not, what was the proper measure of the damages which the plaintiff was entitled to recover?

The case was argued in the course of the present term.

Mr. Alderson, for the plaintiff.—The bankruptcy of the defendant is no legal answer to the plaintiff's demand. The defendant must contend, either that the demand was proveable under the commission before the last act was passed; or that it is proveable under the 56th section of the 6th Geo. 4. c. 16. I say that it was not proveable at all: that which is the subject of proof under a commission of bankrupt must be certain in amount; it must be of a liquidated nature; there must, according to the opinion of Lord Kenyon, in *Atterson v. Vernon and others* (2), be some criterion by which the amount can be ascertained without the intervention of a jury. Here, the whole claim rests in damages; and there is no mode, but by reference to a jury, in which they can be fixed in point of amount. That was the state of things under the old law; then, has the new Bankrupt Act made any alteration, so as to make this demand proveable under the commission?—The 56th section provides for the proving of any debt contracted by the bankrupt, payable on a contingency which has not happened before the date of the commission. But the cases therein provided for are expressly those of *debts*; and the commissioners are empowered to place a value upon the debt, which in many cases they can do; such for instance, as the case where it is a question of survivorship. They may, by certain known and admitted rules, ascertain the value by reference to tables of lives. But here, there is no question whatever by which the commission

could proceed; and for the best reason, that there was no debt due from the defendant to the plaintiff. The case of *Atwood and others v. Partridge* (3) seems to be very analogous to the present. There, to an action to recover damages by reason of a person not having paid the premium on insuring his life, the defendant pleaded his bankruptcy in bar; and the Court held this to be no answer to the action. The facts are stated very shortly by the Lord Chief Justice Best, as follows:—

"Robinson owes the plaintiffs money. The defendant does not become a surety for that debt; but Robinson having agreed, by way of security, to pay the premium upon a policy of insurance of his life, the defendant undertakes to guarantee, not the payment of Robinson's debt to the plaintiffs, but of that premium. There was, therefore, no *debt* from the defendant to the plaintiffs, contingent or otherwise. Upon Robinson's failing to pay the premium, the plaintiffs were entitled to recover from the defendant unliquidated damages, the amount of which might have varied according to circumstances. If Robinson continued alive, the amount would have been the premium paid by the plaintiffs. If Robinson had died, it might have been the whole sum insured. How is it possible then, to say that this was a *debt* due from the defendant?" The reason given by the Lord Chief Justice applies to this case. When the defendant failed in the performance of his contract with the plaintiffs, they were entitled to recover damages from him; and the amount of those damages would vary according to circumstances. The market for oil might have risen. That would affect the question of damages. It might be considered advantageous by the assignees to enforce the contract. The true measure of the damages is the difference between the contract price, and that which goods of a similar quality and description bore, on or about the day when the goods ought to have been delivered: *Gainsford v. Carroll and others* (4), *Leigh v. Paterson* (5). The declaration in this case shews the cause of action to be in damages only. The cor-

(1) No point was made in the argument upon this part of the case.

(2) 3 Term Rep. 539.

Vol. VII. K.B.

(3) 4 Bingham, 211; 5 Law Journ. C.P. 124.

(4) 2 B. & C. 624; 4 D. & R. 161; 2 Law Journ. K.B. 112.

(5) 8 Taunt. 540; 2 Moore, 588.

tract is set out ; and the breach averred. The general averment of damage is sufficient ; the legal damage is in the difference of price, which arises of necessity. There was no occasion to state any special damage ; because that should be stated only where the damage is not of necessity a conclusion from the facts.

Mr. Follett, contrà.—First, the defendant's certificate is a bar to the action. Secondly, if it is not, the plaintiff is not entitled on this declaration, to any damage arising from a re-sale of the goods.

First, the declaration sets out a sale of a specific quantity of goods ; not part of a larger quantity. The property in such goods was vested by the contract in the purchaser, though the seller might have a lien upon them until payment. Upon those facts, the plaintiff might have maintained an action for goods bargained and sold : and, as a necessary consequence, he might have proved the amount under the commission. That the property in the goods passes to the buyer, under these circumstances, is shewn by a class of cases, *Hanson v. Meyer* (6), *Simmons v. Swift* (7), *Rhode v. Thwaites* (8).

[*Lord Tenterden*.—In those cases the seller was in possession of the property at the time.]

The same may be inferred from the facts in this case.

[*Lord Tenterden*.—No.]

Then, supposing that the action for goods bargained and sold would not lie, still the plaintiff might have proved under the commission. The 56th section of the Bankrupt Act provides for engagements of this nature ; and it does not follow, that, because this was contract, the amount of the proof would require the intervention of a jury to ascertain it. The 121st section of the act renders all demands barred which are made proveable under the commission ; the plaintiff might have proved in this way :—the principal of the subject-matter was the contract ; the case of *Van Sandau v. Corsbie* (9) has decided, that damages arising out of the contract, being accessory to the principal,

shall not be separated from the principal, so as to defeat the right of the debtor to plead his bankruptcy in bar. The plaintiff then might have proved the amount, which is the principal, under the commission ; or if this be not held, then the bankruptcy rescinds the contract, according to the case of *Ex parte The East India Company* (10). But, even supposing the plaintiff was not entitled to prove under the commission, it does not follow that the certificate is not a good bar. *Mr. Eden*, in p. 389 of his work on the *Bankrupt Law*, notices this, and puts several cases in which the demands are not proveable under the commission, and yet are barred by the certificate. In *Van Sandau v. Corsbie*, the present Mr. Justice Parke, who argued the case for the defendant, treated the certificate, which is given in pursuance of the statute, as a statutory release of all demands ; and *Shepherd's Touchstone*, p. 338, was cited, as shewing that a release of all demands releases all manner of actions and duties. And in *Forster v. Surtees* (11), an attempt like the present to charge the debtor in damages for that which arose out of a contract made before his bankruptcy, was ineffectual : and the defendant had judgment. But, supposing the Court to be against the defendant upon all these grounds, the plaintiff, it is submitted, cannot recover upon his present declaration. The plaintiff does not appear to have sustained any damage by the defendant's not having performed his contract. The definition given by the other side of special damage, may be admitted to be a good one ; but in the application of it, a material fact is assumed. It is assumed, on the other side, that the Court will take notice that there has been, of necessity, a difference in the market price. That does not appear by the declaration ; nor can the Court take any such judicial notice of the fluctuation in price of any particular commodity in the market.

The Court took time to consider ; and, on this day, the judgment was delivered in the following terms, by,

Lord Tenterden.—The bankruptcy intervened between the time of making the con-

(6) 6 East, 614.

(7) 5 B. & C. 557 ; 8 D. & R. 693 ; 5 Law Journ. K.B. 10.

(8) 6 B. & C. 388 ; 5 Law Journ. K.B. 163.

(9) 3 Barn. & Ald. 14.

(10) 2 P. Wms. 396.

(11) 12 East, 605.

tract, and the time for delivery of the goods. One of the questions raised upon the argument was, whether the plaintiff could have proved under the commission of bankrupt against the defendant. We think it is impossible to contend successfully that he could; the price might have varied between the bankruptcy and the time of the delivery. Then, it was said on behalf of the bankrupt, that the bankruptcy rescinded the contract: that could not be, for the assignees might have confirmed the contract; and no doubt would have done so, if their so doing would have been beneficial to the estate. The only remaining question is, whether the plaintiff's declaration is sufficient. It was objected that no special damage was stated, and that the Court would not intend that any had been sustained, inasmuch as they would not take judicial notice of any fluctuation in the market price of the goods sold. But, without reference to that question, we are of opinion that the declaration is sufficient to entitle the plaintiff to maintain his action; for when a contract is made, and is broken by one party, the damage, the sustaining of some damage by the other, in consequence of that breach, is the natural and legal result. The *postea* must therefore be delivered to the plaintiff.

Judgment for the plaintiff.

1829. } ALEXANDER V. LAWSON AND
Feb. 12. } OTHERS.

Costs—Justification.

1. *Where the plaintiff obtains a verdict with damages upon the general issue, and the defendant obtains a verdict upon pleas of justification, or other pleas which answer the action, the defendant is entitled to judgment upon the whole record, and to the general costs of the cause.*

2. *Semble, that it is proper, in all such cases, for the plaintiff to have damages assessed at Nisi Prius, under the general issue; in order that he may be entitled to judgment in case the defendant's pleas should afterwards be held not to amount to a legal defence.*

This was an action for an alleged libel, which appeared in *The Times* newspaper,

purporting to be an account of certain proceedings at a police office, and which went to charge the plaintiff with having suborned one Elizabeth Levi to commit perjury in an action in which the plaintiff was a party. The defendants pleaded—

First—Not Guilty.

Secondly—A justification, which in substance was, that the plaintiff had suborned the said Elizabeth Levi to commit perjury; and *Thirdly*, a plea in substance similar to the second.

On the trial of the cause, Lord Tenterden left three questions to the jury: First, whether Elizabeth Levi had committed perjury. Secondly, whether the plaintiff had suborned her so to do. Thirdly, whether the alleged libel contained a true report of what took place at the police office mentioned in the declaration.

The jury found a verdict for the plaintiff, with 6*d.* damages on the plea of the general issue; and for the defendants, on the plea of justification; answering all the above questions left to them in the affirmative. The Judge certified to deprive the plaintiff of costs.

The defendants, after giving the usual rule for judgment, proceeded to tax their costs in the cause, on the pleas found for them; and afterwards took the plaintiff in execution for the amount.

The plaintiff thereupon moved for a rule to set aside the execution, and for the taxation to be reviewed; and the defendants, by *Sir James Scarlett* and *Mr. Platt*, now shewed cause.

The Court inquired of the Master, what costs he had allowed. The Master (*Mr. Goodrich*) answered, that he had allowed the defendants the whole of the costs in the cause, as if the verdict had been for the defendants upon all the pleas.

Whereupon, *the Court* was inclined to think that the Master had proceeded upon an erroneous principle; and had misapprehended the effect of the certificate of the Judge. That certificate went merely to deprive the plaintiff of his costs; but it did not therefore entitle the defendants to the general costs in the cause, if they were not otherwise entitled to them.

Mr. Platt, for the defendants, admitted that the certificate of itself gave the defendants no right to their costs; but contend-

ed that the justification covered the whole of the alleged libel, and consequently that the defendants were entitled to the verdict; that this was perfectly consistent with the finding of the jury for the plaintiff, with nominal damages, upon the general issue; which was a necessary form of proceeding, in order that the plaintiff might have judgment, in case it should afterwards turn out that the defendants' pleas were not, in point of law, a sufficient answer to the action. The necessity of this was manifested in the case of *Clement v. Lewis* (1), wherein (upon a verdict affirming the justification of a libel,) the plaintiff, having omitted to take a verdict on the general issue, was put to great difficulty afterwards, when he succeeded in shewing that the pleas of justification were not an answer in point of law to the action.

The Court took time to look into the pleadings, in order to see if the justification covered the whole of the alleged libel; and now—

Lord Tenterden stated, that they had looked into the pleadings, and found that the defendants' special pleas covered the whole of the libellous matter charged by the declaration. The judgment, therefore, which, upon the whole record, had been entered for the defendants, was right; and the taking of a nominal verdict for the plaintiff upon the general issue, was the proper course in order to secure to him the judgment, in case it should be successfully contended by him that the pleas, which had been affirmed by the verdict, did not answer the declaration. It was now competent for the plaintiff, if he thought fit, to bring a writ of error for the purpose of trying that question; but, as the Court thought that the pleas did answer the declaration, the judgment for the defendants was right; and, consequently, the present rule should be

Discharged.

(1) 3 B. & B. 297; 7 Moore, 200.

1829. }
Feb. 18. } SWEETING v. HALSE.

Contract—Stamp—Cancellation.

1. *Where a plaintiff declares upon a contract, which appears to have been afterwards rescinded, and a new contract entered into, but which new contract has not been stamped, the plaintiff cannot resort for his remedy to the old contract, on the ground of the new one not having been stamped.*

2. *But if the defendant has no means of proving that the old contract was rescinded, except by shewing the new one, and that new contract requires a stamp, he cannot offer it in evidence, unless it be properly stamped.*

This was an action by the drawer against the acceptor of a bill of exchange for 157*l*.

Plea—The general issue.

The cause was tried, before Lord Tenterden, at the Sittings after Easter term 1828, when the following appeared to be the principal facts:—

The bill declared upon appeared to be accepted by the defendant, and a person named Hammond, and became due on the 29th of May 1826. That acceptance was drawn through with a pen; and on the back of the bill appeared the following matter:—

£157. London, May 28, 1826.

Six months after date, pay to me, or my order, the sum of one hundred and fifty seven pounds stock, new four per cents., for value received.

J. W. Sweeting.

To Mr. Halse,
66, Great Titchfield-street,
London.

Accepted,
J. Halse.

The body of the above was written in the handwriting of the defendant's son. The signature, "J. W. Sweeting" was that of the plaintiff: and the acceptance was in the handwriting of the defendant. The action was not brought until after six months from the above date.

There was no count in the declaration applicable to the above.

It was objected thereupon by the defendant's counsel, that the plaintiff could not recover, inasmuch as it appeared upon his

own shewing, that the contract upon which he declared had been rescinded, and a new contract made between the parties;

The plaintiff's counsel contended, that it was not competent for the defendant to shew the new contract, as it was not stamped; and secondly, that it was not available to him, unless he shewed that he had performed it, which he had not; and therefore, that the plaintiff was remitted to his original cause of action.

Lord Tenterden left it to the jury (handing the bill to them) to say, whether the bill declared upon had been cancelled with the consent of the plaintiff; and the new contract entered into between the parties in substitution thereof; and if they were of opinion in the affirmative, they were to find a verdict for the defendant. The jury having found a verdict for the defendant,—

Sir James Scarlett moved for and obtained a rule to set aside that verdict; and to enter a verdict for the plaintiff, or to have a new trial: against which rule,

Mr. Campbell and *Mr. Barstow* now shewed cause.—The case of *Reed v. Deere* (1), is expressly in point. There, a party declared upon two written agreements. By the second, variations were made in the first; there were counts upon each separately; but the first only was stamped. The Court held, that the second could not be read in evidence to support the plaintiff's case, but might be looked at in order to ascertain whether the first was altered by it; and that therefore the plaintiff could not exclude the second agreement, and proceed upon the counts setting out the first only. It is impossible to distinguish that case from the present; except in the fact, which is unfavourable to the present plaintiff, that there the plaintiff had a count in his declaration upon the new agreement; and here he has not. Here the instrument declared upon appeared, on the face of it, to be cancelled. Upon that alone, the plaintiff should be nonsuited, unless he offered some explanation of the circumstances. The new contract shewed that the parties meant to turn the transaction from a money into a stock contract. The original transaction was therefore entirely at an end; and the old contract extinguished. It is open to

the plaintiff still to proceed upon the new contract, if he chose to get it stamped. If it be contended that the new arrangement is in the nature of accord and satisfaction; and that the defendant cannot be allowed to prove accord without satisfaction;—the answer is, that the doctrine of accord and satisfaction is applicable only to cases where there has been originally a default in the defendant: here it is not so. The new contract bears date upon the day stipulated for the performance of the old one. No default, no demand of payment was proved; and, in the absence of all evidence, the natural inference must be, that the parties came together—abrogated the old, and entered into a new contract. This is a common case; and is quite independent of the doctrine of accord and satisfaction. If the contrary were to be held, the parties would not be upon equal terms; for, as there cannot be any doubt that the new contract bound the defendant, the plaintiff, if allowed the option, might wait until the six months mentioned in the new contract had expired; and then, if the price of the four per cent. stocks was above par, he might say he would have stock, but if it were below par, he might say that he preferred going upon the old contract, and would have money. This would be unreasonable, and never could have been in the contemplation of the parties.

Sir James Scarlett and *Mr. Chitty*, contra. The case of *Reed v. Deere* ought to be reconsidered. The defendant is really seeking to get out of one contract by setting up another, which he has never performed. If the defendant chose to give the plaintiff this new contract, he ought to have given it in an available shape; and he has no right to throw upon the plaintiff the difficulty of seeking to get it stamped. But the plaintiff cannot avail himself of it at all; for a bill of exchange which is once issued unstamped cannot be stamped.

[*Mr. Justice Bayley*—This is not a bill of exchange; it is a special agreement, and as such may be stamped.]

Still, it was the duty of the defendant at all events to give the new contract in an available shape. The mere cancelling of the bill did not extinguish the plaintiff's right of action; the mere cancelling of an instrument, according to the well known

(1) 7 Barn. & Cress. 361.

case of *Roe d. Earl Berkeley v. the Archbishop of York* (2), is but one step towards putting an end to the obligation created by the instrument. The intention of the parties should be shewn. What was the intention here? That the plaintiff should be paid at the end of six months. Has he been paid? Not a shilling. The case of *Wilson v. Vysar* (3) shews, that an unstamped instrument is no evidence of payment or satisfaction of a debt. The second contract was therefore the defendant's evidence; and at all events, it was incumbent on him to get it stamped. The Court, upon motion, would have compelled the plaintiff to produce it at the Stamp Office for that purpose.

Lord Tenterden.—In the case of *Reed v. Deere*, the Court looked at the instrument (4). In this case the jury were allowed to look at it; and to form their opinion on the case with reference to an instrument which was not properly stamped. That they ought not to have been allowed to do; it was my mistake. On this ground we think there ought to be a new trial.

Mr. Justice Bayley concurred.

Mr. Justice Parke.—I should have been quite satisfied with the verdict, if the jury had considered merely the cancelled acceptance. But I think they ought not to have been allowed to look at the unstamped instrument; and that on this account alone, there should be a new trial.

Rule for a new trial.

1829. }
Feb. 18. } LITTLE v. POOLE.

Contract—Coal—Vender's Ticket.

Where an act of parliament had been passed to prevent the committing of frauds in a particular trade, the omitting to comply with those regulations will prevent the party who omits from recovering in an action founded upon the transaction in which the omission has been made, although it be not proved that any fraud has been committed;

(2) 6 East, 86.

(3) 4 Taunt. 288.

(4) But even as to the Court looking at the instrument for any purpose in the cause, unless it be properly stamped, see *Vincent v. Cole*, 7 Law J. K.B. p. 130.

and although the party against whom the action is brought, has had the full benefit of his contract.

Accordingly, by the act 47 Geo. 3. c. 68. s. 113, certain regulations are made to prevent frauds in the coal trade. Among them it is directed, that upon a sale of coals by wharf measure there shall be two tickets; one a vender's ticket, the other a meter's ticket. The vender's ticket is to be signed by the meter, and is to express the quality of coal sent; and the meter is not to sign it until he be satisfied that the coal actually sent corresponds in quality with that which is expressed in the ticket. In an action for coals sold and delivered, in which it appeared that the vender's ticket had not been signed by the meter,—Held, that the plaintiff was not entitled to recover; although the defendant had paid the amount of the debt after the commencement of the action; and the action itself was continued merely to recover the costs.

This was an action of assumpsit for goods sold and delivered.

Plea—The general issue.

The cause was tried, before Lord Tenterden, at the Guildhall Sittings after Easter term 1828; when the following appeared to be the principal facts:—

The goods in question were coals; the plaintiff was a dealer in coals by commission; he received an order for the coals from the defendant, and thereupon desired one Witherby, a coal merchant, to send them to the defendant. Witherby accordingly sent them to the defendant, but sent them on account of the plaintiff. The plaintiff commenced the present action for the amount. After the writ had been issued, the defendant called at the plaintiff's house, and paid the amount of the debt to the plaintiff's wife. It is presumed, that the wife was not then aware that the writ had been issued; for a difficulty arose afterwards respecting the costs; and the defendant refusing to pay them, the action was carried on. The plaintiff confined his evidence to proof of the payment of the debt by the defendant after action brought; and he sought therefore to recover merely nominal damages, in order to carry the costs.

The defendant rested his case upon the following evidence:—

The carman employed by Witherby to

deliver the coals at the defendant's house, identified the tickets which were shewn to him, as being those which were sent with the coals. The vender's ticket was in the usual printed form, but was not signed by the meter. This, the defendant contended, was necessary, according to the 47 Geo. 3. c. 68. s. 113. The printed form appeared to have a blank left for the name. Evidence was also given of an entry in the book kept at the office of the principal coal meter; from which book the ticket alluded to had, in the usual course, been cut. In that book, the coals in question were described as *Burdon*; but, in the ticket delivered to the defendant, they were described as *Wallsend*. The latter species of coal is better in quality than the former.

Upon these facts, the defendant's counsel contended, not only that the provisions of the act above cited had not been complied with, but that they had been fraudulently violated; and that the payment of the debt after action brought, could not give the plaintiff a legal right, if he had none at the time of the commencement of the action. Subject to this point, the plaintiff had a verdict, with 1s. damages. A rule to enter a nonsuit having been obtained,—

Mr. Channell now shewed cause.—He contended, first, that the act did not expressly require that the vender's ticket should be signed by the meter. The tickets vary according to the modes of sale, of which there are three: by pool measure, by wharf measure, and by weight; the present being a sale by wharf measure. The meter's ticket upon such a sale ought to be signed by him. It was in the present instance. But it is said that the vender's ticket should also be signed by the meter. This is not so; if the name of the meter appeared, no matter by whom signed, that would be a compliance with the act. The provisions applicable to the meter's ticket are contained in the 102nd section, and they include a variety of details,—the names of buyer and seller, the quantity, the date, measure, name of the carman, &c. And this clause expressly requires signature. The provisions respecting the vender's ticket are to be found in the 113th section: the form given by the act does not appear to require the signature of the meter; for the terms which are used so pointedly in the

section respecting the meter's ticket, are not used in this part of the act. If, then, it may be assumed that the insertion of the name of the meter in the vender's ticket was of comparatively inferior importance, and that the name might be inserted by any one; and if (as the fact is) the inserting of the name gives to the purchaser no additional information, (and consequently, the not inserting it withholds none from him,) can the mere omission to comply with the directory part of the act in this respect, be of such moment as to deprive the plaintiff of his right of action for goods sold and delivered? If a compliance with the form be held to be so strictly necessary, a mistake in the date, or the name of the carman, or of the purchaser, would deprive the seller of his right of action. The Court will pause before they put such a construction upon the act. But, supposing that the insertion of the name is essential, it does not appear that the omission is one for which the plaintiff ought to be held responsible. The omission seems to have been on the part of the meter, who is a public officer; and the vender cannot properly be held liable for his default. But, at all events, the omission cannot be carried nearer to the plaintiff than to Witherby, who for this purpose must, admittedly, be considered as his agent. And, although there may be omission in the agent, there is no evidence that the omission led to or covered any fraud; for it does not appear that the coals were of a different quantity or quality than those expressed in the ticket, which was delivered to the defendant.—Then, with regard to analogous cases on the subject. All the cases in which a plaintiff has been precluded from recovering, in consequence of the transaction contravening the policy of the law, are cases where the party himself, by his own act, and of his own motion, had disregarded and violated the law. Such were *Langton v. Hughes* (1), that was the case of a sale of drugs to a brewer, the plaintiff knowing that they were to be used in the brewery,—*Cannan v. Brice* (2), where money was lent for the express purpose of settling losses on illegal stock-jobbing transactions; in that case, the judgment of Lord Tenter-

(1) 1 Maul. & Selw. 593.

(2) 3 Barn. & Ald. 179.

den expressly went upon the fact, that the party was aware of the illegal purpose,—*Law v. Hodgson* (3), which was a sale of bricks under the size directed by statute,—and *Bensley v. Bignold* (4), which was the case of a printer, who sought payment for work, labour, and materials, in his trade of printing; he having violated the provisions of the act, which requires the printer's name to be given upon certain printed papers. The object of these decisions was to prevent parties from entering into illegal contracts. Here, there was no illegal contract, and the defendant has *bond fide* been supplied with the goods for which he contracted. It is submitted that a good test by which to try whether the plaintiff ought to be deprived of his remedy, is to be found in this question: "Would the evidence be sufficient to convict the plaintiff of any offence under the act?" In all the other cases coming within this description, the answer to such a question would be in the affirmative; for, in all those cases, the plaintiff was a willing infractor of the law.

Mr. F. Pollock, *contra*.—The true question for the decision of this case is, not that which has been suggested by the other side;—not whether the plaintiff could upon the evidence be convicted of any offence; but, whether the law has been violated in the transaction which is the basis of the plaintiff's cause of action? The plaintiff claims through that transaction; he claims to be paid through it; he claims through Witherby, and he must therefore be bound by Witherby's acts. The argument drawn from the fact that the *vender's* ticket need not be signed by the meter, and that the signing is of inferior importance, would be a very powerful argument if it were supported by the fact. But the fact is assumed by the other side, and the fact is otherwise. The language of the sections applicable, one to the meter's, and the other to the vender's ticket may be different; but the whole of the act shews that the signature of the meter to the vender's ticket is of importance. How can it be otherwise, seeing that the 93rd section imposes a penalty upon the meter if he sign the vender's ticket without being satisfied of a particular fact mentioned in

it. That particular fact is, that the meter be satisfied of the *quality*, that the coals mentioned in the vender's ticket are of the quality of those sent to the buyer. This disposes of the argument, that the omission of the signature is of no importance to the buyer; that it withheld no information from him. It was of importance in this, that it enabled Witherby to sell coals as Wallsend, which there is every reason to suppose were not Wallsend; seeing that they were entered as Burdon in the principal meter's book. The buyer, therefore, has not had that which the statute meant he should have; namely, the guarantee of the meter that the coals sent are of the description mentioned in the vender's ticket. These circumstances shew that the case is precisely within the principle to be drawn from the authorities on this subject; all of which are collected in *Bensley v. Bignold*.

Lord Tenterden.—I am of opinion, that this rule ought to be made absolute. It is of importance that venders of coals should be compelled to obey the provisions of an act which was intended to prevent fraud. The act in question requires the delivery to the buyer of two tickets. That which is called the vender's ticket is to describe the quality of the coals sold, and professed to be delivered; and if those which are sent are not of that quality, the meter would (for he ought to,) refuse to sign the ticket. The book kept in the office of the meter shewed that the coals in question, as described in his book, were of an inferior quality to those described in the vender's ticket, and which the meter had not signed. I think it is immaterial how the fact was, as to the quality of the coals actually sent. The provision was made to prevent fraud, and it would not be giving due effect to the act to inquire whether fraud had been committed in the particular case which is the subject of inquiry.

Mr. Justice Bayley.—I think this case clearly comes within the principle laid down in *Law v. Hodgson*. The coals here in the meter's book are called Burdon, which is an inferior description of coal to Wallsend, which was the description professed to be sent. The meter, according to the act, will not sign the vender's ticket, unless he has ascertained the actual quantity and quality

(3) 11 East, 300.

(4) 5 B. & A. 335.—See also *Tyson v. Thomas*, 1 M'Clel. & Y. 119.

of the coals which are sent out, and of those mentioned in the ticket, and has seen that they correspond. This is the chief provision of the legislature to protect the public against fraud in these cases. With regard to the plaintiff seeking to recover, because he was not cognizant of Witherby's acts; I take it to be clear, that for the purpose of this action, the plaintiff, Little, is to be considered as Witherby, through whom he claims, or who at least was, for this purpose, his agent.

Mr. Justice Littledale.—I think that Little and Witherby are to be considered, for the purposes of this action, as the same person. That being so, I am clearly of opinion, that the plaintiff is not entitled to recover. The object of the legislature in passing the act in question was to prevent fraud: and that effect may be given to the act it must be held, according to the principle of decided cases of a similar nature, that the plaintiff who has violated the act of parliament, is not entitled to recover upon the contract which is connected with that violation.

Mr. Justice Parke.—I concur in opinion with my learned Brothers. The object of this act of parliament being to prevent fraud; I think that, according to the principle laid down in *Law v. Hodgson*, and the other cases which have been cited, the plaintiff is not entitled to maintain any action.

Rule absolute.

1829. { WHITTAKER v. WHITTAKER AND
ANOTHER.

Practice — Judgment after defendant's death.

Where the proceedings were by original, a judgment, signed by virtue of a cognovit on the first day of full term, the defendant having died between the essoign day and that day, held to be regular.

The proceedings were by original. A cognovit was given, upon which judgment was signed in Michaelmas term last. But one of the defendants had died the day before the term commenced; whereupon, the question being whether the judgment was regular or not;—

VOL. VII. K.B.

Mr. Richards, for the plaintiff.—The judgment relates to the essoign day of the term, and must therefore be taken to have been signed before the death: *Samuel v. Evans* (1).

Mr. Tomlinson, contra.—Until the first day in full term, the judgment could not be signed: *Pugh v. Robinson* (2). The Court cannot therefore presume it to have been signed at a time when they know it could not have been.

Mr. Justice Bayley.—In an action by original, I think the judgment relates to the essoign day of the term; and consequently that this judgment is regular.

Mr. Justice Littledale.—I am of the same opinion: and, I think, that the expression used in the Statute of Frauds, respecting the operation of docketed judgments, is consistent with judgments by original, referring to the essoign day of the term of which they are signed.

Judgment regular.

[See also *Ruston v. Owston*, 1 M'Clell. and Younge, 202.]

1828. } DOE d. WARREN v. AARON BRAY.

Evidence—Parish Register.

1. Where an entry of baptism appeared, in the parish register, to be in the handwriting of a person who was not the clergyman at the time to which the entry referred, though he became so afterwards, such entry was held to be inadmissible in evidence to prove the baptism.

2. Nor were certain memoranda, made by the parish clerk at the time of the baptism, corresponding with the entry made by the subsequent clergyman, held to be admissible in evidence themselves, or to give an explanation sufficient to warrant the admission in evidence of the register.

This was an ejectment, to recover possession of property in the county of Worcester. The cause was tried at the Spring Assizes

(1) 3 Term Rep. 569.

(2) 1 Id. 116.

for that county, in the year 1828, when the following appeared to be the material facts :

The main questions in the counts were—First, whether Aaron Bray, the defendant, was the son of John Bray, by Elizabeth his wife. That was a question of identity, upon which nothing turned afterwards. Secondly, supposing that he was the son of John and Elizabeth Bray, whether he was born before or after the marriage of his parents ; it being in evidence, that they had a son before their marriage, and a son afterwards.

In support of the latter of the two facts in question, among other evidence, the register book of baptisms of the parish of Castlemerton, in Worcestershire, was produced. Under the date of 1776, appeared an entry of the baptism of Aaron, the son of John Bray and Elizabeth his wife, on the 6th of February 1776.

This entry was in the handwriting of the Rev. Dr. Smith, formerly clergyman of the parish, but who, in point of fact, did not become its minister until 1777, the year after the date of the entry. During the years 1775, and 1776, the then clergyman of the parish was very infirm ; and old Bond, the parish clerk, was in the habit of entering baptisms, &c. on leaves of paper. Those leaves were produced, and contained an entry corresponding with that made in the book by Dr. Smith. The handwriting in those leaves was proved by young Bond, the present parish clerk, to be that of his father ; and the inference urged on the part of the defendant was, that Dr. Smith had made the entries in the book from those leaves.

The counsel for the lessor of the plaintiff objected, that neither the register book nor the leaves could be received in evidence. The former, because it was in evidence that the entry was made by a person, who at the time to which the dates referred, had no authority to make it ; the latter, because it was not the proper legal document to establish the fact. The learned Judge received both of them in evidence. A verdict was found for the defendant ; and, a rule having been obtained, calling upon him to shew cause why that verdict should not be set aside, and a new trial granted,—

Mr. Campbell, and Mr. R. V. Richards, shewed cause.—The book appearing to be

the parish register was *prima facie* evidence ; and its title to credit cannot be impeached, unless it be falsified. All the evidence connected with the subject went to confirm, and not to falsify the register. It cannot be successfully contended, that entries like the present must be made at the very time ; if this entry had been made by the clergyman of the parish, who had himself, several months before, performed the ceremony, there surely would be no objection to it ; nor is there any legal necessity that the entry should be made by the clergyman, who filled that character at the very time of the ceremony, which is the subject of the entry. Supposing, however, that the fact of the entry having been made by a clergyman who was not so when the baptism took place, was a fact which called for explanation, that explanation was fairly and fully given by the memoranda, made by old Bond, the parish clerk.

[*Mr. Justice Bayley.*—But those memoranda were not, of themselves, evidence. In *Newham v. Raithby* (1), the copy of a register of a dissenting chapel was not allowed to be pleaded. If the private memoranda of this clerk were not evidence of themselves, how can they be made evidence by being copied into the register book?]

They are entered by a person whose situation gives them authenticity.

[*Mr. Justice Parke.*—By a person who knows nothing about the transaction, of which he makes an entry. The ground of these entries being received as authentic, is the presumption that they are made by a person whose duty it is to make the entry at the time. Dr. Smith had nothing to do with the parish at the date to which the entry refers.]

[*Mr. Justice Littledale.*—The proper course as to these entries is pointed out by the 70th Canon. They are to be entered in the register book at the end of every week.]

The entry by the clerk is equivalent to an entry in the book. If it were made by the clerk, in the lifetime of the previous incumbent, there could be no objection to it.

[*Mr. Justice Bayley.*—That is a very different case from the present ; in that case it might properly be presumed, that the entry

(1) 1 Phillimore, 315.

by the clerk was authorized by the clergyman. We cannot presume, that an entry made after his death was made with his authority. In *May v. May* (2), entry in a day-book, from which the entries in the register of baptisms were made, was held inadmissible in evidence.]

The entry in the day-book in that case was at variance with the register: and the case itself was decided on the ground that there could not be two registers of one parish. One register was there offered in evidence to contradict the other (3). At all events, the admission of this piece of evidence had no influence in the cause upon the main question. There was an abundance of other evidence; the learned Judge is satisfied with the verdict, and the Court will not order a new trial merely on account of the admission of a piece of evidence, which they may think ought not to have been admitted, but which they see can have had no influence upon the verdict.

Mr. Serjeant Russell, contra, was stopped.

The Court took time to consider; and on the 17th of December the judgment was delivered in the following terms:

Mr. Justice Bayley.—I regret it exceedingly, but there must be a new trial in this case. There was very strong evidence to shew the legitimacy of the defendant, independently of the register; but we are of opinion that the verdict must be set aside, inasmuch as the evidence to which objection was taken, was improperly received in evidence. Registers should be made up promptly, and by the person whose duty it is to make them up. The register of baptism in this case, purports to bear date the 6th of February 1776, but it was not made up till June 1777; and it was then made up, not by the person who was minister of the parish at the time of the baptism, or by a person who appeared at that time to have any connexion with the parish; but by one who afterwards became the minister of the parish. It must be taken, therefore, that he made this entry after the death of

the minister of the parish, who was present at this baptism. He was recording a fact, therefore, not within his own knowledge, but one of which he received information from the clerk. I think, therefore, the register itself ought not to have been received in evidence. But then, supposing there was no register, it has been said, that the clerk's memoranda were admissible in evidence, to prove all the facts that could be proved by a register. It was not his duty to make such memoranda: they are mere private entries. The case of *May v. May*, to which I referred, during the argument, shews that a day-book, from which the entries in a register were made, is not admissible in evidence. The editor of *Burn's Ecclesiastical Law*, after stating that case in vol. iii. p. 293, makes the following observation: "If, indeed, the entry in the day-book, representing the plaintiff as illegitimate, had been signed by the reputed father, or the mother, or made under their direction, such evidence would have been admissible, as the declaration of a deceased parent on a question of legitimacy; for the declarations of deceased persons, supposed to have been married, (who might themselves be examined if alive,) are admissible to disprove the fact of marriage: *Rex v. Bramby* (4); but if, on the other hand, in the absence of such proof, the entry appeared to be merely a private memorandum, kept for the purpose of assisting the clerk to make up the register," (and of that nature it seems here to have been considered,) "in that case it should not be received as the original authenticated entry." The editor, therefore, thought, that the entry in the day-book would not be receivable in evidence in the character of a register; but that, if it had been signed by the reputed father and mother, it might have been received as a declaration of the deceased parents. In the case of *Newham v. Raithby*, the copies of the register of a dissenting chapel were not allowed to be pleaded in evidence, in the Ecclesiastical Court, on the ground that they were mere private memoranda, and not copies of public documents, which are in official custody. So in this case, the entries made by the clerk were mere private memoranda. They were not, therefore, admissible in evidence, and

(2) *Strange*, 1072.

(3) See 6 Wm. 3. c. 6; 7 Wm. 3. c. 35; and 9 & 10 Wm. 3. c. 35, for ecclesiastical regulations on this subject.

(4) 6 Term Rep. 330.

the rule for a new trial must be made absolute.

Mr. Justice Littledale.—I am of the same opinion; and, I think, the directions of the 70th Canon ought to be strictly attended to.

Mr. Justice Parke.—I am clearly of opinion, that the register was inadmissible. The law, which gives authority for making the entries, reposes a confidence in the person, that he will make them of his own knowledge, and not from the information of other persons. The whole history of the present entry by Dr. Smith, amounts, in point of law, to nothing but hearsay; he was a perfect stranger to the fact, of which he made the entry. The minute made by the clerk, can have no weight whatever. It was a mere private memorandum. I concur with my Brother Bayley in regretting the necessity which presses upon us to set aside this verdict, and to send the case again for trial.

Rule absolute.

1829. }
Jan. 23. } EDGINGTON v. —

Practice—Misnomer—Common Bail.

Common bail filed, in which the plaintiff's name was spelled Edginton instead of Edginton. The plaintiff's attorney treated it as a nullity, and signed judgment without demanding a plea. Judgment held irregular.

The defendant's attorney filed common bail, but omitted the second *g* in the plaintiff's name; and it therefore stood as Edginton. The plaintiff's attorney signed judgment without demanding a plea; and against a rule for setting it aside,—

Mr. Archbold now shewed cause, contending that common bail had not properly been filed. But—

The Court instantly made the

Rule absolute.

1829. }
Jan. 31. } BAILLIE'S CASE.

Practice—Excommunication—Contumace Capiendo.

1. *A defendant who is in the custody of the marshal may be brought up by habeas corpus, and re-committed, charged with a writ de contumace capiendo directed to the sheriff of Surrey.*

2. *Such a writ does not deprive the defendant of the benefit of the rules.*

The defendant being in the custody of the marshal for other causes, was brought up by habeas corpus, to be charged with a writ *de contumace capiendo*. The habeas corpus was directed to the marshal, and the writ with which it was proposed to charge him, was directed to the sheriff of Surrey.

Mr. J. Jervis moved that he be committed to the custody of the marshal, charged with this writ, which, he submitted, might lawfully be done. The case of *Rex v. Buckland* (1) is an authority in point. The report runs thus—"The Court was moved to deprive one, in custody on an *excommunicato capiendo*, of the benefit of the rules: but, on consideration, and search for precedents, they refused to do it." This shews that the marshal was considered at that time as a proper custody.

Mr. Justice Bayley.—I think the case in *Strange* is an express authority.

Mr. Justice Littledale.—I doubt whether the marshal is the proper person, to whose custody the defendant can be committed under this writ. He is not an officer to execute process according to the 5th Eliz. c. 23, and the 53 Geo. 3. c. 127; but, I think the case in *Strange* binds us.

Mr. Justice Parke.—I think the case in *Strange* sufficient to shew, that the marshal was the proper officer under the statute of the 5th Elizabeth, relating to the process *de excommunicato capiendo*; and the statute of the 53d Geo. 3. puts the proceeding of *de contumace capiendo* on the same footing.

Defendant committed to the custody of the marshal.

(1) 1 Stra. 412.

[For the statutes, and the cases collected on this subject, see 1 *Chitty's Statutes*, p. 244, *et seq.* For the Practice, see 1 *Gude's Crown Office Practice*, p. 239.]

1829. } THE KING v. THE INHABITANTS
Jan. 31. } OF MUCCLESTONE.

Evidence—Subscribing Witness.

Upon a question of settlement by apprenticeship, the indenture was produced, apparently executed by all parties: and the name of "George Jones" affixed to the attestation, as the attesting witness; but without any description. It was proved, that diligent search had been made in the place where the indenture was executed, but no person of that name could be there found; and that inquiry had also been made of the parties to the indenture, but no information as to the witness could be obtained from them:—but that between two and three miles from the place, there was a George Jones, who had been applied to, and who said he knew nothing at all about the matter. He was not produced.

Upon this evidence, the Sessions refused to receive the parties themselves to prove the execution of the indenture; being of opinion that enough had not been done to prove the handwriting of the attesting witness. The Court of King's Bench held the Sessions to have decided rightly.

[This case will be found in the Cases relating to the Duties of Magistrates, p. 96.]

1829. }
Feb. 7. } CLARK v. PALMER.

Sheriff—Escape—Indorsement of Writ.

1. The omission to indorse upon a writ of *ca. sa.* a description of the defendant's residence and situation in life, is not in general a ground for setting aside the writ as between the parties.

2. But, under special circumstances, it may be a ground for setting aside the writ, where, if it were allowed to remain, it might subject the sheriff to an action, at the suit of the plaintiff, who had been guilty of the omission.

The common rule had been taken out by the plaintiff, calling upon the sheriff to return the writ of *ca. sa.* The sheriff applied to the Court to have the writ and the rule set aside, under the following special circumstances:—

The writ, which was for several hundred pounds, when delivered to the sheriff's agent, did not bear the indorsement required by the rule of court, giving the residence and description of the defendant. It was stated, verbally, that the defendant had no occupation, and that his residence was not known. The plaintiff's attorney desired the warrant to be made out to a particular officer of the sheriff; and stated, that he would send instructions to him. In point of fact, he never did; and the defendant was never arrested under the writ in this cause. But, subsequently, the defendant was arrested under another writ, by another officer, in a distant part of the country;—paid the debt, and gave the officer who arrested him a guinea and a half to dispense with searching the sheriff's office, to learn whether there were any other writs against him; and he was accordingly discharged out of custody.

The defendant, upon the present rule, made an affidavit on behalf of the plaintiff, stating the fact of his having been so arrested under the other writ, and the circumstances before mentioned, which attended that arrest.

The plaintiff made no affidavit.

Mr. Campbell was now heard for the plaintiff.—The sheriff might probably have refused to receive the writ, when it was offered to him, without being indorsed according to the rule of court. But, having received it, he is bound to make a return; and the Court will not, upon motion, deprive the plaintiff of any remedy against the sheriff for his misconduct, or that of his officer, for which he is responsible. The relieving the sheriff upon this motion will, in fact, be relieving the officer who took the bribe for not searching the office. Whether the plaintiff can, under the special circumstances of this case, maintain any action against the sheriff, may be doubtful; and in that action the sheriff may avail himself of all the facts upon which he now relies. But if the Court relieve him thus

upon motion, they will shut out the plaintiff from any remedy.

Mr. Gurney, contra.—It would be unjust to allow the plaintiff to call upon the sheriff to make a return to this writ. Under the circumstances which have taken place, the sheriff cannot make any return, which will not subject him to an action at the plaintiff's suit. It is singular, that upon, the present motion, the plaintiff makes no affidavit; and more singular that the defendant makes one in favour of the plaintiff. This is only one of the very suspicious facts which appear in the case. The plaintiff named his own officer; stated that he would send instructions to him,—but never did so: in the interim the defendant is arrested under another writ; pays the debt; shews great anxiety to prevent the office being searched; and very extraordinarily comes forward now on behalf of the plaintiff, in an endeavour to fix the sheriff with the whole amount of the debt.

Lord Tenterden.—In this particular case, I think the writ of *ca. sa.* should be set aside; but I do not lay it down as a general rule, that the omitting to indorse the writ with the description of the defendant is alone to be a sufficient ground for setting a writ aside. But where we see, as we do in the present case, that the plaintiff has not done what he ought, and that the sheriff may be endangered, I think we should interfere. Here the plaintiff had the warrant made out to an officer of his own naming; he said he would give directions to that officer; he never did;—he learns that another officer in a distant part of the country has arrested the defendant, and discharged him upon payment of the particular debt; and then he calls upon the sheriff to return his writ, in order, no doubt, to bring his action against the sheriff, either for an escape, or for a false return. It is said, that the plaintiff did not know the residence of the defendant; and that he had no occupation. But surely he might have given some directions; and if a plaintiff give all the information in his power, he will satisfy the rule of court. He might have given a description of his person, and of his former residence. These, he must be presumed to have known, for he was able to sue the defendant to judgment. He might have

given all the information of which he was himself possessed, in order to his finding out the defendant. There is also this additional reason for the Court interfering in the present case:—The process is in execution; and the sheriff, if liable to an action, will be liable for the whole amount of a very large debt. Under these particular circumstances, I think the present rule for setting aside the writ of *ca. sa.* should be made absolute.

Mr. Justice Bayley concurred.

Rule absolute.

1829. }
Feb. 12. } BULL v. GARDNER.

Arrest—Defendant's Initials.

An arrest of a defendant who is described in the writ by the initials only of his christian names, is irregular in the King's Bench. —Semble, contra in Common Pleas.

The defendant was arrested as the acceptor of a bill of exchange. The affidavit of debt and the writ described him as William R. Gardner. He gave a bail-bond by the name and description of "William Robert Gardner; sued by the name of William R. Gardner." A rule having been obtained by *Mr. Fish*, calling upon the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled upon the defendant's filing common bail, and why the plaintiff should not pay the costs of the application,—

Mr. Tomlinson shewed cause, upon an affidavit, that the defendant's signature to the acceptance was—"W. R. Gardner;" and that the plaintiff had made diligent inquiry to ascertain both the names of the defendant before the arrest. *Mr. T.* admitted that the last case upon this subject, in this court, was against him. That was the case of *Reynolds v. Hankin* (1); wherein this Court held, that the arrest of a party, described in the writ by his initials only, was irregular. That case was also acquiesced in by the Court of Common Pleas, in the case of *Taylor v. Rutherford* (2). But in a subse-

(1) 4 Barn. & Ald. 536.

(2) 6 Moore, 264.

quent case, in the Common Pleas, of *Lake v. Silk* (3), the Court said, "We find ourselves fettered by the decisions in this court and the King's Bench; and as the party may have acted upon those decisions, the bail-bond must be set aside, but without costs. For the future, we shall not give relief on motion in similar cases."

[*Mr. Justice Bayley*.—There the defendant executed the bail-bond in his right name.]

So he did here, and the last-cited case is therefore expressly in point against the present application.

Lord Tenterden.—We have decided, on consideration, that an arrest of a person described in the writ by his initials only, is irregular. We see no reason to alter that decision.

Rule absolute.

1829. } HARVEY AND OTHERS v. KAY,
Feb. 18. } BART.

Joint Stock Company.

1. *The 39 and 40 Geo. 3. c. 28. does not extend to prevent persons exceeding six in number paying their own debts by their own bills.*

2. *Where a plaintiff sued the members of a joint stock company for goods sold and delivered, and the defence was, that he was himself a member of the Company:—Held, that his own letters, in which he spoke of himself as a member, were evidence to shew, that he was a member, although it was provided by the partnership deed, that none should be members who did not execute the deed, and it did not appear that the plaintiff had executed it.—Held, also, that those letters were evidence of his being a member at the time at which they were written, although his shares had been entered in the books of the Company as transferred to another person; the provisions of the deed requiring the execution of a formal transfer, which, it did not appear, had ever been executed.*

This was an action to recover 197*l.* 8*s.* 3*d.*, the amount of goods supplied by the plain-

tiff to the Cornwall and Devonshire Mining Company, in part payment of which, an instrument for 66*l.* 3*s.* 2*d.* was given in the following form:—

Redruth, April 1826.

No. 275. £66. 2*s.* 9*d.*

Two months after date pay to the order of Messrs. Harvey, William & Co. sixty-six pounds two shillings and ninepence, value received.

To the Cornwall
and Devonshire
Mining Company,
Lombard - street,
London.

Accepted for the Cornwall
and Devonshire Mining
Company, payable at Sir
Wm. Kay, Price & Co.,
bankers, London.
John Wood, Secretary.

For the Corn-
wall and De-
vonshire Min-
ing Company,
Rowland
Wilks,
Mine Cashier.

Upon the trial of this case, at the Sittings before Easter term, at Guildhall, a verdict was taken for the plaintiff for 134*l.* 2*s.* 7*d.*, with liberty to the defendant to move for a nonsuit, or, in the alternative, to reduce the verdict to 61*l.* 19*s.* 10*d.*

The declaration contained eleven counts. The first three were upon the instrument in question, treating it as a bill of exchange: the first and second charging defendant as acceptor, and the third as drawer. The other counts were for goods sold, work and labour, and the usual money counts.

Pleas.—First, the general issue; and second, that Reynolds, one of plaintiffs, was a partner of defendant in the company.

The replication joined issue on the first plea, and traversed the second.

The two points in dispute were, first, the right to recover upon the instrument above set forth, which the plaintiff called a bill of exchange; and, second, as to whether the plaintiff Reynolds had ceased to be a partner in the Cornwall and Devonshire Mining Company at the time of the contracting of the debt in question.

Upon the trial of the cause, the deed establishing the company was given in evidence, on the part of the plaintiffs; and it appeared, that it was executed by the defendant in person, and for Mr. Reynolds, by Mr. Wilks, jun. in the following form: "For William Reynolds, of Illogan, by power, John Wilks, jun."

The defendant gave notice to the plaintiffs to produce the power under which Wilks executed for Reynolds; and on their

failing to do so, in order to shew that Reynolds authorized the act of his alleged attorney, the defendant put in evidence the following letters :—

“Trevenson, 5th November, 1825.

“Sir,—When I had the honour of meeting at Redruth the deputation from the Cornwall and Devonshire Mining Company, I then stated to Mr. Wilks, that I feared I could not, consistent with my numerous engagements, continue the office of a country Director, so as to do justice to the important affairs of the association; and, finding such to be the case, from the pressure of my own private concerns, I am reluctantly compelled to request the favour of your presenting this letter to the Chairman of the association as my resignation of the office of Director, with my assurance, that I shall at all times feel much pleasure in rendering the company, as far as I can consistently, any assistance within my power.

“W. Reynolds.

“P.S.—I shall be much obliged by your acknowledging the receipt of this letter.”

“To John Wood, esq. Secretary
to the Cornwall and Devon-
shire Mining Company.”

“Trevenson, February 11th, 1826.

“Sir,—I have this day disposed of my 30 shares (No. 3279 to 3308, both included,) in the Cornwall and Devon Mining Company, to Mr. John Jeffery, of the parish of Camborne, in the county of Cornwall; and I request you will transfer the said shares to the said Mr. J. Jeffery accordingly, and that you will be pleased to acknowledge the receipt of this letter.

“William Reynolds.”

“To John Wood, esq. Secretary,
No. 26, Lombard-street.”

In consequence of this last letter not containing all the information required by the deed of settlement, with reference to the transfer of shares, some further correspondence took place between the then Secretary to the Company and Mr. Reynolds, and the following letters, written by Reynolds, were given in evidence :—

“Trevenson, February 20th, 1826.

“Sir,—The consideration to be paid by Mr. John Jeffery to me for my 30 shares

in the Cornwall and Devon Mining Company is 360*l.*; and I must beg the favour of your sending me, without loss of time, the necessary transfer for the execution of the contracting parties.

“I am Sir, yours,
William Reynolds.”

“Trevenson, 30th March 1826.

“Sir,—I am rather surprised at not receiving from you the transfer for my shares to Mr. J. Jeffery in the Cornwall and Devon Mining Company; I again beg leave to have it without further delay.

“I am, Sir, &c., Wm. Reynolds.”

“To J. Wood, esq.”

These letters were put in by the defendant with a view of shewing Reynolds's acquiescence in the deed by which he was appointed a Director of the Company, from which deed the following clauses were read :—

“That any proprietor of the said company or partnership society who shall be desirous of selling any share or shares held by him or her in the said company, shall give notice thereof in writing at the office of the said company, specifying and truly setting forth in such notice the share or number of shares so intended to be sold, and the price for which he or she hath agreed to sell the same, and the name or respective names and place or places of residence of the person or persons who shall have agreed to become the purchaser or purchasers thereof.

“That no person who shall hereafter purchase any share or shares in the said company or partnership society, shall become or be deemed a proprietor of the said company, in respect of the share or shares so purchased by him or her, unless and until he or she shall duly execute, at the office of the said company, either in person or by attorney, these presents, or such further or other deed or deeds, instrument or instruments, as may be from time to time, by the Directors of the said Company, for that purpose prepared, and as may be requisite or proper to bind him or her (whether by way of covenant or otherwise) to the observance or performance of all the rules, orders, and regulations of the said company contained in these presents, or other the existing rules, orders, and regulations

thereof; and he or she shall *immediately* after such execution by him or her as aforesaid, and *not before*, become a proprietor of the said company.

"That the Board of Directors shall, on notice being received at the office of the company, of the transfer of any share or shares in the said company or partnership society, (provided such transfer be made in all respects in conformity with the rules and regulations of the said company in that behalf, whether herein contained or otherwise,) cause such transfers to be registered in the books of the said company, or in such way or manner as the existing rules and regulations of the said company may in that behalf direct.

"That every person by whom any share or shares shall be transferred, conformably to the provisions hereinbefore contained, and the other existing rules and regulations (if any) for the time being of the said company or partnership society in that behalf, and who shall have paid all instalments that may then have become payable on the share or shares so transferred, shall, *immediately after such transfer shall have been registered in the books of the said company*, cease to be a proprietor of the said company, in respect of such share or shares; and the person so ceasing to be a proprietor as last aforesaid, his heirs, executors, and administrators, shall, as between him and them, and the other proprietors and shareholders of and in the same company, and also as to all other persons whomsoever, as far as the rules of law and equity will permit, be thenceforth and for ever thereafter acquitted and exonerated from all claims and liabilities, and all covenants, rules, and regulations, to which such person was subject in respect only of such shares, and shall be indemnified therefrom by and out of the funds and property of the said company, or otherwise, by the remaining and other proprietors of the said company."

It then appeared in evidence, that a transfer in the following form was prepared by

the secretary, on a proper deed stamp, and sent down to Reynolds in Cornwall for execution, but was never returned:—

"Know all men by these presents, that in consideration of the sum of _____, of lawful money of Great Britain to him paid by _____, hath assigned and transferred, and by these presents doth assign and transfer unto the said _____, all those _____ shares in the capital of the Cornwall and Devonshire Mining Company, of and belonging to him, the said _____ numbered respectively _____; and all the right and interest of him, the said _____ of, in, and to the said shares respectively, and of, in, and to the interest, dividends, and profits now due, or hereafter to become due, on and in respect of the said shares and every of them,—to hold the said shares hereby assigned and transferred, and every of them unto the said _____, his executors, administrators, and assigns, subject to the future instalments to be made thereon, and to the laws and regulations of the partnership contained in the deed of settlement, bearing date the 6th day of July 1825, and also subject to such bye-laws, rules, and regulations, as may be made by the Directors of the said Company, and on the same conditions, in every respect, as the said _____ held the said shares, and every of them, immediately before the execution of these presents."

[Then followed covenants by the assignee to perform the stipulations in the deed of partnership; and by the assignor, that he had not previously assigned; and for further assurance.]

This instrument, it was in evidence, never was returned to the secretary, and there was no evidence of its having been executed. The plaintiff, in order to shew that the before-stated clauses in the deed of settlement had been fully complied with, so as effectually to determine Reynolds's partnership in the company, put in a book of the company, called the transfer-book, in which appeared the following entry:—

Date of transfer.	Shares numbered.	Total number.	Name and residence of person transferring.	To whom transferred.	Payments made, when transferred.	Total consideration.	When and to whom delivered.
1826. March 28.	3279 to 3308.	30.	Wm. Reynolds, Trevenson, Cornwall.	John Jeffery, Camborne.	£450.	£360.	

It will be observed, that the last column of the above entry is not filled up. It appeared in evidence that the above entry was made *prior* to the sending of the before-mentioned deed of transfer to Reynolds to execute.

Upon these facts, the defendant raised several objections: the principal of which was, that it appeared the plaintiff Reynolds was a partner at the time of the accruing of the cause of action, and had never ceased to be one, according to the provisions of the deed. This objection, if well founded, went to the whole of the action. This was the point upon which the case ultimately turned; and as no opinion was expressed on the subject of either of the others, except two, those two alone are here noticed.

First, it was objected, that (assuming the plaintiff Reynolds to be a partner in the company,) the bill of exchange, upon which the action was brought, was drawn by one person upon the same person; so that the plaintiff filled the character of both drawer and acceptor of the bill, while the declaration treated the bill as drawn upon different persons than those who drew it.

Secondly, that the bill being accepted by a greater number of persons than six, it was void, as being against the provisions of the Bank Act, 39 & 40 Geo. 3. c. 28.

The plaintiff recovered a verdict, subject to the questions reserved. A rule having been obtained calling upon the plaintiffs to shew cause why the verdict should not be set aside, and a nonsuit entered, cause was shewn at the Sittings before this term, by *Sir James Scarlett* and *Mr. Chitty*; the cause was then adjourned; and this day, *Mr. Campbell* was heard in support of the rule.

Arguments for the plaintiffs.—The evidence was not sufficient to shew that the plaintiff Reynolds was a partner; for he had never executed the deed; nor did it appear that Wilks, who executed for him, had any authority. But, if it should be considered that the evidence was sufficient for the purpose of shewing that he ever was a partner, it must be taken to be also sufficient for the purpose of shewing that he had ceased to be a partner at the time of the accruing of the present cause of action. His shares had been transferred in the books of the company to Jeffery.

Upon the question as to the variance.—There is no objection, in point of law, to a man belonging to a firm which draws, as well as to the firm upon which a bill is drawn: *Carthen*, 509. (1)

And with respect to the question upon the Bank Act, that act does not apply to persons greater in number than six, who pay their own debts: *Wigan v. Fowler* (2), *Hervey v. the East India Company* (3); and the same point has been recently decided before the twelve Judges (4).

For the defendant.—The case of *Teague v. Hubbard* (5) has expressly decided, that no action can be maintained by the members of a joint stock company against one of the others, even for money received on their account by him in a character distinct from his being such a member. It is, therefore, sufficient to shew, that the plaintiff Reynolds has not ceased to be a partner. The letters of Reynolds himself shew, that he was a partner; for, as late as the 30th of March, he wrote a letter expressing his surprise that the transfer of the shares had never been sent to him to execute. The transfer was sent to him to execute; it does not appear that he ever executed it. Even if he had, and even if the entry in the book were complete, he would not cease to be a partner, according to the terms of the deed, until Jeffery, to whom the shares were supposed to be made over, had executed the deed. It was incumbent, therefore, on the plaintiff to shew that he had ceased to be a partner.

Then, with respect to the bill of exchange.—It is drawn against the provisions of the Bank Act.

(1) 18 Ves. jun. 69.

(2) *Starkie*, N.P.C. 459.

(3) 5 Barn. & Ald. 204.

(4) The learned counsel probably alluded to the case of *Magor v. Hammond*. It was an action in the Common Pleas, tried before Mr. Justice Gaselee, when a special verdict was found; which raised, among other questions, that which the *dictum* of Lord Tenterden above stated assumes to have been decided. We understand, however, that, although the case was heard, by desire of the Court of Common Pleas, before the Judges at Serjeants' Inn, no judgment was given, or is likely to be given, on account of a defect in the special verdict. The case was argued by Mr. Crowder for the plaintiff; and Mr. Alderson for the defendants. Lord Tenterden was not present at the argument.

(5) 8 B. & C. 345; a. c. 6 Law Journ. K.B. 326.

[The Court expressed so decided an opinion that this point had been recently disposed of before the Twelve Judges, that it was not pressed.]

At all events, there was a variance between the evidence and the declaration; for the evidence shewed, that the drawer and the acceptor, at least as to one person, was the same. The declaration avers the bill to be drawn and accepted by different persons.

Lord Tenterden.—I think the third count in the declaration is free from the last objection; for it is so general that it does not appear distinctly, that the defendant may not be one of the Cornwall and Devon Mining Company: that point is therefore disposed of. Upon the main point, I think, that, although the execution of the partnership deed by the plaintiff Reynolds was not proved, yet his own letters shew that he had become a partner according to the terms of the deed. Then, had he done enough to relieve himself from the partnership? There was no transfer proved; no execution of the deed by Jeffery, to whom the transfer was supposed to have been made; and no acts of Jeffery by which he would appear to have made himself chargeable. I think, therefore, that there was evidence, that the plaintiff Reynolds became a partner, but none that he had ceased to be one.

Mr. Justice Bayley concurred.

Mr. Justice Parke.—I think there was sufficient evidence to shew, that the plaintiff Reynolds was a partner; and I think there was *prima facie* evidence to shew that his shares had been transferred, but that *prima facie* evidence was rebutted by his own letters.

1829. }
Feb. 19. } SAMS v. CULHAM AND ANOTHER.

Practice—Notice of Declaration.

A notice of declaration, whether the declaration be filed conditionally or in chief, must express the nature of the action.

Notice of declaration being filed in chief, not stating the nature of the action—

Motion to set aside the proceedings for this irregularity.

Mr. Archbold shewed cause.—The notice of declaration requiring a statement of the nature of the action, is provided by the old rule of court, Trinity, 1st Geo. 2. 1727—1 *Gude's Crown Office Practice*, 358; and it provides only for cases where the plaintiff proceeds by entering an appearance for the defendant, under 12 Geo. 1. c. 29. But, by

The Court.—There is no reason for any such distinction; in either case you must express the nature of the action. The process does not inform the defendant what it is.

Rule absolute.

1829. }
Feb. 19. } HARRISON v. SMITH.

Practice—Dies non.

A party is not entitled to open the office in order to sign a judgment, or take any other proceeding on a dies non, unless he was entitled to take that proceeding on the previous day.

The question in this case was, whether the judgment had been regularly signed.

The rule to plead was out on Saturday the 31st of January. Monday the 2nd of February was Purification Day. On that day, the plaintiff's attorney paid for opening the office, and signed judgment.

Mr. Archbold, for the plaintiff, contended, that this was regular, and that the case of *Mesure v. Britten* (1), was expressly in point. There it was held, that the defendant was bound to plead on Purification Day.

Mr. Hutchinson, contra, was stopped.

Mr. Justice Littledale.—As long as the law has been known in England, Purification Day has been considered a *dies non*. The Court always adjourn over that day.

(1) 2 H. Bl. 616.

As to the *offices* being open on that day, the meaning of it is, that the officers of the court practically work upon that day; but all that is done is considered as of the previous day; and all the entries relate to the previous day. A rule to plead cannot expire on that day; if the day were a mere holiday at the office, but were also a day upon which the Court sits, the party might open the office and sign the judgment. If a judgment, for the convenience of business, be signed on Purification Day, it is a judgment of the previous day. It is as much a *dies non* as Sunday. I am sure it has

been so since the time of Edward the 6th; and, I believe, long before. I cannot agree to the doctrine of the case in Henry Blackstone.

Mr. Justice Parke,—I think the day in question is so strictly a *dies non*, that any business transacted at the offices, must be entered and treated as business of the previous day. His judgment would consequently be a judgment of Saturday, when the plaintiff was not entitled to it.

[No other Judge was in court].

Rule absolute.

END OF HILARY TERM, 1839.

CASES ARGUED AND DETERMINED

IN THE

Court of King's Bench,

IN AND BEFORE

EASTER TERM, 10 GEO. IV.

1829. } SPARROW, PECKOVER, AND
April 23. } OTHERS V. CHISMAN.

Partnership.

Where the facts of the case are such, that one of several plaintiffs could not recover against the defendant, if the cause of action were considered as accruing to him alone, he cannot sue in conjunction with the other plaintiffs, although they may not have been parties to the facts, which would deprive the other plaintiff from suing alone.

Therefore, where a partner in a banking house, for his own accommodation, drew bills upon the defendant, and caused the defendant to accept them, he (the partner) undertaking to provide for them; and afterwards, being indebted to the firm, of which he was a member, he indorsed them for a valuable consideration to the firm:—Held, that an action on the bill could not be maintained by the firm, of which that partner was one.

This was an action by the plaintiffs, who were bankers at Chelmsford, to recover the balance of a banking account due from the defendant; and also the amount of two bills of exchange for 1500*l.* each, drawn by the plaintiff, Peckover, one of the firm of the plaintiffs, upon and accepted by the defen-

dant; and by Peckover, indorsed to the plaintiffs' firm; of whom Peckover himself was one. The cause was tried at the last Summer Assizes for Essex, before Mr. Baron Garrow, when the following appeared to be the principal facts:—

The dispute in the cause was respecting the two bills for 1500*l.* each. There were private dealings between the plaintiff, Peckover, and the defendant; and at one time, a partnership between Peckover's son and the defendant was in contemplation. Peckover drew the bills in question upon the defendant, and asked the defendant to accept them for Peckover's accommodation; he undertaking to provide for them. Peckover indorsed them to the firm of the present plaintiffs, of whom Peckover himself was one; and, for the purpose of the argument in the present cause, it may be taken that Peckover was indebted to the plaintiffs' firm, and that the firm gave value for the bills.

The point taken for the defence was, that Peckover himself could not sue upon those bills, nor could he sue with others upon them. The learned Judge left to the jury the question, whether the firm had given a valuable consideration for the bills; and, a verdict having thereupon been found for the plaintiffs,—

Mr. Serjeant Spankie, in Michaelmas term last, moved for a rule to shew cause why the verdict should not be set aside. He contended, that the principle, that a person who could not alone sue the defendant, could not do so in conjunction with others, had been established in the cases of *Jacand and another v. French* (1), and *Richmond v. Heapy* (2). In the former case Lord Ellenborough observed, that "it was impossible to sever the individuality of the person." A rule having been granted accordingly,—

Mr. Gurney shewed cause, and proceeded to rely upon certain facts in the case, which went to shew that Peckover, who, he said, was a disappointed and dismissed partner, had unfairly sought to assist the defendant in the present defence, to the prejudice of his late partners.

[*Mr. Justice Bayley*.—But if Peckover undertook to provide for the bills, can he sue upon them?]

He is here suing in a different character, and with others, who, with him, have separate rights.

[*Mr. Justice Bayley*.—But if one is precluded from suing alone, can he join with others?]

Mr. Gurney—finding the opinion of the Court so strongly against him, did not press the case any further.

Mr. Justice Littledale referred to the case of *Bolton v. Puller and others* (3), as somewhat in the plaintiffs' favour, upon the point; but expressed his own doubt, whether the decision could be maintained in point of law.

Mr. Justice Bayley concurred; though he thought the present case was distinguishable from that of *Bolton v. Puller*.

Rule absolute to strike out the amount of the bills from the verdict.

[See also *Jones v. Fleeming and another*, 7 B. & C. 217; 6 Law Journ. K.B. 113.]

(1) 12 East, 317.

(2) 1 Starkie, N.P.C. 202.

(3) 1 Bos. & Pul. 539.

1829. } TAYLOR, GENT. v. WATSON AND
April 30. } ANOTHER, GENT.

Attorney—Costs—Assumpsit.

Where a suit at law is depending for the recovery of a sum of money; and, before judgment, the plaintiff in the action authorizes the defendant in the action to pay over the money to a third person, to whom the plaintiff is indebted, the mere consent of the attorney for the plaintiff to such payment is not a sufficient consideration to support a promise to him to pay his costs.

Whether such consent would be a sufficient consideration, in case the attorney had previously given notice to the defendant in the action not to pay over the money until his costs were paid—Quære.

This was an action of assumpsit. The first count of the declaration stated, that, before the making of the defendant's promise, mentioned in that count, a certain suit had been prosecuted, and was then pending in the Court of King's Bench, wherein one Duncan Graham was the plaintiff, and William Chrystie and Simon Taylor were the defendants; and wherein the said Duncan Graham had impleaded the said William Chrystie and Simon Taylor on certain promises and undertakings of the said William Chrystie and Simon Taylor, to recover therein a certain large sum of money, to wit, the sum of 165*l.* 13*s.* 5*d.*, due from the said William Chrystie and Simon Taylor to the said Duncan Graham, in which said suit, during all that time aforesaid, the said plaintiff was attorney as aforesaid for the said Duncan Graham; and during all that time aforesaid, the said Duncan Graham was indebted and liable in a certain other large sum of money, to wit, the sum of 648*l.* 17*s.* 3*d.* to, amongst divers other persons, one James Goodall; and thereupon, in consideration that the said Duncan Graham, at the special instance and request of the said defendants, would [with the consent of the said plaintiff, as such attorney for the said Duncan Graham,] give an authority for the said William Chrystie and Simon Taylor to pay the said sum, to wit, of 165*l.* 13*s.* 5*d.* to the said James Goodall, they, the said defendants, promised the said plaintiff, that they would pay to the said plaintiff the amount of his costs in the said suit; and Graham, confiding in the said promise of the said defendants, did [with

the consent of the said plaintiff,] give an authority for the said William Chrystie and Simon Taylor to pay the said sum of money to the said James Goodall, of which the said defendants had notice; and the said plaintiff saith, that his said costs in the said suit then and there amounted to a large sum of money, to wit, the sum of 60*l.*, of which the said defendants then and there afterwards, to wit, on the said day and year aforesaid, had notice, to wit, in the city aforesaid. The second count was nearly similar, except that it omitted the words marked in brackets relative to the consent of the plaintiff.

The third count, after stating the suit by Graham against Chrystie and Taylor, stated, that "during all the time aforesaid, the said Duncan Graham was indebted and liable in a certain other large sum of money, to wit, the sum of 648*l.* 17*s.* 3*d.* to, amongst divers other persons, one James Goodall; and the said defendants, before and at the time of the making their said promise and undertaking hereinafter mentioned, were attorneys for the said James Goodall." The cause of action was then charged in terms similar to those of the second count.

The fourth count,—after stating the proceedings in the suit between Graham and Chrystie and Taylor; that Graham was indebted to Goodall; that the plaintiff was attorney for Graham in that suit; and that the defendants were attorneys for Goodall,—charged the cause of action thus: "In consideration that the said Duncan Graham, at the special instance and request of the said defendant, would give authority to the said William Chrystie and Simon Taylor to pay the said sum, to wit, of 165*l.* 13*s.* 5*d.* to the said James Goodall, they, the said defendants, undertook and then and there faithfully promised the said plaintiff, that they would not accept the same, but on payment to him, the said plaintiff, of his costs in the said suit, as such attorney for the said Duncan Graham as aforesaid."

There were added counts for work and labour, as an attorney for the defendants, and upon their retainer; with the usual money counts. To the counts last mentioned the defendants pleaded the general issue.

To the four special counts they demurred, assigning, for special cause, as follows:—

That the promises charged in those counts did not appear to be founded on any consideration coming from the plaintiff to the defendants, but appeared to be without any good consideration, and to be mere naked agreements:

That it did not appear, that the plaintiff had any right to the sum of 165*l.* 13*s.* 5*d.* mentioned in the several counts, or any right or authority to prevent Graham from giving authority to Chrystie and Taylor to pay the money to Goodall:

That it did not appear, that any judgment had been recovered in the action by Graham against Chrystie and Taylor, or that the plaintiff had given any notice to the latter not to pay over the money to Graham or to Goodall, or to any other person other than the plaintiff, as the attorney in the action:

That it did not appear, that the plaintiff had any lien or a right to the costs.

The plaintiff joined in demurrer.

Mr. Patteson, in support of the demurrer.—To support an assumpsit, there must be a consideration moving from the plaintiff. This rule is laid down by *Mr. Selwyn* (1), and supported by a reference to *Bourne v. Mason* (2). In those cases, it was held, that no party could sue upon the promise who was not a party to the consideration. Here, it is not alleged that the promise was made in consideration of anything done or relinquished by the plaintiff. The first count seems to be the only one with which the defendant need grapple. In that count, it is alleged, that the authority was to be given at the request of the defendants. It seems as if the plaintiff had a right to prevent the money from being paid over, and that he had relinquished that right in favour of the defendants; but it does not amount even to that. It is nowhere averred, that the plaintiff had any right to prevent Graham from authorizing the defendants in that action to pay the money over. It may be admitted, that an attorney has a lien upon the judgment for his costs, and that if the money is paid, in fraud of that lien, he would be allowed to proceed for his costs.

(1) *Nisi Prius*, p. 52.

(2) 1 *Ventris*, 6, n. 6.

(3) *Strange*, 592.

[*Mr. Justice Parke.*—It does not appear that any costs were due.]

It may be said, that before judgment, if the attorney gives notice to the adverse party not to settle without securing his costs already incurred, he might have a right to proceed in the action for the purpose of recovering them. No doubt, if the defendants and the plaintiff in that action had colluded, the attorney might have gone on; but there does not appear to be any case where a *bond fide* payment, though after notice, has been held to be improperly made. Here, it is not even pretended, that notice was given. The plaintiff ought to have put himself in that situation that he had tied up Chrystie and Taylor from paying the money to Graham, without the consent of the plaintiff. The count shews no detriment to the plaintiff, or any benefit whatever derived from the act of the plaintiff. It is not stated, that the plaintiff had any lien against his own client for costs. It does not appear that the plaintiff might not have gone on for the costs against Graham, or that he relinquished any rights. It is not stated that he had any right to prevent the money from getting into the hands of Goodall, or that he relinquished such right.

[*Mr. Justice Bayley.*—There is nothing to shew, that the authority is effectual. Chrystie and Taylor never bound themselves to accede to the authority.]

The second count is in the same situation. The fourth count states the promise to be, that the defendants would not accept the 165*l.* 13*s.* 5*d.* but upon payment to the plaintiff of his costs. This count, therefore, does aver, that the defendants were attorneys of Goodall, and that the authority was acted upon; but the vice of that count is, that the consideration is there laid ill.

Mr. Campbell, contra.—If it appears that the plaintiff had a lien on the money, there is a sufficient consideration for the promise. A lien belongs to an attorney upon all money recovered or to be recovered by him. The Court will take notice, that an attorney has a lien to this extent; and this being a point of law, it was not necessary to allege in the declaration, that the plaintiff had a lien, or that he had waived it. The question, as to the personal liability of an attorney

upon such a promise, does not arise (4). The plaintiff had brought an action for 165*l.* 13*s.* 5*d.*, and that sum clearly appears to have been due. The law raises the debt, and will not presume it to have been satisfied.

[*Mr. Justice Bayley.*—Has an attorney any lien until the money is recovered and in his hands?]

In *Reade v. Dupper* (5), it was held, that the defendant could not pay over the debt to the plaintiff, after notice from the plaintiff's attorney not to do so, even where no fraud could be charged. In *Drinkwater v. Goodwin* (6), it was held, a factor had a lien.

[*Mr. Justice Parke.*—He in that case made the contract. The plaintiff here does not give up his claim against Graham or upon the money.]

As matters stood before this contract was entered into, the plaintiff might have resorted to his own client, and had a chance of obtaining payment out of the sum to be recovered. It was not, strictly speaking, a lien, because there was no possession. It was the chance of recovering money, and of repaying himself out of that money when the lien would have accrued. The question is, whether a waiver of that advantage is a sufficient consideration to support the promise that is implied in the terms of the question. It is immaterial whether the promisor derives any benefit from the consideration. The lien would attach if the money was paid in the course of a suit.

[*Mr. Justice Bayley.*—There is nothing to shew that the plaintiff's right to call upon Graham has been impeached, or to shew that Graham is insolvent.]

The giving up of the security is sufficient. The moment the authority was given, with the plaintiff's assent, he had no longer any claim upon the 165*l.* 13*s.* 5*d.* He could only look to Graham, his own client.

[*Mr. Justice Parke.*—In *Read v. Dupper*, there was a judgment. Before judgment, could the attorney prevent the defendant,

(4) Upon the question, as to the personal liability, —see *Burrell v. Jones*, 3 B. & A. 47; *Ex parte Hughes*, 5 B. & A. 482; *Iveson v. Cowington*, 1 B. & C. 158; s. c. 1 Law Journ. K.B. 71; 2 D. & R. 307; *Scrace v. Whittington*, 2 B. & C. 11; 3 D. & R. 195; s. c. 1 Law Journ. K.B. 221.

(5) 6 Term Rep. 361.

(6) Cowper, 251.

by a notice, from paying the debt to a solvent plaintiff? My impression is, that there must be fraud; a settlement, with the knowledge, that no part of the money will reach the attorney. Where there is no fraud, you may compromise, and receive the money.]

[*Mr. Justice Bayley*.—If Graham had thought fit, he might have entered into an arrangement in the original action. Even in the Common Pleas, where the practice is rather different, upon this point the Court will not interfere, except in cases of fraud.]

The question is, whether, after the authority had been given, the plaintiff was equally secure as before. He is now confined to Graham, and may lose his costs altogether. Then, there is sufficient performance averred; and, even if the right of the plaintiff were doubtful, his giving up that which is contended to be a right, is a sufficient consideration to support a promise: *Longridge v. Dorville* (7). The plaintiff did give his assent to the authority.

[*Mr. Justice Bayley*.—*Non constat*, that the authority was acquiesced in by Chrystie and Taylor.]

That is immaterial; because it would authorize them, if they chose, to act upon it; and the chance of its being acted upon is sufficient.

[*Mr. Justice Bayley*.—Unless Chrystie and Taylor consented to pay over the money to Goodall, the parties remain as they were. If the authority was not acted on, it is useless. Upon this count, the right seems still to remain as perfect as ever.]

[*Mr. Justice Parke*.—You say that Graham is prejudiced, and that thereby you are injured.]

The plaintiff is no longer in the same situation. There was nothing to prejudice his interposition before.

[*Mr. Justice Parke*.—The other counts are much more difficult to support than the first. There is nothing moving from the plaintiff. The plaintiff must confer a benefit or suffer detriment.]

Mr. Paterson, in reply.—The injury is of the minutest quantity, if any.

[*Mr. Justice Parke*.—The question is, whether giving up a remote chance is a sufficient consideration.]

(7) 5 Barn. & Ald. 117.

VOL. VII. K.B.

The consideration ought to be alleged with complete accuracy. It is not alleged, that the consent of the plaintiff was given at the request of the defendants.

[*Mr. Justice Parke*.—Suppose it had been alleged, in consideration plaintiff should consent.]

It might have been, that, in consideration that the plaintiff, at the request of the defendants, had consented that Graham should do so and so; but, even then, there ought to appear something for which a consent is necessary. It is not so shewn. If it had said, that Graham was unable to pay, and that notice had been given, it would have been within the case of *Read v. Dupper*. The plaintiff might have said, that, in consideration he had forborne to give notice, the defendants promised. There is no distinct averment, that the plaintiff ever waived his chance. The declaration ought to shew, that the plaintiff agreed to sustain detriment, and that he did sustain detriment. There is nothing to shew that any detriment was sustained. The plaintiff may still have a right to proceed to judgment against Chrystie and Taylor in the name of Graham; besides the first count contains no allegation of non-payment.

[*Mr. Justice Parke*.—That omission is not assigned as ground of special demurrer; and therefore, the demurrer must be considered in that respect as general.]

If this is a consideration, it is the least that was ever put into a declaration. If the situation of the parties is at all altered, it is by the act of third persons, over whom the plaintiff had no controul whatever.

The Court took time to consider; and, on this day, without giving judgment, intimated an opinion, that the matter alleged as the consideration for the defendants' promise, was not sufficient.

Mr. Justice Parke observed, "I had some little doubt about it; but I now think there is not a sufficient consideration stated to support the defendants' promise. The consent given by the plaintiff to the paying over the money to Goodall, was purely void. The act to which he consented might have been done without his consent; and, though his chance of getting payment of his costs may thereby have become diminished, I do not think that is sufficient, because it has

been diminished not by any act of his own, but by the act of a third person, over whom he had no controul. It has not been shewn in the argument (for that is the point,) that the plaintiff could prevent Graham giving the authority to pay Goodall."

Upon this intimation, the plaintiff's counsel craved leave to amend the declaration, in the hope, that some other facts might be introduced so as to make it sustainable. Accordingly,—

Leave to amend, on payment of costs.

[*Note.*—Before the above action was commenced, the matter in dispute had been the subject of a motion to the Court, calling upon the defendants in the first action, and Messrs. Watson and Byrom, the defendants in the above action, to shew cause why they, or one of them, should not pay the present plaintiff, J. M. Taylor, his costs in the action against Chrystie and Taylor. Upon the hearing of that rule, Lord Tenterden, C. J., observed, "This is not the ordinary case. I see no cause to say, Watson and Byrom should pay these costs; for they were not concerned for parties to the action." The rule was therefore discharged without costs.]

1829. { SINCLAIR AND ANOTHER v.
BOWLES. *

Contract—Part-performance.

In general, an entire contract is not divisible; and a part-performance cannot therefore be the subject of an action, either upon the contract itself, or for the value of labour applied to, and materials wrought up with, the property of the defendant, the subject of the contract.

Assumpsit for work and labour, and goods sold and delivered. The cause was tried at the Guildhall Sittings, in Hilary term, before Mr. Justice Parke, when the material facts appeared to be as follows:—

The demand was 10*l.* for work done to, and materials provided for, some glass chandeliers of the defendant. The order was of the plaintiffs' seeking; and one of

them, on looking at the chandeliers, said, he would repair them for 8*l.*; but, on the defendant pointing out to him that several things were required, that three arms were wanted, and observing, that if they were done complete, he would give 10*l.*, the plaintiff said he would complete them for that sum. He afterwards called to take them away; and was told by the defendant not to take them, unless he would complete them for the 10*l.* He took them away; and returned them in a few days, but by no means in a complete state, and one of the arms, which was perfect when taken away, was broken. But a few articles, such as icicles and drops had been supplied.

The defence was, that the contract being entire, and the plaintiffs having totally failed in the performance, they were not entitled to recover anything at all.

The plaintiffs urged, that at all events they were entitled to recover for the materials actually supplied, if not a fair sum for the work performed.

The learned Judge thought the contract was entire; and that, as the plaintiffs had not performed their part, they were not entitled to recover at all; but he put two questions to the jury:—

First—Whether the contract had been substantially completed according to the intention of the parties? This the jury answered in the negative.

Secondly—Whether the defendant had derived any benefit from the work done; and, if he had, to what amount? The jury answered that the defendant had derived such benefit, to the amount of 5*l.*

His Lordship then nonsuited the plaintiffs, reserving leave for them to move to enter a verdict for 5*l.*

Mr. Gurney now moved.—The defendant is surely bound to pay for that from which he has derived benefit. Where a contract for the sale of goods is entire, and some of the goods are delivered, and the buyer does not return them, he must pay for those he keeps, although the remainder be not delivered; though the plaintiff may be liable to an action for non-performance of his contract to deliver. The keeping of part, raises an implied new contract to pay for them. At all events, the plaintiffs should recover for their own property which has been applied to the defendant's chandelier.

The icicles and drops should have been returned, if the defendant did not mean to pay for them.

Lord Tenterden.—The plaintiffs ought to have demanded the last articles. But the contract has not been performed, and they are not entitled to recover anything at all.

Mr. Justice Bayley.—This was an entire contract. The plaintiffs have not performed their part; and the defendant has been thereby discharged from his part.

Rule refused.

[*Note.*—The decision in the above case, may at first sight appear to be contrary to *Shipton v. Cassen* (2), upon the question, whether it is necessary for the seller to demand back the part of the property which has been delivered, or whether it is incumbent on the buyer to deliver it back. In *Shipton v. Cassen*, the seller was allowed to recover for the part delivered and not returned. But the goods were there not wrought up with the buyer's property as they were in this case; and it was but reasonable here that the defendant should not be expected to sever his own property from that of the plaintiffs,—at least, until the latter applied to him to do so.]

1829. { DE LA CHAUMETTE V. THE BANK
OF ENGLAND.*

Bank Note.

1. *Whether a Bank of England note is transferrable abroad, so as to give the person who receives it abroad a right of action in England—quære.*

2. *Where a Bank of England note had been stolen, became circulated in France, and was transmitted by a merchant in France to his correspondent in England, in part payment of an account, but the English correspondent made no advance upon the credit of the note:—Held, that he could not maintain an action against the Bank (who had stopped the note), without proving that the French*

merchant became possessed of the note under circumstances which would entitle him to recover.

This was an action of trover for a Bank of England note for 500*l*.

Plea—The general issue.

The cause was tried, before Lord Tenterden, at the Guildhall Sittings after Michaelmas term 1827, when the following appeared to be the principal facts, respecting which there was no dispute.

The plaintiff, being possessed of the note in question, which in the usual form was payable to the bearer, on the 29th of May 1827, caused it to be presented at the Bank of England; and the defendants detained the same, on the ground that the note had been stolen some time before, from a person named Hasleton, and refused to deliver the note to the plaintiff, or to pay him the amount thereof. The defendants proved, that Hasleton, about the 28th of February 1826, being possessed of the note above mentioned, in the night of that day the same was stolen from him. The defendants also proved, that the plaintiff had stated that he had received the following letter, which he sent to them as a letter received by him from his principals, Odier & Co., dated Paris, July 21, 1827. "We should have liked to trace the sales of the stolen 500*l*. note to their source, but unfortunately our endeavours have not been very successful, and we doubt whether Mr. Hasleton will be able to discover the thief. We offer him, however, our best services, and will, if he chooses to pay the expenses, take any steps that may appear desirable to him. Our seller is a Mr. Emerique, a bullion-dealer, who has signed his name on the back of the note. His seller, Mr. Duval, another bullion-dealer, residing in the Passage du Panorama, who says he bought the note of an English gentleman, whose name and address he does not know. The latter adds that, being well acquainted with bank notes, when he buys them he merely ascertains their genuineness, which, though a vague mode of dealing, is a very current one amongst our bullion men, as the addresses which are given are generally false, and other precautions cannot well be taken. If the loser should wish us to summon Mr. Duval before a commissary of the police,

(2) 5 B. & C. 378; s. c. 8 D. & R. 130; 4 Law Journ. K.B. 199.

* S.C. 9 B. & C. 308.

we will do so. We do not believe it will lead to a beneficial result."

To prove that this letter was a translation of a letter from Odier & Co., sent by the plaintiff to the defendants, the plaintiff's clerk was called as a witness by the defendants. He proved that the plaintiff was a merchant in extensive business, and corresponded with the firm of Odier & Co. at Paris, and was in the habit of receiving from them, and other houses there, large remittances in bills of exchange and bank-notes; that, in the course of a year he had received remittances from Odier & Co. alone to the amount of 40,000*l.*; that he received the bank-note in question on the 28th day of May, being part of a remittance of a sum of 1800*l.*; and that, at the time when he so received it, Odier & Co. owed the plaintiff a balance of 1700*l.*; that balance, however was reduced to 900*l.* by other remittances, before he had notice that the note in question was stopped at the Bank. The course of business between the plaintiff and Odier & Co. was for Odier & Co. to make remittances to the plaintiff from Paris to London, and for the plaintiff to remit to them from London to Paris, and so take advantage of the exchange, and they divided between them the profits at the end of the year; each party was however answerable for the paper transmitted to the other. It was stated, that Bank of England notes to the amount of 500*l.* were commonly bought and sold at Paris by money-changers; and that when a money-changer sold a bill of exchange, or a note, to a banker or merchant, he put his name upon the bill, and warranted the payment of it; and, in case of a note, he guaranteed on a separate paper, called a *val*, that the note was genuine. Upon these facts, the defendants' counsel contended—

First—That although Odier & Co. were indebted to the plaintiff at the time when he received the note, yet, as he had not given them any further credit on the faith of the note, before he had notice that payment had been stopped at the Bank, he must be considered as having received it as their agent, and that he could recover on their title only. For this they cited *Solomons v. the Bank of England*(1);—and,

(1) 13 East, 135, in note.

Secondly—Assuming that to be so, it was incumbent on the plaintiff to shew that Odier & Co. gave full value for the bill.

Thirdly—That, as promissory notes were transferrable, not by the custom of merchants, but by the 3 & 4 Anne, c. 9, which placed them on the same footing as inland bills of exchange, a promissory note made in this country was not assignable in France; that this note must therefore be considered a mere chattel; and that, being so, and having been feloniously stolen from Hasleton, the property in it remained in him.

Lord Tenterden said, that, as the last point was one of considerable importance, he would give no opinion upon it; but would reserve liberty to the defendants to move to enter a nonsuit if there should be a verdict for the plaintiff. As to the other point, he was of opinion, that, for the purposes of this cause, the plaintiff must be considered identified with Odier & Co., and that unless they could recover he could not; and he directed the jury to find a verdict for the plaintiff, if, upon the evidence, they were of opinion, that Odier & Co. obtained the note in the ordinary course of business. A verdict having been found for the plaintiff, a rule *nisi* had been obtained for a nonsuit, upon the ground that Odier & Co. had acquired no property in the note by the delivery; or for a new trial, on the ground that the plaintiff ought to have proved that Odier & Co. gave value for it.

Sir J. Scarlett now shewed cause.—The plaintiff received this note in payment of a debt due to him from Odier & Co. It is not pretended that he came by the note improperly. He, therefore, acquired a property in it, and a right to sue upon it. Had there been no debt due from Odier & Co. to the plaintiff, and he had sued as their agent, he must have shewn that they gave a consideration for it. In *Solomons v. the Bank of England*, it did not appear that the person who transmitted the note from Holland was indebted to his correspondent in England. But, admitting, for the sake of the argument, that the plaintiff is identified with Odier & Co., and can recover only on their right, there is no fact to warrant an inference that the latter took the note under circumstances which ought to have excited in the mind of a prudent per-

son any suspicion that it had not been properly obtained. Odier & Co. were proved to be respectable merchants, in the habit of transmitting bank notes to this country. The question is, whether, (as in the case of *Down v. Halling and others* (2),) the holder of the note has exercised due caution. Upon being required by the plaintiff, at the instance of the defendants, to state how they acquired the note, Odier & Co. pointed out the source by giving the name and address of the persons through whose hands the note had come to them. The circumstances proved, not only throw no suspicion on Odier & Co., but, on the contrary, are evidence that they took it in the ordinary course of trade, and the jury have found that to be the fact. The only question in the cause, that of proper caution on the part of Odier & Co., has been decided by the jury.

Mr. Serjeant Bosanquet, contra.—The plaintiff is jointly concerned with Odier & Co., and cannot recover unless they have a good title to the note. The plaintiff was the agent of Odier & Co., and although they were indebted to him at the time when the note was remitted, he did not advance to them any money on the faith of this note. His situation has not been in any degree changed; the argument on the other side in substance is, that any person who, in a foreign country, may have possessed himself of a bank note, under circumstances which would prevent his recovering upon it, may, by sending it to a creditor in this country, enable the latter to maintain an action upon it. In *Solomons v. the Bank of England*, it did not appear whether there was an antecedent debt due to the plaintiff from his correspondent at Middleburgh. It is stated, indeed, by Lord Kenyon, that it did not appear that the plaintiff had given any consideration for it. Solomons received it as the agent of Henriquez and Co. of Middleburgh; and his right to recover was considered to depend upon their right. This case is substantially the same; the plaintiff is the agent in England of Odier & Co.; and they are the agents in France of the plaintiff. They assist each other in carrying on money transactions; and, at the end

of the year, divide the profits; but each is answerable for the paper transmitted to the other. Then, what was the conduct of Odier & Co., taken from their own letter? It does not appear from their own statement, that they gave the full value for it; and if they gave less than the full value, that circumstance would raise a strong suspicion that they obtained it improperly: and it is a remarkable fact that, with the knowledge that bank notes are sold to bullion-dealers with false addresses of the sellers, they buy this note of a bullion-dealer. They state that they *bought* it of Emerique, and that he *bought* it of Duval; but it is clear, according to their own statement, that Duval took it under circumstances which, if the transaction had taken place in this country, would have prevented him from acquiring any property in it; and the knowledge of the practice seems to have been as much within the knowledge of Odier & Co. as within that of Emerique and Duval. Duval merely ascertained the genuineness of the note, and did not require the name of the person from whom he received it; even if the instrument is to be considered as one in which the property passes by delivery, Duval could not have recovered upon it; but here, the note was not transferred to Odier & Co. by way of payment in the ordinary course of business, but as a subject matter of sale; and, having acquired it by purchase, they have no right to treat it as an interest transferable by delivery. If it came to them merely by purchase, it must be subject to all the principles which govern matters of sale. Here they seek to recover the instrument itself—the very paper in which they have acquired an interest by sale or transfer; and they ought therefore to have shewn they gave full value for it, as one of the facts necessary to give them the right of property in it. But, thirdly, this case is not to be considered in the same light as if the note had been taken by Odier & Co. in the ordinary course of payment in this country. For, though such a note, payable to bearer, generally passes by delivery to the person who takes it, yet it is a mere promissory note, and not transferrable (like a bill of exchange) by the custom of merchants, but by the statute 3 & 4 Anne, c. 9. which makes a note in writing, signed by the

(2) 4 B. & C. 330; s. c. 6 D. & R. 455; 3 Law Journ. K.B. 234.

party who makes the same, whereby such party promises to pay to any other person, or his order, any sum of money, assignable or indorsable over in the same manner as inland bills of exchange are, according to the custom of merchants. That statute made a promissory note transferrable by indorsement in England; but in France a promissory note made in England must still be considered a mere chattel.

[*Lord Tenterden*.—Before the statute of Anne, a promissory note was not transferrable in England by indorsement; but by the law of France and other countries, is such an instrument transferrable by indorsement? and if so, is it by the law of merchants or by positive enactment?]

According to Pothier—*Traité du contrat de change* (3),—bills of exchange are not transferrable in France by the law of merchants, but by a particular ordonnance; and it does not appear that there is any distinction between a bill of exchange and a promissory note in that respect. In the case of *Carr v. Shaw* (4), cited in *Bayley on Bills*, p. 22, in an action on a promissory note made at Philadelphia, the Court intimated a strong opinion that the statute did not apply to foreign promissory notes. Then, if this instrument be not a promissory note transferrable by delivery, it is like a parchment or paper, valuable as a security; it is a mere chattel; and where a chattel has been obtained by fraud or felony, the property in it does not pass, but remains in the original owner.

Mr. F. Pollock on the same side was stopped.

Lord Tenterden.—We think the plaintiff stands in the same situation as Odier & Co., who sent the note to him; they were mutually agents for each other: and unless therefore we were to lay down a rule that a party who holds a note, however obtained, may, by merely remitting it to a person to whom he is indebted, enable him to sue, we must say that the plaintiff must be considered as representing Odier & Co.; and that, if he can recover at all, it must be upon their right. Then that brings it to the ques-

tion, whether Odier & Co. could recover; and that appears to involve two points: first, whether Odier & Co. gave such value for the note as to exempt them not only from any reasonable ground of suspicion of any knowledge that it had been improperly obtained, but also from the charge of any want of caution in the taking it. That is a question of fact; as all that is known at present is, that they *bought* the note. What the effect of the finding of that fact may be (if it be in favour of Odier & Co.) we are not called upon now to decide—If a note of this description be not transferrable abroad, although the transaction be clearly *bond fide*, the holder cannot recover. I do not at present say, that that is the law. That will be the question; there will be an opportunity given of raising that question upon the record. If the cause goes down to another trial, Odier & Co. may prove, as they probably will, that they gave such value as to exempt them from all ground of suspicion of any knowledge that this note was improperly obtained, and also from the charge of a want of caution in the taking it; and in order that they may be enabled to give that evidence, we think the cause should go to another trial. I have adverted to the other point of law, not to give any opinion upon it; but merely that it may be raised upon the record. It is a question of law of very great importance; and upon which I should be exceedingly unwilling to give an opinion without hearing the question very fully discussed, and giving it very great consideration. On the one hand, we are to take care that we do not prevent the circulation of the Bank of England notes in foreign countries. It would be very inconvenient to merchants and travellers if we should do that. But, on the other hand, we must not shut our eyes against existing facts that come to our knowledge. It has now become to a certain degree the practice, when notes to a large amount are stolen, to get them conveyed abroad, in order that they may pass there, and that the person who takes them may sue upon them in England. We think upon the whole there should be a new trial, to give the plaintiff an opportunity of proving that Odier & Co. gave full value for the note, and that they took it under circumstances which exempt them from suspicion, as well as from a

(3) Pothier, by Dupin, vol. iil. p. 125. Paris edit. 1825.

(4) 39 Geo. 3.

charge of the want of due caution, and of raising upon the record the other very important question.

New trial.

1829. { FRANKLIN v. THE BANK OF
ENGLAND.*

Stock—Executor.

Where a testator makes a specific bequest of stock in the public funds to one person, and appoints another as his executor, the executor is entitled to have the stock transferred into his name, unless he has previously assented to the legacy.

This was a case sent by the Lord Chancellor for the opinion of this Court. The Equity Case which led to it will be found in 4 Law Journ. Chancery, 214. *Franklin v. the Bank of England.*

CASE.

John Franklin, by his will, bearing date the 29th of November 1822, attested by three witnesses, gave, devised, and bequeathed unto Thomas Franklin, the manors, messuages, lands, freehold, leasehold, and copyhold estates, hereditaments, and premises therein mentioned and described, to hold the same unto the said Thomas Franklin for the term of his life, without impeachment of waste; and after the decease of the said Thomas Franklin, the said testator gave, devised, and bequeathed the same unto George Jones Bevan and his heirs, to the uses therein and hereinafter mentioned, that is to say, to the use of the said testator's grandson, Richard Franklin, who was the son of the said Thomas Franklin, and his assigns, for his life, without impeachment of waste; with remainder to the use of the said George Jones Bevan, in trust to preserve contingent remainders; with several remainders and limitations over in tail, in favour of the issue of the said Richard Franklin, and of the said Thomas Franklin, and with the ultimate limitation to his (the testator's) own right heirs. And the said testator, in and by his said

will, gave and bequeathed all the monies which he might have at the time of his decease in the three per cent. consolidated bank annuities, or any other public funds, unto his cousin Catherine Bevan, spinster, since deceased, and the said George Jones Bevan, and the survivor of them, upon the trusts, and to and for the several uses, intents, and purposes therein and hereinbefore mentioned and referred to, concerning his real estates thereinbefore devised, or as near thereto as the nature of the respective estates would admit: and after giving certain legacies of trifling value therein mentioned, the said testator, by his said will, gave, devised, and bequeathed all the rest, residue, and remainder, of his goods, chattels, real and personal estate whatsoever and wheresoever, subject to the payment of his just debts, funeral and testamentary expenses, the foregoing legacies, and also such other legacies as he might bequeath, in and by a codicil, which the said testator declared he intended to add to that his will, unto the said Thomas Franklin, his heirs, executors, administrators, and assigns, to and for his and their own use absolutely; and he thereby nominated and appointed the said Thomas Franklin sole executor thereof. By a codicil to his will, dated the 28th of November 1824, executed in the presence of, and attested by two witnesses, the said testator, amongst other things, bequeathed unto the said Richard Franklin the sum of 10,000*l.*; with the payment of which sum he charged all his real and personal estate devised and bequeathed by his said will; and he thereby in all other respects confirmed his said will.

The sum of 16,000*l.* consolidated three per cent. annuities, was standing in the name of the testator, John Franklin, in the books of the Bank of England, on the 29th of November 1822, the date of his will; and on the 22nd of March 1823, the further sum of 500*l.* like annuities, was transferred into the name of the said John Franklin, in the books of the said company, making together the sum of 16,500*l.*; and on the 29th of November 1824, the said John Franklin died, without having revoked or altered his said will or codicil; and the said sum of 16,500*l.* consolidated three per cent. annuities continued to be, and was standing in the name of the said testator,

* S. C. 9 B. & C. 156.

John Franklin, until and at the time of his death.

Thomas Franklin, the executor, on the 30th of December 1824, proved the said will and codicil in the Prerogative Court of Canterbury; and on the 2nd of January 1825, caused the same to be registered in the books of the Bank, where an extract of so much as related to the said annuities was duly entered. On or about the 3rd of February 1825, Thomas Franklin demanded permission of the Bank to transfer the whole of the said annuities to such persons as he should think fit, to enable him to pay the testator's debts and legacies, when the officers of the Bank refused to permit him to make such transfer, on the ground and by reason that the said sum of stock ought to be transferred into the names of the said Catherine Bevan, and George Jones Bevan, to whom the same was given and bequeathed in and by the said will.

A bill has been filed by the said Thomas Franklin in the High Court of Chancery, to compel the Bank to allow the said plaintiff to sell and transfer the said stock. No evidence was given in the suit that there were any debts due or owing by the said estate at the time of such demand.

The question for the opinion of the Court was, whether, under the circumstances above stated, Thomas Franklin, the executor, has any right of action against the Bank for not permitting the transfer by him of the said 16,500*l.* three per cent. consols.

The case was argued partly in Michaelmas term 1828; and partly in Hilary term 1829.

Mr. Alderson for the plaintiff.—This case is in the nature of an appeal from the decision of the late Lord Gifford when Master of the Rolls, who decided in favour of the plaintiff. The statutes relating to the public funds, make all of them personal estate: 7 Ann. c. 7. and 1 Geo. 1. c. 19. Such property must, therefore, be subject to all the consequences of being personal estate; and the first of those is, that the property, although specifically bequeathed by the testator, vests in the executor until he assents to the legacy. Many difficulties will arise from a contrary rule; it cannot be contended that the property does not vest in the executor when there is no specific bequest; and whether a bequest be specific

or not, is often a very difficult question; and if the Bank Directors are right in transferring to the specific legatee, and not to the executor, they must take upon themselves to determine that question. Again, this being personal estate, is assets for payment of the testator's debts, and would be so held in an action against the executor; now it would be very unjust that he should be unable to plead *plene administravit*, and yet be unable to use the assets for payment of the testator's debts. Again, in *Deeks v. Strutt* (1), it was held, that an executor cannot be sued at law for a legacy, but that it must be recovered by suit in equity; and one of the reasons for this rule is, that in the case of a legacy being left to a married woman, the husband may be compelled to consent to a proper settlement. This reason is equally applicable to a bequest of stock; but the rule will not apply if it be held that the stock vests in the legatee, and not in the executor until he assents to the legacy. The point has been several times mentioned in courts of equity; but the opinions delivered by the different eminent persons who have presided, are not quite consistent with each other. In *The Bank of England v. Lunn* (2), the opinion of the then Lord Chancellor (Eldon) appears to have been, that the stock vested in the executor. For this there appears to be very good reason, as otherwise the Bank of England would be converted into a subsidiary court of equity. And if stock were not vested in the executor for payment of debts, it would be in the power of a dishonest debtor to cheat his creditors, by investing all his property in the funds.

[The remainder of the argument consisted chiefly of a reference to the cases cited in the Chancery suit, to which we refer our readers.]

Mr. Serjeant Bosanquet, contra.—When Lord Rosslyn decided that the Bank Directors were not bound to look to the trusts of a will, which he did in the case of *The Bank of England v. Parsons* (3), he conferred upon them a very great favour; for he relieved them from much difficulty. All that is now desired by the Bank is, that there may

(1) 5 Term Rep. 690.

(2) 15 Ves. jun. 569.

(3) 6 Ves. 565.

be a certain rule laid down by which they may act, and the observing of which will indemnify them. If this Court now decides that they are not bound to inquire whether an executor has assented to a specific legacy or not, but may at once transfer the stock to the executor, that also will relieve them from much difficulty. But if they are bound to transfer to the executor if he has not assented, (but not otherwise,) they will be much embarrassed in the management of the public funds. For in the case of a specific bequest of personal property, if the executor assents, the property immediately vests in the legatee, and he has a right of action for it. Suppose then, a will is brought and entered at the Bank, and the executor applies to make a transfer of the stock; he is answered that it has been specifically bequeathed; but, upon his statement that he has not assented to the bequest, the transfer is allowed. Afterwards, the legatee shews a previous assent by the executor to the bequest, and thus the Bank, although they could not possibly know anything of it before, are made liable to an action.

[*Lord Tenterden*.—How would the law be in the case of an ordinary bequest of a chattel in the hands of a third person, if the executor assented to the legacy, and afterwards went and claimed, and got possession of the chattel?—could the devisee sue the party from whom it had been so taken?]

According to *Doe v. Guy* (4), he might.

[*Mr. Justice Bayley*.—There the action was against the executor, and it did not appear that he claimed the term as assets for payment of debts.]

It has never yet been decided, that stock is legal assets for payment of debts.

[*Lord Tenterden*.—I believe it has never been doubted.]

The nature of the property is a debt from the public to the individual. The dividends or proceeds may be assets, but the stock itself cannot be assets, until it has been converted into money.

[*Mr. Justice Bayley*.—You cannot argue, that if a fund-holder die intestate and insolvent, his next of kin can claim the stock.]

A court of equity may compel a sale of it, but it is not assets at law.

[*Lord Tenterden*.—Do the Bank ever al-

low the legatee to receive the dividends?—Your argument would go to shew that the legatee has a right to demand the dividends.]

The present question is certainly of some difficulty, and the case put by his Lordship is one of them. In *Pearson v. the Bank of England* (5), Lord Thurlow appears to have been of opinion, that the stock vests in the specific devisee, without the assent of the executor; but since Lord Thurlow's time, the Bank have always required the executor to act. In *The Bank of England v. Moffatt* (6), he adopted a different rule with respect to a residuary devise which comprehended stock. In *The Bank of England v. Lunn*, Lord Eldon expressed a doubt, whether the legislature did not intend that the devisee of stock should take by the devise without the assent of the executor; but ultimately, the case was decided on another ground. The question was much discussed in the case of *The King v. the Bank of England* (7), but it was not decided. It was the opinion of Lord Mansfield, however, that the legatee took the stock; and that the executor had no interest in it. The statutes, seem to warrant the opinions of Lord Mansfield and Lord Eldon. By several statutes, relating to various public funds, it is provided in nearly the same words—"That all persons possessed of any share in the joint stock of annuities, may devise the same by will in writing, attested by two or more credible witnesses, but that no payment shall be made on any such devise, till so much of the said will as relates to any share, estate, or interest in the said joint stock of annuities, be entered in the said office; and that, in default of such transfer or devise; such share, estate, or interest in the said joint stock of annuities, shall go to the executors or administrators." This never could mean that the executor should take the stock for his own benefit. It must therefore mean, that he shall take the interest when there is not a specific devise.

Mr. Alderson, in reply.—The Bank will be put to no inconvenience, except that of inquiring whether the executor has assented to the bequest. That is a difficulty which

(5) 2 Cox, 175; 2 Br. C.C. 529.

(6) 3 Br. C.C. 260.

(7) 2 Doug. 524.

(4) 3 East, 120.

falls upon every individual who holds a fund claimed by two parties. Like other parties they must obtain their remedy by bill of interpleader; they must already do so in all cases where the stock forms part of a bequest of the residue: *Mead v. Lord Orrery* (8).

The Court sent the following certificate to the Lord Chancellor.

This case has been argued before us by counsel; and we are of opinion that, under the circumstances above stated, Thomas Franklin, the executor, has a right of action against the Bank, for not permitting the transfer by him of the said 16,500*l.* three per cent. consols.

TENTERDEN.
J. BAYLEY.
J. LITTLEDALE.
J. PARKER.

1829. { CLARK, ESQ. CHAMBERLAIN OF
LONDON, v. LE CREN.

Restraint of Trade—Custom—By-Law—Habeas Corpus.

1. *The custom in favour of unrestrained trade among the King's subjects is so strong, in point of law, that even the Lord Mayor's Court of London cannot support proceedings upon by-laws in restraint of trade among the citizens, without first shewing the immemorial custom, that none but freemen of the city shall carry on trade within it. The shewing the general custom to make by-laws is not sufficient.*

2. *Semble, that an action in an inferior court, for a penalty of 5*l.*, under a by-law, is not an action within the 21 Jac. 1. c. 23. so as to prevent the removal of the cause to a superior court. At all events, the Court will not interfere by procedendo; but will leave the plaintiff to go on in the inferior court at his peril.*

This case came before the Court by habeas corpus, directed to the Mayor, Aldermen, and Sheriffs of London, to remove a cause brought in the Lord Mayor's Court.

It was an action of debt brought in that

court to recover from the defendant a penalty of 5*l.*, for the having used and exercised the art, trade, or mystery of a painter, within the city of London, he, the defendant, not being free of the Painters' Company, though he was free of another company in the said city.

The return to the writ of habeas corpus stated, that the Mayor, Aldermen, and Commons of the city, in Common Council assembled, from time immemorial have been accustomed, and of right ought to pass, make, enact, ordain, and establish, in manner hereinafter mentioned, acts and ordinances for the regulation of trade within the said city, and the better government of certain ancient companies or corporations, established for the carrying on of trade within the said city; and the customs and privileges of the city were confirmed by a certain act of Parliament, passed at Westminster, in the seventh year of Richard the Second;—that, within the city, there now is and from time immemorial hath been, a certain ancient body corporate, called by the name of the "Master, Wardens, Assistants, and Commonalty of the art or mystery of Painters of the City of London;"—that, on the 23d of June 1767, at a Court of Common Council in the city, then holden, according to the custom, &c. a certain act was then and there duly made by the mayor, &c. entitled "An Act for regulating the Masters, Wardens, Assistants, and Commonalty of the Art and Mystery of Painters of the City of London;" whereby, after reciting, "that the freemen and citizens of the said city of the faculty, art, or mystery of painters, had full power for ever to search and govern all works and things belonging to the said mystery, and the defaults of the same works to punish and correct; that many persons, at the time of making the said act, exercised the said art or mystery, and had obtained their freedoms of other companies by redemption or otherwise, by reason whereof, the said company of painters were much diminished, and might fall into decay, and such persons using the said art or mystery could not be regularly searched, nor the defects, defaults, deceits, and misdemeanors in the art properly corrected;" for remedy thereof, it was enacted, "that, from the 29th of September 1767, every person, not being already free

of the city, who should exercise the art, trade, or mystery of painters within the city of London, or liberties thereof, should be made free of the said company; and that no person then exercising, or who should thereafter exercise, the said art or trade within the city or liberties should, after the 29th of September 1767, be admitted by the Chamberlain into the freedom of the said city, or in any other company than the said company, any law, usage, or custom of that city to the contrary thereof notwithstanding: provided always, that all and every person or persons not being already free of the said city, and who then were, or thereafter should be entitled to the freedom of any other company within the city, by patrimony or service, and ought, in pursuance of the said act, to be made free of the said Company of Painters, should be admitted into the freedom of the said company, upon payment of such and the like fine and fees, and no more, as were then usually paid and payable upon the admission of the child or apprentice of a freeman of the same company." The by-law then further enacted, "that if any person (other than and except such persons already free of the city) should, after the 29th of September 1767, exercise the art of a painter within the said city, &c. not being free of the said Company of Painters, then every such person (except as aforesaid) should forfeit and pay the sum of 5*l*. for every such offence;" and it was further enacted, "that the forfeitures and penalties made payable by the said act should be recovered by action of debt, in any of his Majesty's courts in the said city, to be prosecuted in the name of the Chamberlain of the said city of London for the time being." The return then stated, that the defendant was taken and detained in prison, by virtue of a plaint and action brought against him in the Mayor's Court of London, in a plea of debt for 5*l*., the penalty imposed by the by-law.

The plaintiff had obtained a rule *nisi* for a *procedendo*, on the ground that the by-law was good, and that the penalty was recoverable in the Mayor's Court; and secondly, that, as the debt sought to be recovered did not exceed 5*l*., the cause could not be removed from the inferior court.

Mr. C. E. Law now shewed cause.—The

by-law set out in the return to the habeas corpus is a by-law in restraint of trade, inasmuch as all persons by the common law have a right to trade in any place. The effect of this by-law is to restrain persons from carrying on the trade of a painter. But the return does not even aver, that the Company of Painters have any jurisdiction over their members; and if they have not, the effect of the by-law cannot be merely to regulate the trade, but must be in restraint of trade; and a by-law in restraint of trade, is bad, unless it be warranted by special custom. For this position, it is scarcely necessary to cite authorities; but, in *Harrison v. Goodman* (1), a by-law, that any person who should use the trade of a butcher was held to be bad, for want of a special custom to support it. In *Rex v. Harrison* (2), the same by-law was held to be good; but the reason given shews the present argument to be good: the reason was, the return to the *mandamus* shewed a special custom to warrant the by-law. So, in *Wannell v. the Chamberlain of London* (3), a by-law to oblige a joiner in London to be free of the Joiners' Company, was held good; but there again, the return set out a particular custom, though that fact does not appear in the report of the case in *Strange*. The Court, as appears by the case in *Burrow*, examined the original record. This distinction was recognized and acted upon in *The Chamberlain of London v. Compton* (4), which is an express authority in point. There, it was held, that the custom ought to be alleged as a fact, and that the recital of such a custom in a private act of Parliament set out in the return, was not sufficient.

[*Mr. Justice Bayley*.—But are you right in your form of proceeding by habeas corpus? The case of *Mitchell v. Mitcheson* (5) held, that you cannot remove by habeas corpus, unless the defendant be actually or virtually in custody.]

That objection was taken in *The Chamberlain of London v. Compton*, but was overruled; as was also an objection, that the case was within the statute 21 Jac. 1. c. 23. s. 4; and, therefore could not be removed

(1) 1 Burr. 12.

(2) 3 Burr. 1322.

(3) 1 Stra. 675.

(4) 7 D. & R. 597; 4 Law Journ. K.B. 49.

(5) 1 Barn. & Cres. 513.

without a previous recognizance. But the answer given to it was, that if this Court had no power to remove, the other side might go on at their own peril in the court below, without the aid of a *procedendo*. The action is, in form, an action of debt ; but, substantially, it is an action for a breach of the by-law. It is not one of the cases contemplated by the 21 Jac. 1. c. 23, as was observed by *Mr. Justice Bayley*, in *The Chamberlain of London v. Compton*. As for the by-law itself, there is no assignable reason in support of it. The company who impose it are merely nominally paper-stainers. The object is to pocket the fees to be obtained from the trade. But the objection to the return is alone a sufficient answer to this rule.

Sir James Scarlett and *Mr. Campbell*, contra.—The argument of the other side assumes the whole question, as to the by-law. The return is good : it states an immemorial custom, for the Common Council to make by-laws for the regulation of trade, and the better government of the companies established for carrying on trade, and that this custom was confirmed by act of parliament. This by-law was made for the regulation (and not the restraint) of the trade, and for the better government of the Company of Painters. The object was, that the trade itself should be *regulated*, and that the persons exercising it should be under the government of the company. It is a by-law made pursuant to the custom stated in the return. In *The Butchers' Company v. Morey* (6), a by-law similar to the present was held to be good. The case of *The Chamberlain of London v. Compton* is distinguishable from the present ; as there, the return did not state, as it does here, that the Common Council, &c. had been *accustomed* to make by-laws. Then, upon the other points :—this case ought not to have been removed by habeas corpus. The statute 21 Jac. 1. c. 23. s. 2. enacts, "that no writ of habeas corpus, certiorari, or any other writ or process, other than writs of error or attain, to be sued forth out of the courts at Westminster, to stay or remove any action, &c. depending in any court of record, within any city, &c. shall be received by the Judge or officers of the inferior court ; but

that he may proceed with the case, unless the writ be delivered before issue or demurrer joined ;" and sec. 4. enacts, "that if any action, bill, plaint, suit, or case not concerning freehold or inheritance, of title of land, lease or rent, which shall be brought in any court of record in any city, &c., if it shall appear that the debt, damages, or things demanded, shall not exceed 5*l.*, then the action shall not be stayed nor removed into the courts of Westminster by any writ or writs. There is also an objection to the action being removed at all. The charter of the city of London is confirmed by act of Parliament ; and the by-law declares, that the forfeitures shall be recovered by action, to be brought in any of his Majesty's courts in the said city.

[*Mr. Justice Bayley*.—There are no express words of exclusion of the superior courts.]

Another objection is, that the defendant was never taken into custody : he was only served with process ; and, therefore, the writ of habeas corpus is an improper mode of proceeding.

[*Mr. Justice Bayley*.—You cannot now take that objection. The conclusion of your return admits the defendant to be in custody.]

Lord Tenterden.—Upon the last point which has been made, I think the plaintiff is bound by the terms of the return, which shews the defendant to have been in custody. Upon the main question, I think this case falls within the principle of the decision pronounced by this Court in *Harrison v. Goodman*, and *Clarke v. Compton*. Indeed, I see no distinction between the latter case and the present. In the latter, a by-law, "that every person not being already free of the city, exercising the trade of a pewterer within the city, should be made a freeman of the Company of Pewterers ; and that no person exercising the said trade should be admitted by the Chamberlain of the city into the freedom of any other company ; and that if any person should exercise the trade of a pewterer within the city, not being free of the Company of Pewterers, he should forfeit 5*l.*"—was held to be a law in restraint of trade, and void, there not being any special custom to support it. The defendant, it is to be

observed, is a member of another company. Besides, the return does not even shew, that the Painters' Company exercised any jurisdiction over its members. This is clearly, therefore, in my opinion, not a good by-law. Then it is said, that this cause cannot be removed from the inferior court, because the debt demanded does not exceed 5*l*. It is true, that, in form, the action is brought to recover a debt; but, in substance, it is an action for a breach of the by-law. I doubt whether such a case be within the act. At all events, that is no ground for our awarding a *procedendo*; because, if the case has not been properly removed, the plaintiff may proceed in the inferior court.

Mr. Justice Bayley.—There is a well-established distinction, as to by-laws of this description. By the common law, any person may carry on any trade in any place, unless there be a custom to the contrary; and if there be such a custom, then a by-law, in restraint of trade, warranted by such custom, will be good; but if there be no such custom, a by-law in restraint of trade will be bad. There is a distinction between the cases of *Harrison v. Goodman*, and *Rex v. Harrison*. In the former, it did not appear, that there was any custom to warrant the by-law; in the latter, there was such a custom. The same Court and the same Judges, who had decided in the first case, that a by-law of this description was in restraint of trade; and, therefore, void, for want of a special custom to support it,—held the same by-law to be good, when it was shewn that there was a special custom to support it. The return to the habeas corpus in this case sets out a custom for the Common Council to make by-laws for the regulation (as it is called) of trade; but the effect of the by-law in question is to prevent persons from *carrying on* trade; it operates, therefore, not merely to regulate, but to restrain trade. And, inasmuch as it does not appear that there is any special custom to warrant such a by-law, it is void.

Mr. Justice Littledale and *Mr. Justice Parke* concurred.

Rule discharged.

1829. }
April. } CLEMENT v. CHIVIS.

Libel—Special Damage.

Where a declaration complained of a publication, which charged the plaintiff with having insulted two females and some gentlemen, in a most barefaced manner; and the declaration also averred that special damage had been sustained: and the jury found a verdict for the plaintiff, but negatived the special damage:—Held, that the action was maintainable, in respect of the publication, without proof of special damage.

Error from the Common Pleas. The action was for libel. The first count of the declaration, after the usual inducement of the plaintiff's general good conduct, stated, that, before the committing of the grievance complained of, the plaintiff was the proprietor of a certain stage-coach, wherein he was accustomed to carry and convey passengers for hire; and that the defendant, intending to injure him in his said business of conveying passengers by his coach, published the following libel of him [*as such proprietor*].—

"Greenwich Coachmen.—The insolence of some of the Greenwich coachmen and their cads becomes intolerable. Our notice has been called to the gross misconduct of Thomas Cheves (meaning the said plaintiff,) and his (meaning the said plaintiff's) cad, on coach, No. 7600, who (meaning the said plaintiff,) on Tuesday last insulted two females and some gentlemen, who were outside passengers, in the most barefaced manner. We have no doubt, if a proper representation were made of this conduct to the magistrate, or to the commissioners by whom licences are granted, that the number would be taken from the proprietors of the coach: some such measure is absolutely necessary for the protection of the public. We may truly say, from our own observations, that there is not a road out of town, in which there is more ruffianly conduct displayed amongst coachmen and cads, than the Greenwich road; but it is due also to state, that many of the regular coaches are driven by men whose conduct is unexceptionable. Let those who deserve encouragement then receive the patronage of the public, and an alteration will soon be observable."

There was a second count upon the same article, which was charged to have been published of and concerning the plaintiff, but not adding (as in the first count,) as such proprietor. Special damage was alleged, charging, that one John Davies, by reason of the publication of the libel, refused to be taken in the plaintiff's coach as a passenger.

The plea was the general issue.

On the trial of the cause, the jury found a verdict generally for the plaintiff, with 5*l.* damages; and they, at the same time, negatived the special damage charged in the declaration. Judgment was entered up generally, upon this verdict; and the record being removed to this Court, by writ of error, the following error was assigned, in addition to the general errors:—That the damages were entire, although the last count disclosed no cause of action. This objection was varied in its terms.

The plaintiff joined in error.

Mr. Platt, for the plaintiff in error.—This article is not libellous on the plaintiff below. It does not charge him with any offence known to the law. It is said, that he insulted persons; but it does not charge the lowest description of legal offence,—a common assault. What injury could it be to the character of a *Greenwich coachman* to say, that he had insulted people?

[*Mr. Justice Parke*.—But it charges "gross misconduct," and refers to the plaintiff and his cad having insulted the people in the most barefaced manner.]

It is still short of any charge known to the law. It does not charge the plaintiff with anything which can affect his reputation. If it did, there can be no doubt it would be libellous. Nor does it impute to the plaintiff anything which would render him personally an object of disgust, as was the case in *Villiers v. Mousley* (1), where the plaintiff was called an itchy old toad; or anything which would decidedly mark him for reprobation, as if it were said, that he was one of the most infernal villains that ever disgraced human nature, as was the case in *Bell v. Stone* (2). In *Thorley v. Lord Kerry* (3), the plaintiff was accused of the vice of hypocrisy; and, for that reason, the

publication was adjudged to be libellous. Now, if it were conceded, that insult, which is charged by this publication, amounted to assault, (which it does not, of necessity,) can it be said, that it is libellous to charge a man with having committed an assault? Suppose it were charged of a man, that he had rode over the ground of another, and with horses and dogs had destroyed the man's corn: that would be, at most, but a trespass; but, if the imputing of that which is charged in the present publication be libellous, there seems to be no reason why the imputing of the mere trespass, in the case just put, should not also be considered as libellous. Or, suppose a very aggravated trespass were charged, such as that of pulling down a house, could it be said to be libellous to impute it? The charge of "insulting" is, in the present case, too vague. It does not impute to the plaintiff any capital offence, or other crime; and, according to the general definition given by *Mr. Selwyn, Nisi Prius*, title "*Slander*," it is not actionable; because, "an imputation of the mere defect or want of moral virtue, moral duties, or obligations, is not sufficient." For these reasons, the second count, which describes the plaintiff merely in his personal character, and not with reference to his business, is defective; and, as no special damage has been proved, the count cannot be sustained. It follows, that, as the judgment is general, and including this bad count, it ought to be arrested.

Mr. Chitty, contra.—The definition cited by the other side was applied by the learned writer to cases of verbal slander; and the distinction between that and written slander has long since been fully established. There are many imputations which may be verbally cast upon a man, and for the verbal publication of which he can maintain no action, without special damage, which, if put into writing and published, may be the subject of an action, even without special damage. Such is the present case, which falls exactly within the distinction; for it is admitted, that the plaintiff below could have maintained no action for the mere speaking of the words in question. This distinction is pointed out in the most elementary works upon the subject. In 3 *Bacon's Abridgment*, title "*Libel*," it is thus defined:—"This species of defamation is

(1) 2 Wils. 403.

(2) 1 Bos. & Pal. 331.

(3) 4 Taunt. 335.

usually termed *written scandal*, and thereby receives an aggravation, in that it is presumed to have been entered upon with coolness and deliberation, and to continue longer, and propagate wider and farther than any other scandal." Thus much for the distinction between the two species of slander. The same writer, in describing what it is that constitutes a libel, gives a description, which no one can read and say, that it does not apply to the present case. It is in these words:—"As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which, to some men, is more dear than life itself: hence, it hath been held, that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but also as set him in a scurrilous, ignominious light; for these equally create ill blood, and provoke the parties to acts of revenge and breaches of the peace." In support of this description, reference is made to the celebrated libel case, in 5 Co. 125; and to 1 Keb. 293; Moor, 627; and 1 Roll. Abr. 37. All the cases which have undergone judicial discussion have proceeded in accordance with this description. Thus, if a man were to write and publish of another, that he was a liar, can there be a doubt that this would be libellous? It would be imputing to the man the breach of a moral duty. In *Lord Churchill v. Hunt* (4), the imputation upon the plaintiff was, that he had driven a gig furiously and carelessly; but no crime known to the law was charged upon him. Yet no one entertained a doubt that the imputation was libellous. The defendant's advisers, in that case, must have thought so; for they justified the facts. But the argument of the other side assumes also, that the charging of a mere assault would not be libellous. But, from the case of *Savile v. Roberts* (5), it would appear, that, to charge a man in writing with any breach of the peace, is matter of scandal, and renders the party liable to an action for so doing. So, to charge a man with being a swindler, although the term is undefined in

point of law, yet, on account of its known depraving import, the publishing of such an imputation in writing is libellous. It is not necessary, in this species of slander, that the matter published, if true, would subject the person spoken of to legal punishment. That was the case in *Bell v. Stone*, although the publication was a letter written for the purpose of putting the person addressed upon his guard against the plaintiff. The plaintiff, in that letter, was called one of the most infernal villains that ever disgraced human nature; but there was nothing specific; no fact was mentioned to warrant this general, sweeping, and undefined imputation. But, on that occasion, the Court of Common Pleas expressed so strong an opinion that the publication was libellous, that the defendant's counsel declined to argue the point. Then, can a doubt be entertained by any one that it was disgraceful conduct, which this libel attributed to the plaintiff? It charged him with insulting two females.

[*Mr. Justice Bayley*.—Would it be actionable to write of a man, that he was drunk last Saturday?]

It would. The express provision of the law, as well as the interest of society, render it necessary that sobriety be observed: and there can be no doubt, that, in proportion as a man is deficient in sobriety, by so much is his value in society diminished.

Mr. Platt, in reply.—The proposition laid down in *Bacon's Abridgment* cannot be supported to the extent to which it proposed to carry it; nor do the cases cited by that learned writer bear him out in so general and wide a definition: and with regard to the case cited from 12th *Modern*, it is known, that that is a book of no authority; and cases which can be found nowhere but in that volume are particularly to be guarded against. Most of the instances given by the other side may be conceded without affecting the present argument, that the paper now before the Court is not libellous. Of *Lord Churchill's* case, there can be no doubt. The conduct imputed to him was brutal, unfeeling, and disgraceful. The charge of swindler is known to be one which imports dishonesty. But the paper now in question does not charge the plaintiff in the action with the breach of any moral duty. To write of a man, that, on a particular oc-

(4) 2 Barn. & Ald. 685.

(5) 12 Mod. 208.

casian, he was drunk, would not, it is submitted, be actionable, though it might be otherwise, if he were charged with habitual drunkenness. There seems to be no reason why an undefined charge of this nature should be libellous, any more than that it should be held not actionable, if the charge were merely verbal. It may be admitted, that there are some charges, which, if verbally published, would not be the subject of an action; but which, if published in writing, would be libellous. Yet still, it is submitted, that it is not every vague and undefined charge, like the present, which will give the party a right of action.

The Court took time to consider; and the judgment was afterwards delivered in the following terms, by

Mr. Justice Bayley.—This was a writ of error from the Court of Common Pleas; and the error assigned was, that a general judgment had been entered for the plaintiff, whereas, the second count of the declaration did not shew a sufficient cause of action. The introduction to that count stated only, that the libellous matter was published "of and concerning the plaintiff," without reference to his occupation. But it imputed to him gross misconduct; and that he had insulted two females in a barefaced manner. It was insisted, that this did not constitute a libel; and that was the question reserved for consideration. There is a marked distinction in the books between oral and written slander. The latter is premeditated, and shews design; it is more permanent, and calculated to do a much greater injury than slander merely spoken. There is an early case upon the subject, in which this distinction was adverted to—*King v. Lake* (6), where the libel charged the plaintiff with having presented a petition to the House of Commons, "stuffed with illegal assertions, inaptitudes, imperfections, clogged with gross ignorances, absurdities, and solecisms." A special verdict was found: and, upon argument, Hale, C. B., held, that, "Although such general words spoken, without writing or publishing them, would not be actionable; yet, here, they being writ and published, which contains more malice, they are actionable."

This appears to have been a cross action, arising out of some dispute, as in *Lake v. King* (7); but, in the latter case, it was held, that the action could not be maintained, on the ground, that the alleged publication was a privileged communication. In a subsequent case, *Cropp v. Tilney* (8), Holt, C. J., says, "Scandalous matter is not necessary to make a libel; it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." In *Hawkins's Pleas of the Crown*, c. 73. s. 1, it is said, with reference to the criminal law, "It seemeth, that a libel, in a strict sense, is taken for a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public hatred, contempt, or ridicule." In 11th *Modern*, p. 99, is a *dictum* to the same effect. The distinction between written and oral slander has also been recognized, in *Villiers v. Mousley*, *Bell v. Stone*, and *Thorley v. Lord Kerry*. In the latter case, the distinction pointed out by Hawkins was adopted by Sir James Mansfield, though apparently from a deference to the authorities only. The rule, however, thus adopted was acted upon in the case of *Robertson v. M'Dougall* (9). Having then ascertained the rule, it is only necessary to inquire, whether the publication in question does hold up the plaintiff to public hatred, contempt, or ridicule. It states, that he was guilty of gross misconduct; and then describes in what that misconduct consisted, viz. in insulting two females and some gentlemen, in the most barefaced manner. That was a very serious and contumelious imputation, clearly calculated to bring the plaintiff into contempt by some persons, and hatred by others; and, therefore, according to the rule established by the cases referred to, we think that the publication was libellous, and sufficient to maintain the action. The judgment of the Court below must, therefore, be affirmed.

Judgment affirmed.

(7) 1 Saund. 120—131; and 1 Sid. 414.

(8) 3 Salk. 228; Holt, 426.

(9) 4 Bing. 670; 1 M. & P. 692; 6 Law Journ. C.P. 171.

1829. } BEESTON V. BECKETT AND
Feb. 13. } OTHERS.

Practice—Several Defendants—Title of Declaration.

1. *Where, in trespass, the process was against twenty defendants, of whom but eighteen could be served in time, the plaintiff thereupon declared against seventeen only:—Held, by Mr. Justice Bayley and Mr. Justice Parke, that, according to the Rule of Court, Easter, 1827, the proceedings were irregular.—Contrà, Mr. Justice Littledale.*

2. *The affidavit made on behalf of the defendants to raise the above question, was entitled in the cause as against the twenty defendants named in the process:—Held, by Mr. Justice Bayley and Mr. Justice Parke, that it was improperly entitled; and that it should have been entitled in the cause as against the seventeen who had been declared against.—Contrà, Mr. Justice Littledale.*

3. *Where the writ was returnable in one term, and the defendants duly appeared, and the declaration was afterwards delivered, entitled of a subsequent term:—Held, by Mr. Justice Bayley and Mr. Justice Littledale, that this was not an irregularity, though the defendant might apply to have the title of the declaration altered.—Contrà, Mr. Justice Parke, who thought it was an irregularity.*

Mr. Wyborn had obtained a rule to set aside the writ, and subsequent proceedings in this action, for irregularity. The writ was against twenty defendants, eighteen of whom had appeared, the others could not be served in time. The declaration was in trespass, and was against seventeen only. The Rule of Court, Easter, 8 Geo. 4. 1827, contains the following words, "In all actions by bill, the *mesne* process shall contain the name of the defendant, or (if more than one) of all the defendants, in that action, and shall not contain the name or names of the defendant or defendants in any other action."

The affidavit upon which the rule was obtained, was entitled in the cause as against all the twenty defendants.

Mr. Brodrick now shewed cause,—contending, that, this being an action of trespass, and therefore, several in nature, the plaintiff was not bound to declare against all the twenty, but might proceed against as

many or as few as he thought fit; and he produced an affidavit, that two of the defendants in the present action could not be served in time. This was the reason assigned for the plaintiff declaring against seventeen.

[*Mr. Justice Bayley.*—Have there been no decisions upon the construction of this rule of court.]

Mr. Follet (amicus curiæ).—There have been two during this term, in which the Court held that it could not be considered an irregularity, until there was another declaration, against another defendant, to prove that there was, in fact, two actions against several defendants, included in the same writ, which would then be irregular; and that, until the second declaration, the Court could not know there were more than the defendants originally declared against.

Mr. Wyborn submitted, that, even without a second declaration, this was an irregularity within the meaning of the rule of court. The object of that rule was, to prevent the inconvenience to defendants, who, unacquainted with the forms of these writs, might be put to great expense, in endeavouring to find the names and addresses of persons, of whom they were ignorant, in order to be able to ascertain whether they were in fact interested, collaterally, in the apparently joint demand; and to put an end to the vexations which existed in the country, from the practice of including in the same writ, the names of persons residing in distant places, and for causes of action entirely distinct. The words of the rule are not susceptible of two interpretations. They are, "shall not contain the name or names of a defendant or defendants in any other action." Is this eighteenth individual, who has been served and has duly appeared, but has not been declared against, a defendant in any other action? That he is a defendant in *some* action is certain; he is in court at the suit of the plaintiff, and is entitled to *non pros.* the plaintiff, if he do not proceed against him—which he could not do, were he not a defendant in *some* action. Then is he a defendant in *this* action? Certainly not—for the declaration against the seventeen, excludes that possibility; he is consequently a defendant in *some* other action, and therefore the *mesne* process is irregular as containing his name.

[*Mr. Justice Bayley.*—That mode of putting the question, I confess, convinces me, that the Court can and must take notice, that there is a defendant in court, even before declaration; he is certainly in a situation to do many acts, which only a *defendant* could do; he may call for a declaration, and sign judgment for want of one.]

Mr. Brodrick then objected to the title of the affidavit. It ought to have been entitled as a cause against those seventeen defendants only, who had been declared against, as the application was to set aside that declaration.

Mr. Wyborn.—The application is to set aside the writ or mesne process, which is against the twenty; and the affidavit can, and indeed *must* for conformity sake, be entitled in the actions, set forth by the plaintiff himself. Any one of these defendants has a right to complain of the irregularity of these proceedings, and by destroying the writ as to one, it is bad as to all; the declaration then falls as a consequence: "*Sublato fundo, tollitur id quod fundi potest.*" Had the application been confined to set aside the declaration against the seventeen, the affidavits must have been so entitled; but it attacks the basis and support of the declaration, the irregular mesne process, which is only proved to be irregular by the act of the plaintiff, in subdividing his complaint by his first declaration; thereby evincing his disobedience of the rule of court.

Mr. Justice Bayley.—I have already given my impression of the irregularity of this mesne process, but as the affidavit is entitled against all the twenty defendants, I think, that objection is fatal to this application. There is no declaration as yet against the eighteenth defendant who has appeared, therefore, we cannot suppose that it is he, who complains of the irregularity: those who have not yet appeared, are not entitled to make the objection. Then, it must come from one of the seventeen defendants who have appeared, and have been declared against, and he should have entitled his affidavit in the action against himself and others; I therefore think this rule should be discharged.

Mr. Justice Littledale.—I am of a different opinion from my Brother Bayley, on the objection to the title of the affidavit. The irregularity complained of is, the disobe-

dience to the rule of court. That rule of court is confined to the mesne process; then, to complain of the mesne process, the defendant must follow the form set forth in the writ, and it does not lie in the mouth of the plaintiff to say, there is no such cause as the one he has himself set forth. If this objection is valid, it would be impossible for a defendant to avail himself of such an irregularity; for, had it been only entitled as against seventeen, the plaintiff might say, my writ is against twenty, or against eighteen, because eighteen have appeared. But conceiving this affidavit to be well entitled, I cannot call this declaration irregular; it may be not regular, but there is a great distinction between the two terms. There are many proceedings not strictly regular, but which this Court will not set aside for irregularity. I think, that, according to the rule of court, a plaintiff may declare against some of the defendants in the writ, and leave out the rest. If he were afterwards to declare against the others, it would be different; I therefore agree with my learned Brother Bayley, though for a different reason, that this rule should be discharged.

Mr. Justice Parke.—I agree in both points with my Brother Bayley. The defendant who has appeared, is certainly so far in court, that, although he has not been declared against, he has various privileges of which we are bound to take notice; and strictly speaking, according to the terms of this rule, no defendant's name ought to appear in the writ, except those contained in the first declaration. Had the eighteenth not been served, or, being served, had not appeared before the delivery or filing of the declaration, there would have been no apparent irregularity in this proceeding; but, having appeared, and not being declared against in this action, he is established as a defendant in some other action. But as this application is to set aside the proceedings in the only action in which there is a declaration, viz. against the seventeen, the affidavit ought to have been entitled in that action only. I therefore concur, with the rest of the Court, that this rule should be discharged.

[*Note.*—In the above case it was also objected on the part of the defendants, that the declaration was irregular, it being en-

titled of the term in which it was delivered, and not of the term in which the process was returnable. Mr. Brodrick contended, that this was no irregularity; though the defendants might, if they pleased, apply to have the declaration entitled of the previous term. Mr. Wyborn, on the authority of *South v. Muller* (1), and *Topping v. Fuge* (2), which were adopted by Mr. Tidd, contended that the thus entitling the declaration was an irregularity. Upon this objection—

Mr. Justice Bayley was of opinion, that the plaintiff was at liberty to entitle his declaration of the term in which it was delivered, though the defendant might be at liberty to apply to have it set right according to the process.

Mr. Justice Littledale was of the same opinion; observing that Mr. Tidd, while he stated that it was not regular to entitle the declaration of a term subsequent to the return of the process, went on to describe the mode by which the defendant should apply to have it corrected—"It may be set right at the instance of the defendant if necessary for his defence." It appeared to him, therefore, not to be an irregularity.

Mr. Justice Parke was of opinion that the entitling the declaration of a term subsequent to that of the appearance was irregular.]

1829. } PLACE V. SIR JOHN FAGG AND
April. } ANOTHER.

Fixtures—Execution—Mill.

1. A sheriff has no right, under a fi. fa., to seize fixtures, where the house in which they are situated is the freehold of the person who has the right of property in the fixtures.

2. Otherwise, where the person against whom the execution issues, and who has the right of property in the fixtures, is merely a tenant for a term.

3. Mill-stones pass with a grant of the mill, and are part of the freehold.

This was a special action on the case.

Plea—General issue: not guilty.

At the trial, before Chief Baron Alexan-

(1) 3 Term Rep. 624.

(2) 5 Taunt. 771.

der, at the Spring Assizes for the county of Kent, 1827, the jury found a verdict for the plaintiff, for 1000*l.*, the damages in the declaration, to be reduced to 1*s.*, on the defendant's withdrawing from the possession, subject to the opinion of the Court on the following

CASE.

The defendant, Sir John Fagg, in the year 1826, was sheriff of the county of Kent; the other defendant, William Ashby, was a millwright, and, having obtained a judgment against one John Ashby, he, on the 19th day of July 1826, caused a *fi. facias* to be issued, directed to the other defendant, the sheriff of Kent, commanding him to levy of the goods and chattels of the said John Ashby 600*l.*; and, under that writ the defendant, Sir John Fagg, seized the following articles, which were the stones, tackling, and implements, of a mill, situate on Northumberland Heath, in the parish of Erith, in the county of Kent:—a pair of French stones, 4 ft. 6 in.; all the tackling and iron work to do.; pinion and meal trough; a pair Peak stones, 4 ft. 6 in.; all the tackling and ironwork to do. and pinion; a dressing machine, a cylinder, a strap machine, rigging and gog scry, an upright shaft, spur wheel, waller nut, and regulating stillion bar; a sack tackle complete, a stillion bar, and flour scale; two ladders, one mid-dling, two mill sails, and ironwork complete.

The mill in which these several articles were, had been built by the defendant, William Ashby, upon land belonging to him; and on the 17th day of December 1825, he, by indenture, in consideration of 900*l.*, bargained, sold, released, and conveyed unto John Ashby, his heirs and assigns, (in the actual possession of the said John Ashby then being, by virtue of a bargain and sale made to him by the said William Ashby,) all that piece or parcel of land or ground situate, lying, and being, on Northumberland Heath, in the parish of Erith, in the county of Kent, containing, by admeasurement, one acre and nine perches, little more or less. Also, all that wind or grist-mill, and the messuage or tenement, dwelling-house, and premises on the said piece or parcel of land or ground, or on some part thereof, erected and built; together with all and singular out-houses, out-buildings, &c. rights, members, and appurtenances what-

soever to the said piece or parcel of land or ground, wind or grist-mill, messuage or tenement, dwelling-house, hereditaments, and premises belonging, or in anywise appertaining, with reversion, &c., *habendum* unto and to the use of the said John Ashby, his heirs and assigns, for ever.

After the execution of this deed, William Ashby delivered to John Ashby possession of the mill, and the mill-stones, and the other articles belonging to the mill, which were afterwards seized by the defendant, Sir John Fagg. William Ashby took from John Ashby a warrant of attorney, to confess judgment, as a security for part of the purchase-money.

On the said 17th day of December 1825, for the purpose of securing the payment of an annuity of 20*l.* *per annum*, John Ashby, in consideration of the sum of 250*l.*, the purchase-money of the said annuity, by indenture, bargained, sold, and demised to Francis Place (the plaintiff in this suit,) his executors, administrators, and assigns, all the before-mentioned premises, by the same description as that by which they were conveyed by the defendant, William Ashby, to the said John Ashby, *habendum* to the said Francis Place, for the term of 1000 years, yielding unto the said John Ashby, his heirs or assigns, a pepper-corn rent.

On the 31st of December 1825, in consideration of the further sum of 550*l.*, the said John Ashby, for the purpose of securing the payment of a further annuity to the plaintiff, by indenture, declared, that the said F. Place, his executors, &c. should stand possessed of the said premises, as well for the purpose of securing the payment of the said annuity thereby covenanted to be paid, as for securing the payment of the annuity granted by the indenture of the 17th of December 1825.

No memorials of the said indenture of the said 17th of December 1825, or the 31st of December 1825, or either of them, whereby the said annuities were granted to the said plaintiff, were produced, or proved to have been made or enrolled.

The money secured by the warrant of attorney, given by John Ashby, to William Ashby, not having been paid, as agreed upon, the latter entered up judgment upon the warrant of attorney, and issued the *feri facias*, under which the mill-stones, and

other articles used with the mill, were seized by the other defendant, Sir John Fagg. The plaintiff gave notice to the sheriff, that he claimed the articles seized under the *feri facias* as his property, by virtue of the deed of 17th of December 1825, whereby John Ashby conveyed to the plaintiff the mill and appurtenances. The sheriff, in consequence of that notice, did not sell, but retained the same in his possession.

It was sworn, and not contradicted, at the trial, by the surveyor, who estimated the value of the premises on the purchase of the first annuity by the plaintiff of John Ashby, that the defendant, William Ashby, went over the mill with him, and pointed out what belonged to it, and described the articles seized as forming part of the mill; and it was also sworn, and not contradicted, that the same machinery was in the mill at the time of the execution of both the annuity deeds to the plaintiff, as was then at the time of the conveyance and valuation from the defendant, William Ashby, to John Ashby, and of the levy under the execution.

The stones seized are moveable articles, and such as are usually valued between an out-going and in-coming tenant. This evidence was objected to by the plaintiff—but received.

The question for the opinion of the Court is, whether the mill-stones, and the other articles mentioned in the declaration, and being in the possession of John Ashby, were, at the time of the seizure under the *fi. fa.*, the property of the plaintiff. If the Court should be of opinion that they were, then the verdict is to stand for the plaintiff; otherwise a nonsuit is to be entered.

Mr. Evans, for the plaintiff.—The goods in question were a part of the mill; they were necessary to the working of it; and, according to the authority of *Comyns's Digest*, title "*Grant*," they would go to the heir; and, consequently, they were not liable to be seized as goods and chattels. So, in *Day v. Bisbit* (1), it was held, that a dyer's vat fastened to the wall of a house is parcel of the freehold, and cannot be taken in execution under a *fi. fa.* The same doctrine was held in *Archer v. Bennett* (2). So, in a conveyance of the mill, with the appurtenances, these goods would pass. Indeed, in *Shep-*

(1) Cro. Eliz. 374.

(2) 1 Leonard, 311.

pard's Touchstone, p. 90, it seems, that, "by the grant of a mill, the mill-stone doth pass, albeit, at the time of the grant, it be actually severed from the mill." In *Winn v. Ingilby and another* (3), it was held, that the fixtures of a house, which was the plaintiff's own freehold, could not be taken in execution under a *fi. fa.* against the plaintiff in that action. So, in *Elves v. Maw* (4), it was held, that the tenant had no right during his term to take away certain erections made on the premises during the term, although he left the premises themselves in the same state as when he entered. In the case of *Colegrave v. Dias Santos* (5), it was held, that fixtures passed by a conveyance of the freehold. And, in *Thresher v. the East London Water Works Company* (6), fixtures were held to be repairable at the expense of the tenant; clearly shewing, that they were the subject of demise. Those cases were cited in *Rex v. Topping* (7); and the decision in that case was in conformity with them.

Mr. Hutchinson, *contrâ*.—No doubt, that, in former times, the property in question would pass by general words of grant of the mill, with the appurtenances. But a relaxation of the ancient rule has been introduced of late; and it is considered, that, whatever may be removed, as between the landlord and tenant, may be taken in execution.

[*Mr. Justice Bayley*.—As against the tenant, they may; but, as against one who is the owner of the estate, they are part of the freehold, and would go to the heir. They cease to be goods and chattels as regards him.]

Then, there is another objection to the plaintiff's right. It does not appear that possession was given in conformity with the deed.

By the Court.—It was not necessary, for the very reason already given. They were not goods and chattels: they passed with the land.

Postea to the plaintiff.

(3) 5 Barn. & Ald. 625.

(4) 3 East, 38.

(5) 2 B. & C. 76; 3 D. & R. 255; 1 Law Journ. K.B. 239.

(6) 2 B. & C. 608; 4 D. & R. 62; 2 Law Journ. K.B. 100.

(7) 1 M'Clal. & Y. 551.

1829. } THE KING v. THE INHABITANTS
April 23. } OF RINGSTEAD.

Settlement by Estate—Devise, construction of.

The interest of a remainder-man, after an estate for life, will not entitle him to a settlement, by reason of forty days' residence during the continuance of the particular estate.

Testator, after devising certain real property to his heir-at-law, devised "to my daughter, E. M., all that part of a messuage or tenement, with the appurtenances, which is now in the occupation of H. L., situated in Ringstead, adjoining the tenement in the occupation of J. M., to hold to her and her assigns, for and during the term of her natural life, if she shall so long continue a widow and unmarried; and, from and after the day of her decease, or day of marriage, which shall first happen, I give and devise the said part of a messuage or tenement, with the appurtenances; and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of J. M.; and also, all that my close or orchard lying above the said homestead, &c. unto the four children of my late son:—Held, that these four grandchildren of the testator, under this devise, did not take an immediate vested interest in any part of the premises mentioned therein, but a remainder expectant on the decease or second marriage of E. M., and consequently, that one of those grand-children, a pauper, did not obtain a settlement by forty days' residence in the parish where those premises were situate during the life and before the second marriage of E. M.

[This case will be found among the Cases relating to the Duties of Magistrates, p. 103.]

1829. } SMALL AND ANOTHER, ASSIG-
April 29. } NEES, &c. v. MARWOOD.

Bankrupt—Deed of Composition—Assignment in Trust.

1. *A creditor who executes a deed of composition, by which, in consideration of an assignment of his property for the benefit of his creditors, the creditors release their debts, is thereby debarred from suing out a commission of bankruptcy, though he could shew a*

subsequent act of bankruptcy independent of the deed; and although other creditors, who have refused to execute the deed, may sue out a commission, and rely upon the deed as an act of bankruptcy.

2. *Where a conveyance of property is made to several trustees, it is not necessary that all should execute or assent to it. The property will vest in those who accept the trust.*

This was an action by the assignees of John Campion, a bankrupt, against the executor of the chief bailiff of the liberty of Langborough, in the North Riding of the county of York, to recover the amount of the sale of certain goods of the bankrupt sold by the bailiff, under an execution against the bankrupt, after he had committed an act of bankruptcy.

On the trial, at the last Summer Assizes for the county of York, before Mr. Justice Bayley, the case turned upon a question respecting the validity of the commission. Upon that question the following were the principal facts.

By indenture, dated 23rd of December 1826, made between the bankrupt of the first part; John Barr, Thomas Hudson, Robert Johnson, and Thomas Coser, (creditors of the bankrupt,) of the second part; and the several persons whose names were thereunder written, or thereunto annexed, and seals affixed, being also creditors of the bankrupt, of the third part;—reciting that the bankrupt stood indebted to the several persons, parties of the second and third parts, in the several sums of money set opposite to their respective names in the schedule annexed; that he was unable to discharge the same; that he had proposed to make over to the said Barr, Hudson, Johnson and Coser, all his personal estate, upon the trusts thereafter mentioned; and that the said creditors, parties thereto of the second and third parts, had agreed to accept and take such assignment in full satisfaction and discharge of their debts. The bankrupt then proceeded to assign all his personal estate to the said four persons upon trust, that they, or the survivor of them, his executors or administrators, should sell and dispose of the same, and after paying certain costs therein provided for, should pay themselves and the rest of

the creditors, the amount of their debts rateably,—provided the said parties of the second and third parts did, on or before the 1st of February then next, make proof of their debts if required, and execute the deed. Then followed a provision in these terms: “that the said Barr, Hudson, Johnson and Coser, and all other the creditors of the second and third parts, in pursuance of the said agreement, and in consideration of the assignment thereby made, covenanted with the bankrupt, that they would not sue him for their said debts, and that if they did, the deed should be a sufficient release and discharge, both at law and in equity, and the bankrupt was thereby released and discharged from the said debts.

This deed was executed by the bankrupt, by two of the four persons named as trustees, and by several creditors.

The commission of bankrupt was taken out on the petition of one of the two trustees, who had executed the above deed. The act of bankruptcy relied upon was the lying in prison for twenty-one days by the bankrupt, according to the 6 Geo. 4. c. 16. The custody which produced this result was at the suit of creditors of the bankrupt, who had not executed the deed. The commencement of the custody was on the 20th of January 1827, within a month from the execution of the deed.

Upon these facts, the learned Judge was of opinion, that there was no good petitioning creditor's debt to support the commission. The plaintiffs were thereupon nonsuited: liberty being reserved for them to move to enter a verdict in their favour, if the Court should be of opinion that there was a good petitioning creditor's debt. And a rule to shew cause having been obtained accordingly,

Mr. Hutchinson now shewed cause.—The authority relied upon by the other side is the case of *Doe v. Pitcher v. Anderson* (1). There, a creditor, who with others had become a party to a deed of trust, by which, in consideration of an assignment made by the debtor, they released their debts, was yet allowed afterwards to sue out a commission of bankrupt against the debtor. But the reason for this decision is important, as it supplies a distinction between that and

(1) 1 Starkie, Rep. 262; 5 M. & S. 161.

the present case. The reason was, that it was afterwards discovered, that previous to the assignment, the debtor had committed an act of bankruptcy. This case, therefore, which was in accordance with those of *Bamford v. Baron* (2), and *Tappenden v. Burgess* (3), is no authority for the plaintiffs, inasmuch as it is not suggested that there was any prior act of bankruptcy in this case. The ground of the decision in *Doe v. Anderson* was, that the deed became inoperative, by reason of a fact which was unknown to, and was indeed concealed from the creditor at the time. Here, there was no prior act of bankruptcy, and no concealment; and the creditor is bound by the release of the debt which he executed. It may be urged, that there was a *subsequent* act of bankruptcy; but that was no doubt produced by the consequence of the transaction to which the petitioning creditor was a party. The deed in question deprived him of the whole of his property; took away from him the means of carrying on his trade, and was most likely to bring all his creditors upon him. But the debt due to this creditor was actually extinguished; and in case an action had been brought for the debt, this deed, which contained a release, might have been pleaded in bar. This seems to be laid down by the case of *Dean v. Newhall* (4). There the obligee of a bond covenanted not to sue one of two joint and several obligors: he nevertheless did so, and it was held, that the deed of covenant might be pleaded in bar, though the plaintiff might sue the other obligor. There must be a legal debt to support a commission—such a debt as would maintain an action at law; for it has been held, that a debt barred by the Statute of Limitations would not be sufficient. It may be said, however, that as two only of the trustees executed the deed, it is inoperative; but that is not so, for the deed passed the property out of the bankrupt, and it might have been enforced against him.

Mr. J. Williams and *Mr. Starkie*, contra. It may be admitted that the covenant by the creditors in the deed of assignment amounted to a release, if the deed was per-

fect. The cases cited on the other side are therefore not disputed. But if the deed in question might have been rendered inoperative, the case becomes very different. This was exactly the state of things (no matter how caused,) in *Doe v. Anderson*; every creditor who had not signed the deed, might have treated it as an act of bankruptcy. Independent of this, the deed was inoperative, because all the trustees did not execute. If the deed operated at all, it vested the property in all of them; and, as far as regarded the bringing of any action, founded upon the rights supposed to be vested by that deed, it would have been necessary that all of them should join in the action. The deed was also inoperative by reason of all the creditors not having executed it; for the trust was to pay the creditors who should execute the deed; and as some of the trustees (themselves creditors) did not execute, the condition, upon which it must be taken the assignment was made, has not been performed; for it is obvious, that the bankrupt, and all parties, contemplated the execution of the deed, by at least such of the creditors as were trustees.

[*Mr. Justice Bayley*.—In *Doe v. Anderson* the deed was void altogether, by reason of the prior act of bankruptcy. The property which the bankrupt professed to assign was not in him at the time.]

The Court took time to consider, and on this day, the judgment was delivered in the following terms, by

Mr. Justice Bayley.—In this case a rule was obtained by the plaintiffs, calling on the defendant to shew cause why the nonsuit should not be set aside, and a verdict entered for them, as the assignees under a commission of bankruptcy issued against John Campion, on the petition of John Barr; and the point reserved upon the trial, and which has been since argued, was, whether such petitioning creditor was or was not precluded by the indenture of assignment, executed by the bankrupt for the benefit of his creditors, from suing out such commission. The commission issued in May 1827; and it is admitted, that there was a good act of bankruptcy, independent of the deed on which the commission is resisted. That act of bankruptcy,

(2) 2 Term Rep. 594.

(3) 4 East, 234.

(4) 8 Term Rep. 168.

subsequent to the date of the assignment of 1826, was the going to, and lying in prison for twenty-one days, and thereby becoming bankrupt, as to any person who might sue out a commission. The deed of assignment in question was to this effect.

[Here the learned Judge stated the substance of the deed.]

It was contended, at the bar, that the terms "*and execute these presents*"—were in the nature of a condition precedent, and that by the non-performance of that condition, the deed, to all intents and purposes, is void, and therefore, that it could be no bar to the petitioning creditor's debt; but when the language of that proviso is referred to, it is clear that it was intended to apply only to creditors not executing it; and, in the construction we put upon it, cannot vacate the deed so as to make it absolutely void. We have looked into that point, and it appears to us clear that the proviso, on the language of which it has been urged, that that deed is altogether void, is applicable only to those creditors who should not come in and execute it. In *Smith v. Wheeler* (5), there was an assignment to trustees, upon certain trusts, with a power of revocation reserved by the assignor. The trustees knew not of the assignment during the life of the assignor; and after his death, one assented to, and the other dissented from, the trust. There was a special verdict, finding this among other facts; and one of the questions was, whether Crook, one of the trustees, who alone assented, was of himself a good lessor. Two Judges, in court, held that he was; and on error the judgment of the Court below was affirmed; and Lord Chief Justice Hale says, "The estate was wholly in Crook." There, therefore, we have a case in which the deed remained with the grantor during the whole of his life, the trustees knowing nothing of it till after his death; and there the deed was confirmed, and vested the estate in the one who, of two, assented to the deed; and that case establishes that it is not essential, that the trustees to whom property is conveyed should execute the deed on which the trusts arise, and if one assents, and the other does not,

that the whole vests in the one who assents. If the intention of the party is, that all the trustees should execute, he must insert a proviso, making it imperative upon them to do so; but, it appears that in the absence of such proviso the property will vest. In *Crewe v. Dicken* (6), it appeared, that one of two trustees for the sale of an estate, having released and conveyed to his co-trustee, refused to join in the receipt of the purchase-money. The purchaser of the estate was held not to be bound to the agreement with the remaining trustee. But it would have been otherwise if the other had merely renounced. Lord Thurlow said, that if that trustee had merely dissented, the whole estate would have been in the other; "it must be considered by releasing to have had the property in him," &c. That case, therefore, is an authority to this effect, that where there is a conveyance to two trustees, and one of them dissents, that circumstance will not vacate the conveyance of the property to the other, who does not release. That decision was corrected in *Niclosen v. Wordsworth* (7); and the decision in *Ventris* established, by the late Chancellor Eldon. That learned Lord seems not to have admitted the distinction, drawn by Lord Thurlow in *Crewe v. Dicken*, between a disclaimer by a trustee, and a release by one trustee to another; but for every purpose applicable to the present case, the two decisions go together.

Now these cases all proceed on the principle, that where a conveyance is made to several trustees, it is not necessary that all of them should execute the deed, or accept the trust, but that the property will go to those who do so accept. Applying that principle here, the consequence is, that in this case the property vested wholly in those two who did accept the trust. After the argument was concluded, I doubted whether the deed would operate as a release by Barr of his debt, unless the intended trust property was actually delivered over to the trustees; but I am satisfied that that raises no foundation on which the deed should be construed to be inoperative. Barr and Hutton, who executed, have every thing which the deed stipulated to give them, if

(5) 1 Vent. 128; s. c. 2 Keeble, 564, 608; 1 Lev. 279.

(6) 4 Ves. 97.

(7) 2 Swanston, 365.

they choose to take it. Instead of being framed in consideration of the delivery of the goods, it is framed in consideration of the assignment of the property. Thus they have the whole benefit of the intention of the deed; and if the property itself was not handed over, it is their own fault, and the deed is as fully a bar to the debts of those who executed it, as if the property had been actually handed over. While the case was under discussion, it was pressed before us by Mr. Williams, that there were other creditors who are not bound by the deed who might have taken out a commission; but *non constat* that they will exercise that right to do so; at all events, they are the only parties competent to become petitioning creditors, and Barr, who has accepted the property, cannot make that a ground for his taking out a commission; the deed being personally operative against himself, however it may be inoperative as to that class of creditors. The issuing of a commission is clearly a species of suit and proceeding against the goods and chattels of Campion, the bankrupt, from the taking of which he is precluded by his covenant not to sue; and our judgment therefore must be against the plaintiffs.

Rule discharged.

1829. { *DON, on the several demises*
May 4. { *of THE REV. HENRY DELVES*
 { *BROUGHTON AND DANIEL WM.*
 { *STOW, v. GULLY.*

Church Leases—Memorial of Annuity.

1. *Whether the provisions of the statute 18 Eliz. c. 20. go to prohibiting the granting of any lease of the glebe, and other rectorial property of a benefice with cure—quære.*

2. *But whether they do or not, all such leases made between 1803 and 1816, are good; the statute 43 Geo. 3. c. 84. having repealed the statute of Elizabeth; and the provisions of the latter not having been revived until the 57 Geo. 3. c. 99.*

3. *Where such a lease had been granted within the above two periods to secure several annuities; and subsequently, and after the passing of the 57 Geo. 3. c. 99, a new arrangement was made by the incumbent, the grantor*

of the annuities, by which the annuities were paid off, and the lease was assigned to a new party to secure the payment of a sum of money advanced by that party for the paying off of the annuities, and the further assistance of the grantor:—Held, that such legal estate was well assigned, although it was after the 57 Geo. 3. c. 99. was passed.

But, whether, in a court of equity, such legal estate would be allowed to prevail beyond the securing of that part of the charge which was well created between the 43 Geo. 3. and the 57 Geo. 3,—quære.

4. *In ejectment, upon the assignment of a term to secure an annuity, a proper memorial of the annuity deed will be presumed, until the contrary be shewn.*

Ejectment: tried at the Surrey Spring Assizes 1828, before Mr. Justice Burrough. Verdict for the lessors of the plaintiff, subject to the following

CASE.

On the 10th of August 1811, the Reverend Bryan Broughton became rector of the rectory of Long Ditton, in the county of Surrey; and, being such rector, by an indenture, bearing date the 6th of January 1814, made between him, of the one part, and William Bonnell James, of the other part, in consideration of the sum of 600*l.*, he granted to the said William Bonnell James an annuity of 88*l.* 7*s.* for the term of 99 years, if the said Bryan Broughton should so long live, charged upon the rectory of Long Ditton, with the usual power of distress, and clause of repurchase; and with covenants, on the part of the said Bryan Broughton, that the rectory should continue subject to the annuity as long as it was unpaid; and that he would not resign without the consent of the said William Bonnell James; and, for better securing the said annuity, the said Bryan Broughton did grant, bargain, sell, and assign unto the said William Bonnell James, his executors, administrators, and assigns, all the rectory of the parish, and parish church of Long Ditton, and the glebe lands, tithes, oblations, obventions, and other the rights, members, and appurtenances thereof, to hold the same unto the said William Bonnell James, his executors, administrators, and assigns, from the day next before the

day of the date of the indenture, for the term of 100 years then next ensuing, if the said Bryan Broughton should so long live and continue to be rector of the said rectory, without impeachment of waste so far as the said Bryan Broughton could grant that privilege, upon trust, for the better securing to the said William Bonnell James, his executors, administrators, and assigns, the due and regular payment of the said annuity ; and which said deed was indorsed as follows :—" A memorial of this deed was inrolled in his Majesty's High Court of Chancery, pursuant to an act of Parliament made for that purpose.

"Signed, J. Mitford."

By a certain other indenture, bearing date the 1st day of June 1815, made between the same parties, with a like indorsement thereon as to the inrolment, in consideration of the sum of 1000*l.*, the said Bryan Broughton granted to the said William Bonnell James, another annuity of 15*l.*, for the like term of 99 years, if the said Bryan Broughton should so long live, charged upon the said rectory, and with the like clauses, powers, and provisions, as in the said indenture of the 6th of January 1814 ; and, for better securing the said last-mentioned annuity, and in consideration of 10*s.*, the said Bryan Broughton did grant, bargain, sell, and demise unto the said William Bonnell James, his executors, administrators, and assigns, all the rectory and premises contained in the before-mentioned indenture of the 6th of January 1814,—to hold the same from the day next before the day of the date of the now reciting indenture, for the term of 100 years, if the said Bryan Broughton should so long live and continue to be rector of the said rectory, upon trust, for better securing the said last-mentioned annuity.

By a certain other indenture, bearing date the 26th of October 1816, and made between the said parties, with a like indorsement thereon as to the inrolment, in consideration of the sum of 400*l.*, the said Bryan Broughton granted to the said William Bonnell James another annuity of 60*l.*, for the term of 99 years, if the said Bryan Broughton should so long live, charged upon the said rectory ; and, for better securing the same, the said Bryan Broughton did ratify and confirm unto the said William Bonnell

James, his executors, administrators, and assigns, all the said rectory and premises particularly described in the before-mentioned indentures, to hold the same for the residue and remainder of the term of 100 years, granted by the indenture of the 1st of June 1815, upon further trust, for securing the last-mentioned annuity.

No proof was given of the inrolment of the memorials of the three several annuities or rent charges, further than the indorsements upon the deeds as before mentioned.

These annuities being unredeemed, and the terms created for securing them being still subsisting ; by an indenture, bearing date the 26th day of May 1820, and made between the said Bryan Broughton, of the first part, the said William Bonnell James, of the second part, and William Robert Broughton, a captain in the navy, of the third part,—reciting the before-mentioned indentures of the 6th of January 1814, the 1st of June 1815, and the 26th of October 1816 ; and that the said Bryan Broughton was indebted to the said William Robert Broughton in the sum of 1000*l.*, secured by three bonds, dated respectively the 6th of April 1815, the 14th of January 1817, and the 28th of August 1817, and in the sum of 1000*l.* lent by the said William Robert Broughton to the said Bryan Broughton in the month of January 1819, for which no specific security was given ; and that the said William Robert Broughton had agreed to lend the said Bryan Broughton the further sum of 3500*l.*, in order to enable him to redeem the said annuities, and for his other occasions,—in consideration of 2000*l.* paid to the said William Bonnell James ; of 2000*l.* due to the said William Robert Broughton ; and of 1500*l.* advanced and paid to the said Bryan Broughton, making together the sum of 5500*l.*, the said William Bonnell James, at the request and by the direction of the said Bryan Broughton, did bargain, sell, and assign unto the said William Robert Broughton, his executors, administrators, and assigns, all the sums of 600*l.*, 1000*l.*, and 400*l.*, the purchase-money of the said three annuities ; and for the considerations aforesaid, the said William Bonnell James did bargain, sell, and assign, and the said Bryan Broughton did grant, bargain, sell, and assign, ratify, and confirm unto the said Wil-

liam Robert Broughton, all the said rectory of the said parish, and parish church of Long Ditton, and the messuage or tenement, and rectory-house, glebe lands, tithes, oblations, obventions, portions, profits, and emoluments whatsoever, arising, growing, renewing, and increasing, from and belonging to the said rectory, or any part thereof; and all and singular other the premises by the said recited indentures, or any of them, granted and demised, with their and every of their rights, members, and appurtenances, —to hold the same unto the said William Robert Broughton from thenceforth, for and during all the residue and remainder of the said term of 100 years, then to come and unexpired, if the said Bryan Broughton should so long live and continue incumbent of the said rectory, subject, nevertheless, to a proviso for redemption and re-assignment of the said terms, upon payment of 5500*l.* and interest, on the 26th of November then next.

Captain William Robert Broughton died on the 17th of March 1821; having, by his will and codicil (duly proved in the Prerogative Court of Canterbury, on the 23d of May 1821,) appointed the lessors of the plaintiff his executors.

The several deeds mentioned in the case were to be in court, and either party was to be at liberty to refer to them.

The question for the opinion of the Court was, whether the statutes of 13 Eliz. c. 20, and 57 Geo. 3. c. 29. s. 1. operated so as to vitiate the deed of the 26th of May 1820, and preclude the lessors of the plaintiff from recovering; and generally, whether, under the circumstances stated, they were entitled to recover in the action.

The case was argued on the 27th of April, by *Mr. Thesiger*, for the lessors of the plaintiff; and *Mr. Chitty*, for the defendant.

The questions were,—

First, whether, as the two terms of 100 years were created during the existence of the 43 Geo. 3. c. 84, which repealed the 13 Eliz. c. 20, and was itself repealed by the 57 Geo. 3. c. 99. s. 1, they were legally assigned to and did vest in Captain Wm. Robert Broughton, by the indenture of the 26th of May 1820 (executed, of course, after the 57 Geo. 3. c. 99. had passed), by which deed the annuities were redeemed, and a new charge of a different description created.

Secondly, whether the evidence of the memorials of the said indentures was sufficient; or, whether examined copies of the memorials should not have been produced and proved.

This second point was not pressed by the defendant's counsel in the argument. It may probably be taken, that a proper memorial would, in such a case, be presumed; and that it would be incumbent on the party who contended, that no memorial, or no proper memorial, had been inrolled, to shew that fact.

Mr. Thesiger, for the lessors of the plaintiff.—The case may properly be divided under three heads.

First, a consideration of the object and effect of the statute of 13 Eliz. c. 20.

Secondly, the extent to which the 57 Geo. 3. c. 99. operated upon that statute.

Thirdly, assuming that it revived that part of the statute of Elizabeth which related to charges upon benefices, whether the terms, which were lawfully created by the 43 Geo. 3. c. 84, could be legally assigned, after the passing of the 57 Geo. 3. (1)

The first of these questions is the most material. It will be said, that the prohibiting words of the statute of Elizabeth are general, and that they relate indiscriminately, in their operation, to *all* charges. But this was not the object of the statute. The object was, to put an end to those corrupt dealings, which were prevalent at the time. The preamble shews this; it runs in these words:—"That the livings appointed for ecclesiastical ministers may not, by corrupt and indirect dealings, be transferred to other uses, be it enacted," and so on. The species of corruption which it was the object of the statute to prevent, is described by Lord Kenyon, in *Monys v. Leake* (2), in the following terms:—"The reason of making that act was, because, in former times, the patron sometimes presented a needy incumbent, who, being content to take the living on any terms, agreed to grant leases in favour of the patron himself." The same appears in 2 *Burn's Ecclesiastical Law*, 394. (3) This being the object in view, the

(1) See the Statutes, and the cases therein collected, in 1st Chitty's Statutes, title "Clergy," p. 134.

(2) 8 Term Rep. 415.

(3) Tyrwhitt's edition, title "Leases."

Court will not extend it so as to give effect to the mere literal terms, where the doing so will, have the effect of defeating legitimate arrangements. The words undoubtedly are very general; but the question raised in this case has never been expressly decided. It was alluded to in the before-mentioned case of *Monys v. Leake*, and in *Doe d. Rogers v. Meares* (4). I allude to the case of *Monys v. Leake*, to get rid of the effect of the marginal note of the report of that case. The judgment of Lord Kenyon should be looked at: for the marginal note is not warranted by that judgment. In *Doe v. Meares*, the decision went on another point. If the lease were held to be voidable only, the lessors of the plaintiff would be entitled to recover, because a stranger cannot take advantage of an act which is merely voidable. But, if the Court should not be with me upon the construction of the act, I fear that I could not ask them to treat the lease as merely voidable. The cases of *Doe v. Barber* (5), *Frognorth v. Scott* (6), and *Doe d. Cotes v. Somerville* (7), would go to shew, that it is void, if it is within the meaning of the statute at all. I am, therefore, driven to the first position with which I set out,—that the statute is applicable only to corrupt charges.

Secondly, as to the effect which the 57 Geo. 3. c. 99. had upon the statute of Elizabeth. It repealed the 43 Geo. 3. c. 84, which had repealed the statute of Elizabeth. In general, therefore, it would revive the statute of Elizabeth; but, inasmuch as it professed to embody and consolidate the laws on this subject, I should contend, that it altogether repealed the statute of Elizabeth. I admit, that, according to Burn, title "Leases," 397, and the case of *White v. the Bishop of Peterborough* (8), the better opinion seems to be the other way.

The third point is the strong one for the lessors of the plaintiff. The terms for 100 years were created while the statute of Elizabeth was, admittedly, not in force; that is, during the operation of the 43 Geo. 3. c. 84. They remain, therefore, as legal terms, whatever may be the extent to

which they can be properly applicable, as regards these different securities. If the term be on foot for any lawful purpose, that will be sufficient. It was lawfully created; it has never been extinguished. It must be in some person; certainly not in James, to whom it was granted, for he assigned it to Captain Broughton, in whose representatives it must necessarily be. Whether they may be entitled to make use of the term to satisfy the full extent of the charge; or, whether a court of equity would limit it, is not the question in this court. If the legal estate be in the lessors of the plaintiff, a court of law can look no further.

With regard to the question, as to the proof of the memorial inrolled, the cases of *Doe d. Griffin v. Mason* (9), and *Doe d. Lewis v. Bingham* (10), are expressly in point to shew, that any objection as to the want of a proper memorial should come from the other side.

Mr. Chitty, contra, [was desired by the Court to confine himself to the question, whether the legal estate was not in the lessors of the plaintiff; the term having been created during the operation of the 43 Geo. 3. c. 84.]

The legal estate is not in the lessors of the plaintiff. It was granted for the purpose of securing certain annuities, which annuities are now at an end. The only right which the lessors of the plaintiff have is by the deed of 1820, which created an entirely new charge.

[*Mr. Justice Bayley*.—Unless you can say, that the legal estate passed back to Broughton, the grantor, and was passed by him in 1820 to the testator of the plaintiff's lessor, it cannot be as you say.]

It was so. The old charge was at an end, and a new charge of a different nature was created. It was a charge, which, on that account, required the granting of the legal estate. It was made a mortgage; and was for an amount greater than the first charges. If the Court were to hold otherwise, they would drive the parties into a court of equity, in order that they might get rid of that part of the security which is admitted to be bad. This security is in direct violation of the statute; "other uses" are

(4) Cowp. 129; Lofft, 602.

(5) 2 Term Rep. 749.

(6) 2 East, 467.

(7) 6 B. & C. 126; 5 Law Journ. K.B. 28.

(8) 3 Swanston, 107.

(9) 3 Campb. 6.

(10) 4 Barn. & Ald. 672.

provided for than those allowed by law. A court of law will, therefore, not give effect to the deed in any way whatever. No doubt, that if this ejectment were brought by James, the original lessee, he could recover upon the legal title, which was properly conveyed to him while the 43 Geo. 3. was in force. This transaction is vicious; inasmuch as it was made at a time when it would be illegal to originate it. It creates new objects, and introduces new parties. It is *malum in se*: it is against not merely the letter but the spirit of the act of Elizabeth; for it deprived the clergyman of all means of exercising his functions for the advantage of the community.

[*Mr. Justice Littledale*.—The arrangement was so far beneficial to him that it relieved him from the annuities.]

It did so; but it left him personally subject to a heavier charge of debt.

Mr. Thesiger, in reply.—Either the annuities remain, or they have been redeemed. If the former, the lessors of the plaintiff are clearly entitled; as they combine, in that case, the legal estate, with the charge for securing which it was conveyed. If the latter, then did the testator of the plaintiff's lessor relieve the property from a charge which was valid; and he is entitled to hold it, at all events, until the amount of that charge be paid off. If, then, any one of the objects of the present charge be legal, the lessors of the plaintiff have a right to maintain their deed, in order to avail themselves of it, until they shall be satisfied with the legal part of the charge. The cases on this subject are collected in *Greenwood v. the Bishop of London* (11). James had a right to do what he pleased with the legal estate.

The Court took time to consider; and this day, the judgment was delivered in the following terms by—

Mr. Justice Bayley (after stating the facts).—The term was created when the operation of the statute of Elizabeth was destroyed; that is, between the 43 and 57 of Geo. 3, if the statute of Elizabeth did apply to this case. Whether it did, or did not, it becomes unnecessary for us to give any opinion. In 1820, and therefore after the

passing of the 57 Geo. 3. c. 99, an arrangement was made by deed, to give effect to which the present ejectment was brought.—[Here the learned Judge stated the substance of the deed of 1820.]—So that, by this deed, James assigned to Captain Broughton the remainder of the term. The money, which, on that occasion, was paid to James, in satisfaction of his charge, was the money of Captain Broughton. No new term was created by this deed; the old one was assigned. The objection taken to this was, that, as the term was assigned to give effect to an illegal transaction, the assignment of it was void; that it created a new, and an illegal charge. If we thought, upon the whole of the case, that this deed did create a new charge, we should have had to consider, whether the provisions of the statute of Elizabeth applied to benefices with cure. But if it was not a new charge, it was, admittedly, a legal arrangement, by virtue of the 43 Geo. 3. c. 84. On the whole, we are of opinion, that this was not the creation of a new charge; but, in substance, the continuation of an old one. If, as a charge, it is good to any extent, it is good to maintain the legal estate which had been previously conveyed; and to maintain it, until that part of the charge which is good, shall have been satisfied. Before the transaction of 1820, Broughton, the incumbent, was paying annuity interest to James; and to secure the payment of this, James had in him the legal estate. By the deed of 1820, it appears, that that legal estate did not revert back to the original grantor for an instant. The substance of the transaction was, that the charge upon the living should not be annihilated; but that it should be turned into a charge carrying interest at 5*l.* per cent. If it should be considered as valid, only for the purpose of satisfying the amount of the original charge, it would be sufficient to give the lessors of the plaintiff the legal estate, and entitle them to judgment in the present action. The whole frame of the transaction was to turn the security from annuity interest to legal interest. For this purpose, the legal estate was continued out of Broughton, the incumbent; and never revested in him. We are, therefore, of opinion, that the legal estate passed from James to the testator of the lessors of the plaintiff; and, consequently, that they

are entitled to judgment. What a court of equity may do with respect to the amount of the charge, for which that legal estate shall stand as a security, may be a different question; and upon which it is not for us to offer any opinion.

Judgment for the plaintiff.

1829. } SARAH BARBER v. JOSEPH STOKES,
May 5. } EXECUTOR OF SIMON STOKES.

Baron and Feme—Pleading—Nonsuit.

1. *Husband and wife may join in an action upon a cause of action which appears to have accrued to the wife during coverture.*

2. *But they must join as husband and wife;—and accordingly, where a declaration set out a cause of action as accruing to Samuel Barber and Sarah Barber, not describing them as husband and wife, though in fact they were; and the cause of action appeared to have arisen to Sarah Barber during coverture:—Held, that the evidence did not support the declaration; inasmuch as that, except as husband, Samuel was a stranger to the cause of action.*

8. *Where the Judge on the trial is of opinion that the plaintiff ought to be nonsuited, but the plaintiff's counsel refuses to be nonsuited, and the jury find a verdict for the plaintiff, semble, that the Court cannot order a nonsuit to be entered, but will order a new trial.*

The plaintiff, and Samuel Barber, her late husband, commenced the present action to recover a debt alleged to be due to the wife while sole; but the declaration did not so state the cause of action, nor did it state as a fact, that the plaintiff, and the person who joined with her in the commencement of the action, were husband and wife. This caused the chief difficulty in the case; and is mentioned in the outset, in order to point attention to the main question in the cause.

The declaration commenced with a suggestion, that a writ issued against the defendant as executor of the will of Simon Stokes, at the suit of the plaintiff, and one Samuel Barber, and was served upon the defendant; and that, since the issuing of the writ, Samuel Barber had died. It then

went on in the usual form. The first count was upon a promissory note, alleged to have been made by the deceased Simon, whereby he promised to pay Sarah Barber, or order, on demand, 250*l.*, when Martha was at the age of twenty. It then stated, "by means whereof, and by force, &c. the deceased Simon became liable to the plaintiff, and the said Samuel Barber, the sum mentioned in the note." The fact of Martha having arrived at the age of twenty was averred.

The second count was for money lent and advanced to the deceased Simon; the third for money paid, laid out and expended on his account; the fourth for money had and received by Simon; the fifth upon an account stated by Simon; the sixth upon an account stated by the defendant, as executor of Simon. In all the counts, the cause of action was stated to have accrued to the plaintiff, and the deceased Samuel Barber.

The pleas were—the general issue, and *plene administravit*, upon the latter of which issue was joined; but the defence came within the general issue.

The cause was tried at the Summer Assizes of 1828, for the county of Stafford, before Mr. Justice Gaselee; when the following appeared to be the principal facts.

William Stokes, the brother of the deceased Simon, had two illegitimate children by the plaintiff, before her marriage with Barber. It was believed, and assumed, that William placed a sum of money in the hands of his brother Simon, the defendant's testator, for the benefit of the plaintiff and the two children. But it was admitted by the plaintiff's counsel, that the plaintiff was married to Barber before any such money got into the hands of the defendant's testator; and before any promise to pay by Simon was made. Evidence was given of acknowledgments made by the deceased Simon, that he had money in hand of Sarah Barber; that he had paid small sums on account, and had promised to pay the remainder when the children came of age.

The defendant's counsel, upon these facts, submitted that the plaintiff should be nonsuited. There was no evidence of any cause of action accruing to the wife before marriage; she therefore ought not to have

been joined in the present action at all;—but, if she were the meritorious cause of the action during coverture, though she might possibly be joined; yet, on the death of the husband, she alone could not maintain the action. The form of the declaration was also objected to, as stating a cause of action to Samuel Barber and Sarah Barber; not treating them as husband and wife.

The learned Judge was of opinion, that the objection must prevail; and desired the plaintiff to be nonsuited. Mr. Campbell, the plaintiff's counsel, however, refused to be nonsuited. The learned Judge then told the jury, that, in his opinion, in point of law, the plaintiff was not entitled to recover; but they found a verdict for the plaintiff.

A rule having been obtained calling upon the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, the case came on at the Sittings after Hilary term, and—

Mr. Campbell and Mr. Richards shewed cause.—The evidence was sufficient to support the statement in the declaration of a promise made to the plaintiff and her husband; and it was not necessary to state in the declaration, that they were husband and wife. If the promise be stated according to its legal effect, that will be sufficient. The strong argument of the other side is, that the cause of action vested in the husband, and survived to his representatives. But, according to the judgment of Lord Kenyon, in the case of *Milner v. Milnes* (1), it is clear, that where the subject matter is a chose in action not reduced into possession, by the husband during his life, it survives to the wife. It is equally clear, that, supposing the cause of action to accrue to the wife during coverture, the husband and wife may join in the action: *Philliskirk and Wife v. Pluckwell* (2), *Hilliard v. Hambridge* (3), *Pratt and Wife v. Taylor* (4). [See all the cases on this subject, collected in *Selwyn's Nisi Prius*, tit. "Baron and Feme."] The only apparent difficulty in the present case is, in the fact, that the two persons to whom the cause of action is alleged to have accrued, are not stated to be husband

and wife. But this is immaterial, because if the cause of action survived, (and the case shews that it did,) the death of the other party appearing on the record, whereby the cause of action survives, must be sufficient for all legal purposes.

[*Mr. Justice Bayley*.—Suppose a release by the wife had been pleaded in bar.]

The husband might have replied *non est factum*.

[*Mr. Justice Parke*.—There is the difficulty upon the form of your declaration. No doubt, one of two joint plaintiffs in an action of contract may release; and there is nothing on the face of the declaration to shew that the present plaintiff was under any incapacity to release.]

Nor would it be so in another case which may be put.—Action by two plaintiffs; one an adult, the other an infant. Plea, a release by the plaintiff, who was an infant. *Non est factum* might be replied; and proof of the non-age would support the replication; yet, in that case, the declaration would not disclose the fact which created an incapacity in one of the plaintiffs to give a release. This shews that a statement of the contract according to its legal effect is sufficient. Here, the defendant's testator having money in hand, received by him to the use of the wife, promises, during the coverture to pay it to the wife. That, in point of law, according to the cases already cited, creates an implied promise to pay the husband and wife; she being the meritorious cause of action.

[*Mr. Justice Parke*.—But in your declaration you state this as a cause of action arising to two persons, apparently independent of each other. The contract you prove is different from that which you declare upon. That is my present difficulty.]

Mr. Taunton and Mr. Serjeant Russell, contra.—The declaration is not proved. The present is an attempt to assimilate a contract made with a husband and wife to a contract made with two indifferent persons. But the interest of the husband and wife is a peculiar interest arising out of their situation as husband and wife; and although they may in certain cases be allowed to join in an action, for a cause of action accruing during the coverture, their filling the situation of husband and wife should be made to appear. But in this case

(1) 3 Term Rep. 631.

(2) 2 Maul. & Selw. 393.

(3) Aleya, 36.

(4) Cro. Elis. 61.

there is no evidence whatever of a cause of action accruing to the husband ; of any contract made with him, or of any interest which he had in the subject matter, except by reason of his legal character as a husband. It is this alone which warrants the joining of both in the action ; because, where the wife is the meritorious cause of action, it is said that the right of action shall survive to her : *Brashford v. Buckingham and Wife* (5). But where Samuel Barber and Sarah Barber join in an action, without shewing that they are husband and wife, their doing so, imports that they are distinct persons. If Samuel were not her husband, he was a perfect stranger to the cause of action as it was proved. The money was not then had and received to his use ; nor was the promise to pay made to him in point of law ; for in point of fact, it is not suggested that it was made to him. In 2 *Roll's Rep.* 134, it is laid down, that if a sum of money (a legacy, for instance) be paid to a third person for husband and wife, the husband may sue alone if he please ; but if the wife be joined in the action, they must join as husband and wife. If that case is correct, the present declaration is improper in laying the cause of action, as arising to the two, as if they filled distinct characters.

The Court took time to consider, and on this day, the judgment was delivered in the following terms, by—

Mr. Justice Bayley.—We think, that in this case there must be a new trial ; for we are all agreed that the Court cannot order a nonsuit to be entered. Upon the evidence it seems to be very doubtful whether an action at law was the proper form of proceeding at all for the recovery of the sum in question. The money seemed rather to be a residuary share, for the recovery of which an action of course would not be the proper remedy. But, independent of that question, upon which we give no decisive opinion, we think the present declaration is not calculated to entitle the plaintiff to recover upon the facts given in evidence at the trial.

The declaration commences with a statement of the writ issued at the suit of Samuel Barber and Sarah Barber, against the

present defendant. In point of fact, Samuel and Sarah were husband and wife ; but this fact nowhere appears in any part of the declaration. It was contended, on behalf of the plaintiff, that she might recover upon the counts for money had and received to the use of the plaintiff and Samuel Barber, deceased ; but, there being no allegation that they were husband and wife, the declaration holds out that they were the joint owners of the money in question. If the declaration had shewn them to be husband and wife, the evidence would probably have been sufficient to maintain it : but, as it stands, the promise alleged appears to have been made to two unconnected parties. As the pleadings now stand, if Sarah had died, the cause of action would have survived to Samuel. But according to the evidence, it would not be so ; for if this were a cause of action accruing to the wife while sole, and not reduced into possession by the husband during her lifetime, it would go to her administrator. The same observation applies to the count upon an account stated. The evidence did not support the count, for there had been no accounting in respect of money which appeared to be due to the plaintiff and Samuel Barber, deceased. Our judgment, therefore, proceeds upon this—that the declaration is not framed to entitle the plaintiff to recover upon the evidence which was adduced at the trial.

Rule for a new trial.

1829. }
May. } BAILEY v. RAWLINS.

Illegal Contract—Agency.

If an agent effect an illegal contract, he cannot recover from his principal the sum he has paid in effecting it, although he proves an express promise by the principal to pay him.

Assumpsit for money lent ; money paid, laid out and expended ; money had and received ; and the account stated.

Plea—The general issue.

The cause being referred to a gentleman at the bar, he found the facts, and the result he drew from them, in the following terms :—

"The action was brought to recover the sum of 24*l.* 17*s.* 6*d.*, alleged to be due from the defendant to the plaintiff under the following circumstances. The plaintiff, at the time of the transaction, out of which this claim arises, was a certificated conveyancer, residing at Stonehouse, in Devonshire, and was the agent in that place for the Eagle Life Insurance Office in London. In the latter part of April, or beginning of May, 1827, the defendant applied to the plaintiff, as such agent as aforesaid, to get effected for him, in the said insurance office in London, insurances on his account, on the lives of one Thomas Evans, and one Edward Reed. The defendant had no interest in the lives of either of these persons. On the 11th of May, the plaintiff sent instructions to the said office to have a policy effected on account of the said defendant, on the life of the said Thomas Evans, in the sum of 400*l.* At that time, the plaintiff did not know that the defendant had no interest in the lives of these persons. On the 4th of June in the same year, the plaintiff sent instructions by letter to the actuary of the said company, at their office in London, to have a policy effected on account of the defendant, on the life of the said Edward Reed, for the sum of 600*l.*; and, at the time he sent those instructions, he did know that the defendant had no interest in either of the lives, and he so stated in his letter to the actuary, which contained the instructions. On the 8th of June, the plaintiff sent another letter to the actuary of the company, at their office in London, directing that the sum insured on account of the defendant, on the life of Thomas Evans, should be 600*l.* instead of 400*l.*; and in that letter he also stated, that the defendant had no interest in either of the lives, and desired that the policies might be made. Accordingly, three policies of insurance, in the ordinary form, on account of the defendant, and in which the receipt of the premiums was acknowledged, were entered into by the said office, and signed by three of the directors of the said company; the first for 400*l.* on the life of the said Thomas Evans, and which was signed on the 5th of June; another for 200*l.* on the life of the said Thomas Evans, and which was signed on the 8th of June, and the third on the life of the said Edward Reed,

Vol. VII. K.B.

for 600*l.*, and which was signed on the 26th of June. After all the said policies had been signed by the directors, they were sent together to their agent, the plaintiff, at Stonehouse; and on the 24th of July, he sent them to the defendant, and he also sent at the same time an account, in which he made the defendant debtor to him in the sum of 24*l.* 17*s.* 6*d.*, on account of the premium and other expenses on these policies; and the defendant said to the person who brought the policies, and the account, that he would call on the plaintiff in a few days and pay him. Before the plaintiff sent the policies to the defendant, but at what precise time did not appear, the defendant had desired the plaintiff to state to the office in London that he had no interest in the lives, and that he required the policies to be specially indorsed to that effect. On the 27th of July, after the plaintiff had sent the policies and the account to the defendant, he sent to the defendant a letter, in which he stated that he had written to the office to that effect, as desired by the defendant, and that he then inclosed the answer he had received from the office. The letter inclosed was from the actuary of the company to the plaintiff; and was dated the 15th of June 1827, and was as follows—
 "The act of parliament(1) requires that one person assuring the life of another, should have an interest therein. The office is not called upon to inquire in each case into the nature of that interest; but on the declaration of the party, supposes it to exist." The defendant, after the receipt of these two letters from the plaintiff, and before the 10th of September, but on what day was not proved, sent back the three policies to the plaintiff, declining to have anything further to do with them. The plaintiff refused to accept them, and on the 10th of September, the plaintiff wrote, and sent to the defendant the following note:—

"10th of September, 1827.

"Sir,—I am informed that you are about to quit this neighbourhood altogether. This information, coupled with the message you sent with the policies, (which I could not understand, therefore sent them back again,) makes it necessary for me to believe for the

(1) 14 Geo. 3. c. 48. s. 1.

worst; yet, I cannot consider that a gentleman of your respectability would attempt to act in a manner to render legal proceedings necessary to be taken against you. Under such circumstances, I therefore write to inform you, that, the time you promised to pay the money having long since elapsed, steps must be taken against you, unless the amount is paid forthwith; as I cannot under present circumstances pay the money myself, and I am satisfied the office will take measures even to outlawry, nor spare trouble or expense in the matter: Hoping to hear from you that such will be unnecessary,

"I am, &c. &c."

To this letter no reply was sent by the defendant. There was no indorsement on the policies, which were altogether in the ordinary form. The declaration sent by the defendant, for the purpose of having the insurances effected, did not contain an assertion that he had any interest in the lives. At the time the defendant applied to the plaintiff to get these policies effected, there was a running account between the plaintiff and the office; and the usual course of business between them was for the office to debit the plaintiff in his account in their books, with the amount of the premiums and stamps on the policies effected by his agency; and the plaintiff was debited in account in the books of the office, with the amount of the premiums and stamps on these policies—that is to say, with the sum of 6*l.* 18*s.* for the premium, and 1*l.* for the stamp, on the first-mentioned policy; 3*l.* 9*s.* the premium, and 1*l.* the stamp, on the second-mentioned policy; and 10*l.* 10*s.* 6*d.* the premium, and 2*l.* the stamp, on the last-mentioned policy. It did not appear that any copy of this account was at any time sent to the plaintiff. No payment was made by the plaintiff to the insurance office on account of these policies specifically, at any time; and no remittance sent by him to the office on any account, after any part of this transaction, until the 2nd of October, on which day he remitted 30*l.*; and he was at that time indebted to the office in the sum of 29*l.* 9*s.* 11*d.* independent of the premiums and stamps on these policies in question. In the account between the plaintiff and the office, he was debited with different items on other transactions, from

the 2nd of October to the end of November, to the amount of 28*l.* 1*s.* 2*d.*; and during the month of January 1828, with different items, amounting to 19*l.* 9*s.* 2*d.*; and during the month of January, he made a further remittance to the office of 25*l.* On the 3rd of December 1827, the plaintiff made the affidavit of debt in this action, in which he stated the defendant to be indebted to him in the sum of 24*l.* 17*s.* 6*d.* for money paid. On the 5th of December he issued the writ in this action, (a bailable latitat,) on which the defendant was arrested. On the 8th of February the declaration was filed. Upon these facts, I was of opinion, that the transaction relative to these policies was illegal, and that both the plaintiff and the insurance office knew that it was illegal, before either of the policies was issued to the defendant; and I thought, therefore, that in point of law, no right of action could accrue to the plaintiff out of it; and more especially as no money was at any time paid by the plaintiff to the office on account of the defendant specifically; and any authority from the defendant to the plaintiff to pay money to the office on his account, if any such authority could be implied from a transaction of this sort, was altogether revoked and annulled before the 2nd of October, when the first remittance was made."

Accordingly, the arbitrator directed a verdict to be entered for the defendant.

Mr. Godson now moved for a rule to shew cause why the award should not be set aside. He admitted, that the policy of insurance was void, as between the defendant and the insurance office; but he contended, that the plaintiff, as the agent of the defendant in this particular transaction, was entitled to recover, as the defendant affirmed the transaction, and promised to pay. On the faith of that promise the plaintiff had been charged in his dealings with the office. The plaintiff is not here seeking to avail himself of the illegal transaction. That seems to be the test, whether such an action is maintainable: *Simpson v. Bloss* (2). And the plaintiff is entitled, according to the case of *Dalzell v. Mair* (3),

(2) 7 Taunt. 246.

(3) 1 Campb. 532.

to treat the running account between him and the office as money paid.

Lord Tenterden.—The promise to pay was nothing; taking that promise to be an authority to pay, it was revoked before the plaintiff paid anything to the office. The defendant was not liable to pay the company; and the plaintiff therefore paid, if at all, in his own wrong. But, if he had paid, he could have recovered it back.

Rule refused.

[For cases on this subject, see—

Petrie v. Hannay, 3 Term Rep. 418, which was shaken in *Ex parte Bulmer*, 13 Ves. 316.

Steers v. Lashley, 6 Term Rep. 61.

Brown v. Turner, 7 Term Rep. 630.

Child v. Morley, 8 Term Rep. 610.

Tenant v. Ellyott, 1 B. & P. 3.

Webb v. Brooke, 3 Taunt. 11.

Cannan v. Brice, 8 B. & A. 179; 2 Phil. Ev. 121.

Greenland v. Dyer, 6 Law J. K. B. 345.

See also the cases respecting agency on this subject, collected in *1st Hovenden on Equity*, p. 164.]

1829. { *BLADES v. FREE, EXECUTOR*
May 4. { *OF CLARK.*

Husband and Wife—Implied Contract.

1. *Where a man has so dealt with a tradesman, in respect of goods supplied to his wife, or a woman who passes for his wife, as to be liable for goods supplied to her during his absence, such liability is determined by his death; and his executor is not liable for goods supplied after the fact of his death, though before that fact was known.*

2. *But there is no objection, in point of law, to the entering into an express contract which shall cover the supply of goods after the death of the husband, or apparent husband.*

Assumpsit.—The declaration contained several counts; but three only, the 11th, 12th, and 13th, became material; and the verdict was taken for the plaintiff upon those counts. They were in substance as follows:—

The 11th count stated, that Clark, in his lifetime, was resident or dwelling with one Mary Clark, as his wife, and with divers his children and servants, and was about to go to the East Indies; and thereupon, and in consideration that the plaintiff would, after the intended departure of Clark, supply to the order of the said Mary such goods for the use of her, the said Mary, the said children, and the said servants, as she should reasonably require, he, the said defendant, undertook and promised to pay. Then followed the usual necessary averments consequent upon this promise, in order to give the plaintiff a right of action.

The 12th count was similar, except that it stated the supply of goods, as agreed, to be such as she, the said Mary, should reasonably require, *until reasonable and lawful notice to discontinue such supply should be given to the plaintiff*. The averment, among other things, was of a supply of goods before any reasonable or lawful notice had been given to the plaintiff to discontinue. The necessary averments followed.

The 13th was similar, except that it stated the supply of goods, as agreed, to be until the return of Clark, or notice from him to discontinue the supply; and, in case of the death of Clark, after his departure, without returning, then until the plaintiff should reasonably have notice of the death of Clark. The necessary averments followed.

The verdict was taken, subject to a case, of which the following is the substance:—

Captain George Ward Clark, deceased, in the declaration in this cause mentioned, of whom the said defendant is executor, during the year 1822, and from that time until the month of January 1823, resided upon his own freehold property at Kensall Green, in the county of Middlesex, with one Mary Steers, (who passed under the name of, and dwelt with him as, but was not, his wife,) and their children and servants; and in the said month of January 1823, the said George Ward Clark left England for the East Indies, leaving the said Mary Steers and family on the premises at Kensall Green, who continued to deal with the plaintiff, and other tradesmen, and they continued to reside there until the end of the month of August 1825.

During the residence aforesaid at Kensall

Green of the said George Ward Clark, and up to the time of his said departure from England, that is to say, from the month of November 1822, he, the said George Ward Clark dealt with the said plaintiff, and other tradesmen in that neighbourhood, for articles in the way of his and their trade, for the supply, upon credit, of himself and family aforesaid, the orders for the same being given by the said Mary Steers, and the same being paid for at certain periods, from and after the delivery thereof, by the said George Ward Clark.

The said plaintiff continued to supply goods, in the way of his trade, to the order of the said Mary Steers, for the use of herself and family aforesaid, from the said month of January 1823, until the end of August 1825, whereof the goods, for the value of which, 20*l.* 3*s.* 10½*d.*, this action is brought, were part, and were supplied as aforesaid, between the month of October 1824, and the month of May 1825 inclusive.

The said George Ward Clark died in the East Indies, on the 31st of December 1824, without having returned to this country since his departure before mentioned.

The said defendant tendered to the plaintiff the sum of 7*l.*, part of the said sum of 20*l.* 3*s.* 10½*d.*, the said sum of 7*l.* being the value of so much of the said goods that were supplied up to and including the 31st of December, 1824, and the same was received by the said plaintiff before the commencement of this action.

In or about the month of August 1825, and not before, intelligence of the death of the said George Ward Clark reached England, and was communicated to the said plaintiff, and other tradesmen and persons residing at Kensall Green aforesaid.

The question for the opinion of the Court was, whether, upon the above facts, the plaintiff was entitled to recover of the defendant, as executor of the said George Ward Clark, the amount of the goods sold as aforesaid, and yet unpaid for, being 13*l.* 3*s.* 10½*d.*

If the Court should be of opinion in the affirmative, the verdict for the plaintiff was to stand for that amount. If otherwise, the verdict to be set aside, and a nonsuit entered.

The question intended to be raised for the opinion of the Court was, whether the

executors of a person who dies abroad, is liable to pay for goods delivered to the supposed wife, but, in truth, the mistress, of the testator, after his death abroad, and before notice of that event reached the plaintiff in England.

Mr. Kelly, for the plaintiff.—The question is, whether, upon the facts here stated, a contract is not legally implied, that Clark would pay for such goods as the plaintiff should supply to this lady, who passed as his wife, until he, Clark, should give notice to the plaintiff to discontinue the supply. The goods were supplied on the credit of Clark.

[*By the Court*.—Suppose this lady had been his wife?]

The case is stronger for the plaintiff than if she had been his wife. The question is, what was the contract necessarily implied to have been entered into between these parties previous to Clark going abroad? He established a credit upon such orders as she should give, until there should be an express countermand. Such a contract would not be put an end to, merely by the death of Clark, without notice of that fact to the plaintiff.

[*Mr. Justice Parke*.—Suppose she had gone, and lived with another man. Would Clark have been answerable?]

No.

[*Mr. Justice Parke*.—Then your statement of the implied contract should be qualified?]

It is qualified; it is stated, for goods for the use of herself and her family. It is not necessary, in pleading, when you set out an implied contract, to state all the particular exceptions which by possibility may occur.

[*Mr. Justice Bayley*.—You might have qualified it thus: "so long as she should live and conduct herself as his wife."]

The 11th count, at all events, is clear of this difficulty.

[*Mr. Justice Parke*.—But, in that count, you have not the qualification, until the plaintiff should have notice of his death.]

But death does not put an end to the contract. If it were a mere authority to the woman to take up goods upon his credit, that might be revoked by his death; but a contract to pay for goods supplied upon her order, is not revoked. Death, without notice, it has been held, does not render

void, acts which have been done even under a bare authority: *Ex parte M'Donnell* (1).

[*Mr. Justice Bayley*.—But the utmost of this is, that he gave her authority to make contracts as if he were present.]

The credit was given to him, and upon his authority.

Mr. Chitty, contra, was stopped.

Mr. Justice Bayley.—There is no doubt, that a party may make a contract, by which he may bind himself and his effects after his decease, so that his estate shall be answerable for goods furnished to his wife, or his mistress living with him as his wife, even after his death. But here, there is no such contract; nor any contract at all, but an implied one. The highest at which the case can be placed for the plaintiff is, that the testator undertook to pay for the supply of goods to this person as if she were his wife, and the children and servants were his children and servants. Then, it may be taken, that he authorized the plaintiff to supply them. But this authority, like other authorities in general, became revoked by the death of the party who gave it. The instant the husband died, the authority to the wife became revoked. It is said, that this would be hard in the case of a wife, and harder in the case of a mistress: but a tradesman who gives credit must do so at his own peril. When a husband is absent for a considerable time, if a tradesman continues to supply the wife upon credit, he does so, knowing the legal consequence; that is, that, if the husband is dead at the time the goods are supplied, he has no remedy against the husband's estate. I see no hardship in this, if he is willing to run the risk; and, if he knows that the husband is about to leave the country, he may procure an express contract, or decline dealing any longer upon credit. A tradesman wishing to protect himself against this risk, should ascertain that the wife or mistress has such written authority, professing to bind the party giving it for a reasonable time after his decease; and if a tradesman does not see that there is such an authority, he has not used that diligence which he ought to have used, and he deals at his peril, and runs the hazard himself. I am, therefore,

of opinion, that, in this case, the authority possessed by this woman was the same as that possessed by a wife, and that only,—that authority ceasing at the death of the husband. A nonsuit must be entered.

Mr. Justice Littleale.—The only question is, what contract is implied? There is no express contract; the party goes abroad, and the dealings go on as before; but it seems to me, there was no continuing contract. A fresh contract arises on the delivery of every separate article, and the only thing done when Clark left the country was this,—he authorized this woman to order goods as before. It is only an authority to order things wanted for the family; and when he died, the authority ended; she had no longer any authority; and a tradesman having supplied cannot from that time recover the amount. The tradesman is not in a worse situation than if this woman had been his wife; for he could not, even had she been his wife, have recovered against his estate for goods supplied after his death. It is said, this is a hardship; but we cannot put him in a better situation than he would have been in, had this woman been his wife.

Mr. Justice Parke.—It is quite clear, that the plaintiff is not entitled to recover, unless he can make out such a contract as that stated in the declaration. It is a mistake to say, that the party holding out this woman as his wife, and living with her as if she were such, entered into any contract with any one;—he only gave her an authority to make contracts for necessities so long as she continued to appear as his wife: that authority was determined by his death; and there clearly being no such contract as that stated in any of the counts in the declaration, this action cannot be maintained. The cases of *Salle v. Field* (2), and *Murray v. the East India Company* (3), are expressly in point upon the question, as to the authority. I would not say, that a man might not give such a mere authority, as would not determine with his death, arising from the very nature of the object to be effected under the authority.

Judgment of nonsuit.

(2) 5 Term Rep. 211.

(3) 5 Barn. & Ald. 204.

(1) 1 Buck. 399.

1829. }
May 5. } DOE d. COURTAIL v. THOMAS.

Lease—Cancellation—Statute of Frauds.

1. *The mere cancelling in fact of a lease is not a surrender of the term thereby granted within the Statute of Frauds, which requires such surrender to be by deed, or note in writing, or by act or operation of law.*

2. *Nor, where such a lease appears to have been once in the possession of the lessee, who entered into possession of the property, will the fact of the lease being produced by the lessor in a cancelled state, unaccompanied by any other evidence, be sufficient to warrant a presumption that there has been a valid surrender.*

Ejectment for lands in the county of Hereford. The cause was tried, before Mr. Justice Gaselee, at the last Assizes for that county; when the following appeared to be the principal facts:—

The lessor of the plaintiff claimed under a lease, which had been granted to him on the 18th of April 1825, by the Hon. William Booth Grey, and Frances Ann his wife. It appeared in evidence, that that lease had been delivered by Mr. Grey to a lady, who shortly afterwards became the wife of the lessor of the plaintiff. The lessor of the plaintiff was proved to have been afterwards in possession. That lease afterwards, but when or how did not appear, got into the possession of Mr. Grey, and when it was produced at the trial, the names of the parties were torn off. It was in evidence, that there was a dispute between Courtail, the lessor of the plaintiff, and Mr. Grey, respecting the lease in question; that that dispute was the subject of a suit in equity between them, in which Courtail was the plaintiff; and that in that suit an order had been made by the Vice Chancellor, on the 24th of April 1828, directing that Mr. Grey should produce certain letters, papers, and writings, and the lease in question; and that the plaintiff should be at liberty to inspect and take copies thereof.

This being the evidence, it was contended by the defendant's counsel, that the lease, in its then state, with its apparent cancellation unexplained, did not make out a legal title on the part of the lessor of the plaintiff; and that as the lease appeared to

have been cancelled, and to have found its way back to the custody of the person who granted it, a surrender must be presumed. The answer of the lessor of the plaintiff was, that, by the Statute of Frauds, there could be no surrender, unless by a note in writing, or by operation of law; and that the apparent cancellation went for nothing, unless one or other of those requisites was satisfied. The learned Judge reserved the point; subject to which, the lessor of the plaintiff obtained a verdict.—

A rule having been obtained by Mr. Campbell, calling upon the lessor of the plaintiff to shew cause why that verdict should not be set aside,

Mr. Taunton and Mr. Maule appeared to shew cause; but, upon its appearing that the proposition advanced upon obtaining the rule was "that this lease, coming from the possession of the person who had granted it, and coming from that possession in a cancelled form, was evidence of its having been surrendered,"—the Court called upon Mr. Serjeant Russell, who was with Mr. Campbell in the cause, (Mr. Campbell not being now present) to support that proposition.

Mr. Serjeant Russell, accordingly, was heard in support of the rule. He submitted, that the opinion expressed by Lord Tenterden upon the granting of the rule *nisi*, was an authority in favour of the objection. His Lordship had then expressed himself in the following terms:—

"There is another ground on which this motion is made, and that is, simply and plainly this—that when the lease was produced at the trial, it was produced, not from the hands of the lessee, but from the hands of the lessor, from whose hands it was produced in a cancelled state. That then raised the question, upon whom lay the burthen of shewing how, and under what circumstances it was produced in a cancelled state? Now, in the case of *Lord Berkeley v. the Archbishop of York* (1), the circumstances under which the lease was cancelled were quite different, and were clearly explained; namely, it clearly appeared that the first lease was cancelled merely with a view of granting another, and a good and valid lease; and the cancellation of the former instrument did not defeat the legal estate.

(1) 6 East, 90.

Nothing of that kind is here; therefore, the lease in the hands of Mr. Grey, if valid and subsisting, ought not to be in the state in which it is; and it appears to me that my learned Brother, Mr. Justice Gaselee, was mistaken, in considering that the fact of its being cancelled and in the hands of the grantor, was not conclusive evidence. At least, I think there is ground for re-considering whether he was right in his opinion that this established a *prima facie* case. At present, I think, that it was incumbent, under these circumstances, upon the gentlemen claiming under this lease to shew how it came to be in such a state: and upon that point, and that point only, I think a rule for a new trial should be granted." That is the way in which my Lord Tenterden granted the rule.

[*Mr. Justice Bayley*.—When that opinion was expressed, the two facts which now appear were not before the Court; that the lease had come into the possession of Courtail, the lessee; and that he had entered into possession of the property.]

That, it is submitted, does not make any difference, so as to relieve the plaintiff from the necessity of explaining the circumstance. The case of *Roe d. Berkeley v. the Archbishop of York*, and which probably will be relied upon by the other side, decided that which there is no intention at all to dispute; namely, that a mere cancellation is not, of itself, a surrender. All that is contended for here is, that the *onus* to explain lay upon the party who sought to establish a legal title by that instrument; and that, in the absence of that explanation, the circumstances were sufficient to presume a legal surrender. Even before the Statute of Frauds, there could be no surrender of a thing lying in grant, except by deed; yet it was always considered that the cancelling of the lease of a thing lying in grant was evidence of a surrender: 4 *Bac. Abr.* title "Leases," T. p. 218.—[The remainder of the argument is fully noticed in the judgment.]

Mr. Taunton and *Mr. Maule*, contra, were stopped by the Court, after having referred to the note to the case, in *Thursby and others v. Plant* (2), wherein is given the substance of the case of *Magennis v. M'Cul-*

loch (3), with the opinion of the Lord Chief Baron Gilbert, on these points.

Mr. Justice Bayley.—It seems to me that this is a perfectly clear case. Here is a lease which is duly executed, and finds its way into the possession of the lessee; and then it begins to operate. Now the Statute of Frauds says, that no lease shall be surrendered, unless by deed or note in writing, or by act and operation of law. In this case there is no pretence for saying that there was a surrender by operation of law. Then, is there or is there not reasonable ground for saying, that there was a surrender in writing? Now the lease appears to be in the possession of the lessor. How it got there, *non constat*. The names are cut off. How the names came to be cut off, *non constat*. But when you look at the period of time which has elapsed since the lease was granted, and the present period, and look also to the state in which these parties have been during part of the intermediate space of time, is there any foundation for saying, that there has been a note in writing, by which that lease has been surrendered? The period of time at which it finds its way into the possession of the defendant, Mr. Grey, does not appear. How he got it, does not appear; whether he got it immediately from Mr. Courtail, or from any person in whose hands Mr. Courtail had deposited it, does not in any respect appear. In what state it was when he got it from Mr. Courtail, does not appear; but this *does* appear, that, in the intermediate space of time, there is a bill in Chancery, and an answer in Chancery, and there is an order that this lease shall be produced for the inspection of Mr. Courtail, when he shall reasonably require it; and, therefore, that does raise some degree of inference that there has been some dispute between these parties upon the subject of this lease, and upon the subject of the state in which that lease is. Now, the lease is in the possession of Mr. Grey: that alone is no evidence of its having been surrendered; because, it is properly stated by my Brother Russell, that it is only upon the ground, that you are warranted from the state in which it is, to presume that there had been a note in

(2) 1 Saunders, 236.

(3) Gilb. Eq. Rep. 236.

writing, that you can say that the provision of the Statute of Frauds has been complied with : and he says that that is the presumption which in this case ought to be made. Now, the fact of its being in the possession of Mr. Grey, and the fact of its being in a cancelled state, do not seem to me to furnish any degree of presumption, in this case, of there having been a note in writing. It is for Mr. Grey to make out that it has been surrendered ; and that there are facts in existence which did not appear upon the evidence in the case. The burthen of proof in that respect lies upon him. He has, it is true, in his possession the instrument in a cancelled state,—but what does that warrant you in inferring ? It warrants you in inferring that somehow or other it got into his possession, and that it is in his possession in a cancelled state ; but that alone will not do ; that does not make out his case : he is to rely upon a surrender in writing ; and there is no evidence at all from first to last of there ever having been a surrender in writing. If the transaction had been of very long date ; if this lease had been in possession of Mr. Grey, without any dispute on the part of Mr. Courtail, for a long series of years ; or if there had been any destruction of Mr. Grey's papers, or any change of residence, or any foundation for supposing that there might have been a note in writing ; and that, if there were that note in writing, that note might not be forthcoming, but had been destroyed ; that might have been a ground for raising a presumption upon accompanying circumstances ; but I think in this case it is groundless to suppose that there was ever a note in writing accompanying that document, when it found its way into the possession of Mr. Grey. Therefore, I think, that in this case the verdict was right, and that the rule must be discharged.

Mr. Justice Littledale.—It is quite clear that this is not a surrender by operation of law ; those are the cases where the lessee enfeoffs his lessor ; where the lessee and lessor join in enfeoffment ; or where the lessee accepts a new lease. There are a great variety of cases in which a surrender may take place by operation of law ; but there is no pretence for that here. Then, if it is not a surrender by operation of law,

the question is, whether a surrender in writing is to be *presumed* according to the law, as it has been fixed by the Statute of Frauds. I will put the case in the strongest light for my Brother Russell, as to the way in which it may have been done. I will presume that Mr. Courtail and Mr. Grey met together, and agreed that Mr. Grey should give up the possession of the property ; that then a conversation ensued, in which one party said to the other " then the lease must be cancelled ;" and they together, both Mr. Grey and Mr. Courtail, each took a pair of scissors, and cut off those names with the intention of cancelling the lease. It cannot be put stronger for my Brother Russell than that ; and I am perfectly clear, that upon that state of facts this would not be a surrender, since the Statute of Frauds. It is just one of the mischiefs that was meant to be remedied by the Statute of Frauds ; that you should not resort to anything which might amount to putting an end to the term, either by conversation or anything whatever, except by some note in writing ; and probably, if this very case had been submitted to the person who framed that statute, he would have said this is one of the very cases that should be guarded against by the statute ; that it may not be left to any kind of loose evidence, or any parol explanation. My Brother Russell says, there is no case to be found in the books applicable to this : I should be very much surprised if there were ; because it would be defeating the Statute of Frauds altogether. I do not mean to say, that if the parties had been out of possession upwards of twenty years ; and there was, from other circumstances, reason to presume that there had been some note in writing ;—I do not say that then it might not have been left to the jury to say, whether the note in writing had not been lost by length of time, and whether they might not presume that such a note in writing had existed. There are some cases which have come before the Court, as to what would amount to a surrender, but in all of them there was some writing proved. There is a case of *Farmer on the demise of Earl v. Rogers* (4). In that case there was a mortgage of certain premises for the term of

five hundred years; and it appeared that there was a written discharge at the back of the mortgage deed. The question was, whether that was a surrender of the lease. And in that case, although it was upon the back of the mortgage deed, it was thought a question of so much difficulty, that it was argued twice, before the Court gave judgment upon it. There was another case, where there was some question, but there also, there was some writing. It is the case of *Smith v. Mapleback* (5); there the lease came into the possession of Mr. Smith, the lessor, by an agreement between him and the tenant, by which Mr. Smith was to have the house on the terms mentioned in the lease, upon his paying a certain sum annually. Upon hearing that case discussed, Mr. Justice Ashurst doubted whether it was a surrender of the whole interest. Mr. Justice Buller said, that he was satisfied that it was a surrender of the whole term; but in that case, even though there was a surrender in writing, it was a subject of discussion. As to any thing short of that, it seems to me to be quite out of the question; and it appears to me, that the Statute of Frauds was meant to meet this, and a great variety of other cases of the same description.

Mr. Justice Parke.—I think this is a very clear case. It is admitted that the lease was once operative as a lease; and therefore, it cannot be got rid of except by a surrender. The only cases in which a lease can be got rid of are, by a surrender, by operation of law, or by a surrender by a note in writing. Brother Russell contends that there is a presumption, that there was a surrender by a note in writing. It appears to me impossible to draw any such inference; it may be said, that if a lease is found in the possession of the lessor in a cancelled state, that may raise a presumption that it was the intention of the parties to put an end to the term. The presumption to be drawn from that is, that they intended to put an end to the term by a mode which the law will not allow; and if so, there is nothing to raise the presumption that there was a surrender in writing. That is consistent with all the facts in the case; and will explain all the facts: and it seems to me, that one cannot raise any fur-

ther inference than that the parties intended by this step to put an end to the operation of the lease, by a means which the law will not allow; and if so, the lease continues in operation.

Rule discharged.

1829. { JONES AND OTHERS, ASSIGNEES,
&c. v. YATES AND YOUNG.

Partnership — Bankrupt — Trover — Demand and Refusal.

1. *Money, or other property, belonging to two partners, misapplied by one of them, cannot be recovered back in an action in the names of the two.*

2. *Nor, in case of the partners afterwards becoming bankrupt, can their assignees recover back the money, by reason of the mere misappropriation before bankruptcy.*

3. *Where, in answer to a demand of property, the defendant referred the applicant to his attorney, and the applicant did not make any objection to being so referred, and an action of trover was brought, without any application to the attorney, and without any other evidence of conversion by the defendant: —Held (under certain circumstances, in the case, which warranted the inference, that the reference to the attorney was, bonâ fide, for communication), that this was not sufficient evidence of a conversion.*

This was an action of trover, brought by the assignees of Sykes & Bury, bankrupts, to recover the value of certain bills of exchange, delivered to the defendants, under the circumstances hereinafter stated. The conversion was charged to be after the bankruptcy.

Plea.—The general issue.

The cause was tried, at the Guildhall Sittings, before Lord Tenterden, on the 16th of April 1828, when the following appeared to be the material facts:—

The bankrupt Sykes had been in partnership with the defendants, under the firm of Sykes, Yates & Young. That partnership was afterwards dissolved; but, before the dissolution, Sykes had entered into another partnership, namely, with Bury.

On the winding up of the accounts of the partnership of Sykes, Yates & Young, it

was found, that Sykes was indebted to his partners in a considerable sum, the amount of which did not become material upon the main question in the cause; and it may therefore be taken, in round numbers, at about 3000*l*. In part payment of this balance, Sykes indorsed to the defendants, his late co-partners in the old firm, several bills of exchange, which were the property of the new firm of Sykes & Bury, drawn by them upon different persons, and accepted. This he did without the knowledge of his partner Bury. Some of the bills afterwards became due, and the amount had been received by the defendants, after the bankruptcy of Sykes & Bury. No demand had been made by the assignees for the bills before the bringing of the present action.

Upon these facts, it was contended, on behalf of the assignees, that they were entitled to recover, because Sykes had no right to pay his own private debt with the property of the firm of Sykes & Bury; and that the defendants had no right to appropriate, in payment of such a debt, bills which appeared on the face of them to be the property of Sykes & Bury, and not of Sykes alone.

Among the objections taken on behalf of the defendants, it was urged, first, that the declaration was defective, as it charged a conversion of the bills by the defendants, *after* the bankruptcy of Sykes & Bury; whereas, if there had been any conversion at all, it was *before* the bankruptcy. Secondly, that, at all events, the assignees could not recover in an action at law; because, as they were suing upon the partnership rights of Sykes & Bury, they must be subject to the same disabilities; and, it was contended, that Sykes & Bury could not have maintained this action, because it would be, in substance, an action by Sykes & Bury against Sykes, Yates & Young.

Subject to these points, the plaintiffs obtained a verdict; leave being reserved for the defendants to move to enter a nonsuit; and a rule to shew cause having been obtained accordingly—

Sir James Scarlett, Mr. Platt, and Mr. Joshua Evans, now shewed cause.—As to the conversion. This is rightly charged to have been after the bankruptcy; for the conversion may be considered to have been incomplete until the defendants exercised the act of ownership over the bills by receiving

the money from the acceptors. Then, as to the main point. It is said, that, inasmuch as Sykes & Bury could not have maintained any action, therefore, that the assignees cannot; but there are many cases in which the assignees can recover, although the bankrupt could not. The case of a fraudulent preference is one of them; and this is a case of that description. The assignees have a right to contend, that, as to them, the property in these bills has never been divested. A partner has no right to dispose of the partnership property for his own private debt; and those who take partnership property, with a full knowledge of its being so, in discharge of such a debt, and in fraud of the partnership estate, must do so at the risk of being called to account by the assignees, who represent the general body of the creditors. This, in principle, was laid down by Lord Kenyon, in *Bristol and another, assignees, &c. v. Eastman* (1). There, in answer to an action by assignees, it was proposed to give in evidence a receipt in full discharge of the cause of action given by one assignee with the express dissent of the other. Here, there is the express dissent of Bury, and of the assignees. Lord Kenyon said, "A receipt in full of all demands, when given with a complete knowledge of all the circumstances, is a conclusive bar to the action; and the party giving it should not be allowed to rip up the transaction which had been so closed and concluded; but, in order to make such receipt conclusive, it must be given by one having full authority to do so. All the rights of property of the bankrupt center in the assignees; and, though the act of one, in receiving part of the bankrupt's estate, may, if fairly done, bind the estate by any discharge he may give for it, yet it never can be, where one assignee has shewn his express dissent, that the other may give a receipt binding on the estate. Such a construction would enable one assignee to dissipate and destroy the estate in despite of his brother trustee." And, accordingly, in that case, the action brought by the two assignees succeeded, notwithstanding the receipt given by one of them. This doctrine was also laid down in the case of *Skaffe and another v. Jackson* (2).

(1) 1 Esp. N.P.C. 172.

(2) 3 B. & C. 421; 5 D. & R. 290; 5 Law Journ. K.B. 43.

There, to an action by two trustees, a receipt was offered in answer, which appeared to be signed by one of them. The plaintiffs, in reply, proposed to shew, that the giving of the receipt was a fraudulent transaction, and that the money had never been paid. They were allowed to do so; they obtained a verdict, and this Court refused to set it aside. If, then, this were allowed, as between the original parties, *à fortiori* ought it to be where the plaintiffs are representing creditors whose property has been diminished by the fraud.

Mr. F. Pollock and Mr. Kelly, contra.—To the main point. The argument of the other side has frequently introduced the term "fraud;" but there has been no fraud in the case; and the law respecting what is called fraudulent preference, has nothing at all to do with it. The objection is, that the assignees cannot maintain, in point of form, an action which the bankrupts themselves could not maintain. The bankrupts could maintain no action. The case of *Staike v. Jackson* is quite beside the question. It was a question, whether the debt had been paid or not; whether a receipt should be so conclusive as that evidence should not be received to prove that the receipt itself was fraudulent; and that, in point of fact, the money had never been paid. The present is a question not as to the admissibility of any evidence, but as to the legal result of the facts, which are in evidence. The cases of *Cocke v. Jennor* (3), and *Powell v. Layton* (4), go to shew, that Sykes & Bury could not have maintained any action against the two present defendants alone. Then, as to the question of conversion. There is not the slightest evidence of a conversion. The receiving payment of the bill from the acceptor when due, was no conversion. The *not* presenting it, or the *not* receiving the money, might indeed be treated as a conversion; because the defendants, in that case, would have made the bill their own. A demand of the bills, coupled with a neglect to deliver them up, might have been evidence of a conversion. But, even if the delivery of the bills was fraudulent, and even if the case were free from the objection that Sykes is substantially a plaintiff, as well as a defendant, in

this action, the case of *Nixon and others, assignees, &c. v. Jenkinson* (5) shews, that there ought to be a demand by the assignees before they can maintain trover.

[The case stood over, in order that the following might be heard.]

JONES AND OTHERS, ASSIGNEES, &c.

v. YATES AND ANOTHER.

This was an action between the same parties as those in the last. The only difference was, that this, in point of form, was an action for money had and received; and was brought to recover the amount of money which had been received by Yates and Young from Sykes, in part payment of the balance due from him to the firm of Sykes, Yates & Young, which he had left, the money being that of the firm of Sykes & Bury, to which he belonged at the time of making the payment. The plaintiffs recovered a verdict in this case, also subject to the main question, whether the plaintiffs, who sued as the assignees of Sykes & Bury, could maintain the action against Yates & Young.

The affirmative of this proposition was contended by *Sir James Scarlett, Mr. Platt, and Mr. Joshua Evans*, for the plaintiffs.—In support of their argument, they cited the cases of *Graham v. Mulcaster* (6), *Stonehouse v. De Silva* (7), and *Smith v. Goddard* (8).

The negative was contended by *Mr. F. Pollock and Mr. Kelly*, who relied upon the cases of *Bosanquet and others v. Wray and another* (9), and *Moffatt v. Van Millingen* (10).

The Court took time to consider; and, on the 1st of June, the judgment was delivered, in both actions, by

Lord Tenterden, C. J.—After stating the facts, and the arguments on both sides, his Lordship said—We are of opinion, that the plaintiffs, the assignees, must, in this case, stand upon the rights which Sykes & Bury had before their bankruptcy. If, then, Sykes & Bury had brought these actions, the question would be, can the plaintiff Sykes

(3) Hob. 66.

(4) 2 N. R. 365.

(5) 2 H. Bl. 135.

(6) 4 Bing. 115; 5 Law Journ. C.P. 118.

(7) 3 Campb. 399.

(8) 3 Bos. & Pul. 465.

(9) 1 Taunt. 597.

(10) 2 Bos. & Pul. 124, n.

rescind his own contract with the defendants, by saying, that the contract was a fraud upon another person, that other being his co-plaintiff? It appears to us, that it is not competent for a plaintiff to do so⁽¹¹⁾. The *postea*, in both actions, must, therefore, be delivered to the defendants.

Judgment of nonsuit.

[The following case having arisen out of the same bankruptcy, and turning upon a point discussed in one of the previous cases, is here given, though it did not occur in the same order of time.]

JONES AND OTHERS, ASSIGNEES, &c.
v. FORT.

This was an action by the assignees of Sykes & Bury, to recover the value of certain bills, which had been paid to the defendant by Sykes, as the assignees contended, in contemplation of bankruptcy. The case went to the jury upon this question; and they found for the plaintiffs. But, in this case also, there was a question, whether there was sufficient evidence of a conversion. The following were the material facts which bore upon that question:—

The defendant had been several times examined before the commissioners, under the commission against Sykes & Bury; and his examination formed a material part of the plaintiffs' case. By that examination, the assignees were enabled to obtain particulars of the bills, the times when they were given, and the circumstances which attended the transaction. The statement made by the defendant included the mention of other bills, no part of the subject of this action. The defendant afterwards applied to prove as a creditor against the estate; but the assignees objected to his doing so, until he had given up the bills last mentioned, which he did; and then he was allowed to prove. A considerable time after this, and after some of the bills which were the subject of this action had become due, and the amount received by the defendant, and the others remaining in his hands, a person employed by the assignees

as accountant to the estate, called upon the defendant, and, on the part of the assignees, demanded the bills. The defendant referred the accountant to his attorney. The accountant did not go to the attorney. There was no other evidence on the question, as to the conversion.

The case was argued in Trinity term 1829, upon the question, whether this was sufficient evidence of a conversion.

The affirmative was contended by *Sir James Scarlett, Mr. Platt, and Mr. Joshua Evans*, for the plaintiffs. Though they submitted, as in the former action, in *trover*, of *Jones and others v. Yates*, that the receiving of the money for the bills was, of itself, a conversion,—they also contended, upon the authority of *Rust and another, assignees, &c. v. Cooper* (12), that the delivery of the bills was altogether void, so as to render a demand unnecessary.

The negative was contended by *Mr. F. Pollock*, who, as before, relied upon *Nixon v. Jenkins* (13), which laid down, that a demand by the assignees, and a refusal by the defendant, were necessary to prove a conversion. Here, the delivery of the bills was legal at the time; and the possession was lawful. The assignees might have affirmed or disaffirmed the contract; and, until they disaffirmed, the defendant was not only entitled to obtain and receive payment from the other parties to the bills, but he would have acted wrong in not doing so. The mere receipt of the money was, therefore, no evidence of a conversion: and, when the defendant, in answer to the application by the assignees (through their accountant), after his examination before the commissioners,—after his being allowed to prove, there being first, a discussion as to what bills he should give up, the defendant refers the applicant to his attorney,—it would be too much to construe that into a refusal. The applicant made no objection at the time; did not say, that he should not go to the attorney; but he never went, and the assignees brought the action without making any farther demand.

The Court took time to consider; and, on the 8th of July, the judgment was delivered by—

(12) 2 Cowp. 629.

(13) 2 H. Bl. 135.

(11) See also upon this point, *Jones v. Fleeming* and another, 7 B. & C. 217; 6 Law Journ. K.B. 113; and *Sparrow v. Chisman*, 9 B & C. 241; 7 Law Journ. K.B. 173.

Lord Tenterden, C. J.—After stating the facts, the question, and the arguments on both sides, his Lordship stated, that the Court were of opinion, that it was necessary for the assignees to demand possession of the bills; and that the answer given by the defendant, when the demand was made upon him, was not, under the circumstances of the case, sufficient evidence of a conversion, so as to entitle the plaintiffs to maintain this action.

Judgment of nonsuit.

1829. }
May 7. } HUNTER v. LEAKE.

Lien—Witness—Subpoena duces tecum.

A right of lien upon an instrument in the possession of a witness, (except in the case of an attorney or solicitor,) is not a good objection to the production of the instrument in evidence under a Subpoena duces tecum.

This was an action upon a policy of insurance, tried before Lord Tenterden, at the London Sittings before Hilary term, when a special verdict was found, raising a question touching the construction of the policy; leave being also given, to move to enter a nonsuit, upon the following point reserved.

One M'Allum, a broker, in whose possession the policy was, upon being called upon to produce the same, under a *subpoena duces tecum*, objected to do so, until the amount of a lien he claimed upon it be discharged. Lord Tenterden, however, expressing an opinion that the witness was bound by the subpoena to produce the policy, notwithstanding his lien, it was accordingly given in evidence; and now—

Mr. F. Pollock moved to enter a nonsuit. The broker was not bound to produce the policy, but had a right to refuse to disclose at his own discretion, until paid the amount of his claim. It was for him to determine, whether it was prudent to submit the instrument to the inspection of the plaintiff, as it might turn out to be utterly worthless.

[*Lord Tenterden.*—Then he would have made a worthless paper the means of obtaining a large sum of money.]

He was entitled to render the security available.

[*Mr. Justice Bayley.*—Suppose a person has a lien upon goods, and the owner asks permission to shew them to a customer, can he refuse to allow this?]

There is no case which holds that he is obliged to do so. A lien is a right to keep goods or papers, and to compel payment of the debt, by reason of the inconvenience to which the owner may thereby be put. It may happen, that the owner may wish to examine a document, or goods, in order to see whether it would be worth his while to redeem, and therefore, it is consistent with justice, that the party who claims the lien should have it in his power to exercise his paramount right by denying this inspection. The contract between the parties upon which a lien arises, is, that the one shall keep the goods until he is paid by the other.

[*Mr. Justice Bayley.*—But the production of an instrument as evidence does not take it out of the possession of the witness.]

It is then put into the possession of the Court. In *Lord v. Wormleighton* (1), the Lord Chancellor Eldon states his impression of the principle to be, that the party may make use of the non-production of papers, in order to obtain what is due to him.

Lord Tenterden.—We are all of opinion that the broker was compellable to produce the policy, notwithstanding his lien. The case that has been cited, is essentially different; that was a motion to compel a solicitor to produce certain papers which he had in his possession, which was peculiarly for the discretion of the Court, a discretion which the Court are to exercise in a way most likely to do justice between the parties. This, however, arises upon a *subpoena duces tecum*, which, the party who requires the document has a right to take out, and to insist it shall be obeyed. If we were of opinion, that it was not competent for this plaintiff, so to compel the production of the policy, we should produce injustice in innumerable cases; because it so frequently happens, that the broker has the policy in his own possession, and may have a lien upon it. Plaintiffs might be nonsuited again and again, without any means of knowing

what the broker would do, and thus we should furnish an opportunity for collusion between the broker and the underwriter, to defeat any actions upon policies of insurance.

Mr. Justice Bayley.—The lien of an attorney is different from *liens* in general, as there is an understanding between him and the client, that if the client should think proper to change his attorney, the papers may be retained, and shall not be used until the former attorney's bill is paid. The attorney, in fact, looks not so much to the value of the papers he has to secure payment, as to the inconveniences that may be produced by his detaining them till the amount of his bill is discharged; but where goods or papers are in the hands of a creditor, there is no understanding that he is to have more than the possession; and the producing of those goods or papers in evidence to the owner, or to a third person, does not take them out of possession. The distinction between the two cases is this, that in the one the value is the security for the debt, and in the other the inconvenience.

Mr. Justice Littledale.—Whether the witness was entitled to the money he claimed, it seems to me it was not for the Court to inquire. He claimed a lien on the document in his hands, and objected to produce it, unless the Court imposed terms upon this other party. I think it was not in the discretion of the Court to impose any terms, but that the witness was bound to produce the policy under the *subpoena duces tecum*. Suppose it were said that the witness should have his lien discharged; it would perhaps be next to impossible to ascertain the amount at the moment, either from himself or by other satisfactory evidence; and, at all events, long and irregular discussions must arise. The plaintiff might also be non-suited, and the Statute of Limitations, or some other reason, be alleged in defeat of a future action, and the broker would have it in his power to prevent the success of the plaintiff whenever he thought proper.

Mr. Justice Parke.—A lien is a mere right of possession, and does not excuse the party who sets it up from the necessity of producing an instrument, when regularly required to do so for the purposes of a trial. The lien of carriers, of manufac-

turers, of warehousemen, or wharfingers, gives them only a right of possession; and the owner of the goods may inspect or shew them, so long as he does nothing to interfere with that possession. The case cited is applicable only to a solicitor being called upon to produce papers; and the true distinction has been taken between that and the present.

Rule refused.

[A rule *nisi* was granted upon another point, as to the admissibility of the broker's evidence, which will hereafter be noticed, should it be argued and decided.]

1829. }
May 8. } MIERS v. GOLDING.

Trover—Conversion.

A refusal by a constable, on demand, to re-deliver goods taken under a magistrate's warrant, is not sufficient evidence to support an action of trover against such constable.

Quære—If trover be an action within 24 Geo. 2. c. 44. s. 6.

This was an action of trover, tried before Mr. Justice Park, at the Spring Assizes for Berkshire, when it appeared, that the goods, in respect of which the action was brought, had been taken by the defendant under a magistrate's warrant, detained by him for some time after a demand and refusal, and restored to the plaintiff after the action was commenced. It was contended, on the part of the defendant, that he was within the protection of the statute 24 G. 2. c. 44. s. 6, which protects constables, &c. acting under a magistrate's warrant, from any action until demand made, or left at their usual place of abode, &c., by the party intending to bring such action. For the plaintiff, in answer to this objection, were cited *Fletcher v. Wilkins* (1), *Milward v. Coffin* (2); but a verdict having been found for the defendant,—

Mr. Taunton moved for a new trial.—Had the action been in trespass, the objection upon the statute might have prevailed, but inasmuch as the conversion is the gist

(1) 5 East, 283.]

(2) 2 Sir W. Black. 1530.

of the action in trover, and that conversion was beyond the exigency of the warrant, the provisions of the statute cannot apply. In *Harper v. Carr* (3), Lord Kenyon threw out a dictum, that a plaintiff ought not to be permitted to evade the provisions of the act, by adopting a particular form of proceeding; but his opinion was overruled in *Fletcher v. Wilkins*, where it was held that the statute did not extend to an action of replevin. In like manner, it has been decided not to apply in an action for money had and received (4). Since, therefore, in case of a conversion of the goods by the actual sale thereof, the defendant would not have been protected in an action for goods sold and delivered, by reason of non-compliance with the provisions of the statute; neither in principle, is he within its meaning in an action of trover.

Lord Tenterden.—It is not necessary for us to decide this point, as an important distinction has not been noticed. A demand and refusal, it is well known, do not amount to a conversion, but are only evidence of it. We think that the circumstances under which the goods were here taken and detained, and refused to be delivered up, do not shew a conversion.

Rule refused.

1829. }
May 11. } WHITE & FITCH.

Executor—Debtor and Creditor—Presumption of Payment.

Where the debtor makes his creditor executor of his will, the law raises no presumption that the creditor has retained enough to pay his debt, until it be shewn by evidence that he has received enough for that purpose.

Action by the obligee of a bond, against the defendant as executor of the obligor. The defendant was also devisee of the obligor. The plaintiff was a joint executor with the defendant of the obligor; and on the trial, it was contended, on the part of the defendant, that it must be presumed that the plaintiff in his character of executor had retained enough to pay himself. There

(3) 7 Term Rep. 207.

(4) Bull. N.P. 24, b.

was no evidence offered to shew that, in point of fact, the plaintiff had received any property in his character of executor.

After verdict for the plaintiff,

Mr. Gurney moved for a new trial, respecting the objection.

Lord Tenterden.—You contend that a man must have retained money; you not shewing that he had it in his power to retain any.

Rule refused.

[For the cases where the situation of the parties is different, i. e. where the creditor makes his debtor executor of his will, see *Freakly v. Fox*, 9 B. & C. 180; 7 Law Journ. K.B. 148.]

1829. }
May 11. } BLANDY AND ANOTHER v.
HERBERT.

Stamp—Ad valorem.

1. Where two parties were interested in a sum invested in the funds, one having a life interest, and the other the reversion, and a deed was executed between them, by which, in consideration of the person entitled for life consenting to a sale of part of the stock for the benefit of the reversioner, the latter covenanted to pay an annuity to the person entitled for life:—Held, that such deed was not a conveyance upon the sale of an annuity, so as to render it liable to the ad valorem duty, according to the 55 Geo. 3. c. 184, schedule, part 1, title "Conveyance."

2. An assignment of a policy of insurance of goods is not an assignment of property within the above act, so as to require an ad valorem duty.

This was an action of covenant. The deed upon which the action was brought was made between the plaintiffs (who were trustees for carrying the arrangement herein-after mentioned into effect,) and the defendant, and other parties, whose names are immaterial for the present purpose.

From the recitals in the deed, it appeared, that a Mrs. Lewin was entitled for her life to the dividends upon 3384l. 14s. three per cent. consols; that the defendant's wife was a daughter of Mrs. Lewin, and was entitled

upon her mother's death to the sum of 2542*l.* 6*s.* 8*d.*, part of the larger sum before mentioned ; that the defendant and his wife were desirous that 1700*l.* consols, part of the sum to which she would be entitled upon the death of her mother, should be sold out, and the produce paid to them, in part satisfaction of the wife's share ; that this was agreed to on condition that the defendant would engage to pay the mother an annuity equal to five per cent. upon the sum which the sale of the 1700*l.* should produce ; and would, within a month from his return from a voyage he was about to make to the East Indies, pay to the plaintiffs, the trustees, a sum of money which should be sufficient for the purchase of an annuity of that amount, in the three per cents. It appeared further, that the 1700*l.* consols had been accordingly sold, and had produced 1288*l.* 14*s.* 9*d.* in money ; that, an annuity at five per cent. on this sum would be 64*l.* 8*s.* The defendant then covenanted with the plaintiffs to pay this annuity, and, within a month of his return from the voyage, to pay them a sum which, when invested in the three per cents, should produce the same annuity. As a collateral security, the defendant assigned to the plaintiff a policy of insurance upon certain goods and other things mentioned in the deed.

The defendant pleaded, *non est factum*.

On the trial of the cause, before Mr. Justice Park, at the last Assizes for the county of Berks, the deed in question appeared to be stamped with a 1*l.* 15*s.* stamp, which the defendant's counsel contended was insufficient. Subject to this point, the plaintiff obtained a verdict.

Mr. Taunton now moved for a rule to shew cause why the verdict should not be set aside. He contended, that this deed was for the sale of an annuity for the consideration of 1288*l.* 14*s.* 9*d.* ; and that it ought accordingly to have had an *ad valorem* stamp, according to the 55 Geo. 3. c. 184, Schedule, part 1, title "Conveyance." It cannot be denied that this was the sale of an annuity. But, supposing the Court should be of opinion that the instrument in question does not come within the meaning of the Stamp Act, as a deed upon the sale of an annuity, still the assignment of the policy of insurance was an assignment of "other

property," within the very words of the act under the same title.

[Lord Tenterden.—What could it be said to be worth ? It could have no value except upon a loss of the goods insured ?]

There was enough disclosed by the deed to give the means of a calculation as to the value.

Lord Tenterden.—I do not think the assignment of this policy of insurance was a conveyance of "property" within the meaning of the Stamp Act. Nor is the transaction stated in the deed, a sale of an "annuity" according to the ordinary sense of that word.

Mr. Justice Parke.—I think it is impossible to consider this transaction either as a sale of an annuity, or as a conveyance of property by the assignment of the policy of insurance, so as to render the deed in question liable to the *ad valorem* duty. The amount of that duty is to be regulated by the consideration money ; and by the 48 G.3. c. 149 (1), it is expressly directed, that the consideration money shall be truly stated in the deed. To satisfy this, Mr. Taunton treats the 1288*l.* 14*s.* 9*d.* (the produce of 1700*l.* consols) as the consideration. But how can that be so ? The parties who were to pay and to receive this annuity, had each an interest in the stock which produced that money ; the mother having the life interest, and the defendant's wife being entitled to it after her death. Even if the transaction came within the fair meaning of the word "annuity" as used in the Stamp Act (but which I think it does not), I do not see any means by which the amount of *ad valorem* duty could be fixed.

Rule refused.

[See *Denn d. Manifold v. Diamond* (2), which was the converse of the above ; and *Warren v. Howe* (3), where it was held that the assignment of a judgment debt was not an assignment of "property" within the meaning of the Stamp Act, so as to require an *ad valorem* stamp.]

(1) See the Stamp Act, and the cases therein, in 2 Chitty's Statutes, title "Stamps," p. 947.

(2) 4 Barn. & Ald. 243.

(3) 2 B. & C. 281 ; 3 D. & R. 494 ; 2 Law Journ. K.B. 8.

1820. }
 April 24. } **POULTON v. LATTIMORE.**

Contract—Warranty—Quantum meruit.

1. *Where goods are sold with a warranty, and it appears that they are inferior to the warranty, semble that it is not incumbent on the buyer to return them to the seller, in order to his setting up the inferiority as a defence in an action upon the contract for sale.*

2. *But, at all events, it is not incumbent on the buyer to return articles sold under a warranty, merely because he may have reason to believe that they are inferior to the warranty. He may rely upon the warranty, and apply the articles to their intended purpose.*

3. *Where goods have been sold under a warranty, and, in an action for the amount, the defence is, that they were inferior to the warranty, although the buyer kept and used them, and the contest on the trial is upon the question as to the alleged inferiority,—whether the plaintiff in such action, if he fail upon the question of warranty, will be entitled to recover in that action, upon the quantum meruit, a reasonable compensation for the value of the goods—quære. Mr. Justice Parke being of opinion that he would; and that the claim to reasonable compensation could be answered only by shewing that the goods were of no value at all.*

This was an action for goods sold and delivered.

Plea—The general issue.

The cause was tried, at the Summer Assizes for the county of Hertford 1828, before Mr. Baron Garrow; when the following appeared to be the principal facts.

The action was for the value of a quantity of sanfoin seed sold to the defendant by the plaintiff, and warranted to be "good growing seed." The defence was, that the seed in the result did not answer this description. Evidence was gone into by both parties upon this point; and one of the witnesses for the defendant stated, that the seed was tasted before it was put into the ground; and that the taste proved that it was not good growing seed. The witness thought that was the best criterion. It appeared, that the defendant had sold part of the seed to other persons, and it did not appear that, when he sold it, he gave any warranty.

VOL. VII. K.B.

The learned Judge left it to the jury to say whether the seed was what the plaintiff warranted it to be? If they found in the negative, they were to return a verdict for the defendant. They did so; and the learned Judge gave leave to the plaintiff to move to enter a verdict in his favour, for the full amount, if the Court should be of opinion that the defence was not an answer to the action.

In Michaelmas term last, *Mr. Brodrick* (*Mr. Ryland* being with him) moved accordingly for a verdict for the plaintiff, or at all events for a new trial. He contended, that, unless the seed were of no value at all, the question as to its not being equal to the warranty, was immaterial for the purpose of this action; as the remedy of the defendant, in that case, would be by action against the plaintiff for breach of the warranty; and that if the defendant intended to rely upon the inferiority of the article as relieving him from the contract, he was bound to return the goods. This, he submitted, entitled him to have entered a verdict for the plaintiff. But, secondly, he contended, that the case should not have been left to the jury in the terms used by the learned Judge; and that if the quality of the seed was matter of defence *at all* in an action for the price, it was only so proportionably—that is, it might go to reduce the damages, in the same proportion as the quality was below the warranty; but that it could not entitle the defendant to a verdict, unless it was proved that the seed was worth nothing; and that this could not be the case, for the defendant sold some, and got the money for it. Therefore, he contended, it should have been left to the jury to say, in what proportion the quality was inferior to the warranty; and to assess the damages accordingly; so that at least the plaintiff should recover the amount of the seed actually sold by the defendant.

The last point went to a new trial only.

The Court granted the rule upon both points; and—

Mr. Serjeant Andrews now shewed cause. The case was properly left to the jury; and the terms in which it was left to them include the question—whether the seed was of any value. It was warranted to be good growing seed. The jury have declared, that it was not what it was warrant-

ed; and the using of seed for the purpose of growth, which is not good growing seed, must be worse than of no value to the person who uses it, inasmuch as he loses the beneficial use of the land for the growing season; and the land itself must be injured by the use of bad seed. With regard to the question of value, and to the point raised by the fact of the defendant having sold some of the seed, the answer is, that the plaintiff on the trial did not put his case upon the *quantum meruit*; but sought to obtain the verdict for the full price upon the entire contract. He is not at liberty therefore to turn round afterwards, and say, that at all events he is entitled to recover upon an implied contract, touching the *quantum meruit*, seeing that he has failed upon the only question which was debated at the trial—the express contract. But, even if he were at liberty to do so, there was no evidence that the defendant derived any benefit whatever from the seed. The injury he sustained by the non-profitableness of his land must have been much greater in amount than the value of the trifling quantity of seed which he sold; at all events, it was for the plaintiff to shew the value.

Mr. Brodrick and Mr. Ryland, contra.—The defendant should have returned the seed if he intended to rescind the contract for the purchase of it. The buyer of goods is bound to do so, if he means to contend that the contract has not been fully performed by the seller. It might probably be contended, that the general rule in this respect does not apply to property of a nature like the present; because, the buyer might not know of the inferior quality of the seed, until he had tried the experiment of sowing it. But, according to the evidence of the defendant's own witness, the alleged inferior quality of the seed was known to the defendant before he sowed, by the taste of it.

In such a case, the buyer must not lay by, taking his chance of the bargain proving advantageous to himself, yet reserving a right to avoid the contract if he find it afterwards his interest to do so. This was laid down by Mr. Justice Lawrence, in *Grimaldi v. White* (1); there an article was purchased, at a certain price, pursuant to a specimen

exhibited, and on delivery it was found to be of inferior performance. But the learned Judge held, that it was not competent for the defendant to go into this line of defence. He observed, "If the defendant meant to avail himself of that objection, he should have returned the article. He must rescind the contract totally. Having received it under a specific contract, he must either abide by it, or rescind it *in toto*, by returning the thing sold; but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at less price than that charged by the contract." So that the defence was held to be inadmissible, even for the purpose of reducing the amount. So, in *Fisher v. Samuda and another* (2), it was the opinion of Lord Ellenborough, that, as soon as goods are discovered not to answer the order given, they should be sent back, or notice given to the vendor to take them back; otherwise an action could not be maintained by the buyer on the ground of the unfitness of the article. It is not necessary, for the present, to go the length of that case, as here it is merely contended that the defendant must be left to his remedy by action. The same in principle was held in *Kist v. Atkinson* (3); and in *Groning v. Murdham* (4), it was held, that, in an action for the price of goods, the inferiority of the quality cannot be set up as a defence, unless an offer to return them be shewn. And the same was adopted in *Hopkins v. Appleby* (5); although in the latter case there was an express warranty. The principle thus laid down was acted upon in *Milner v. Tucker* (6). Thus much would go to entitle the plaintiff to a verdict for the full amount. But, at all events, the plaintiff is entitled to a new trial; for if the seed was of any value at all, the defendant is liable to pay so much as it was worth. Part of it produced a crop, and other part was sold by the defendant, who actually received the money.

[*Mr. Justice Bayley.*—But it is difficult, as between the plaintiff and the defendant, to say that it was of any value.]

(2) 1 Campb. 190.

(3) 2 Id. 63.

(4) 1 Stark. 257, 299.

(5) 1 Id. 477.

(6) 1 Carr. & Payne, 15.

(1) 4 Esp. 95.

[*Mr. Justice Parke*.—Did you draw the attention of the learned Judge to this on the trial; or did you not press for the verdict upon the entire contract? I believe the latter. Besides, the *quantum meruit* is an implied contract; and how could a contract be implied in such a case as this?]

[*Mr. Justice Bayley*.—What evidence was there to shew that the plaintiff deserved to have anything? I am sure it did no good to the defendant's land, to have it sown with bad seed.]

But here the defendant, knowing the fact of the inferiority by means of the taste, took his chance, and sowed, and afterwards sold a part, without giving any warranty.

Mr. Justice Bayley.—Upon the first point, I am of opinion, that it was competent for the defendant to set up this defence as an answer to the action upon the contract. The seed was warranted to be "good growing seed." The jury have found that it was not seed of the description thus warranted. But it is said that the defendant ought to have returned the seed, in consequence of its being supposed to be ascertained by taste that the seed was inferior; and that if he went on afterwards, with that supposed knowledge, to sow the seed, that he cannot rescind the contract. I do not agree to this; the taste could not be the best criterion. The defendant, from the taste, might have a suspicion as to the quality of the seed; but if he goes on, and tries the experiment of sowing, relying upon the warranty, it certainly does not lie in the mouth of the plaintiff to quarrel with his having done so. Upon the second point, I think, that at all events it should be shewn that the seed was worth something; and upon the evidence, I think there is nothing to satisfy a jury that it was worth a farthing. The fact of some person having bought a part of it, is no proof at all of its being worth anything.

Mr. Justice Littledale.—I am of the same opinion. It is not to be taken as a universal rule, that the property need be returned, where there has been an express warranty. This was held in *Fielder v. Starkin* (7). Upon the second point, there was contradictory evidence; but, on the whole, it is

manifest to me that the seed was worth nothing.

Mr. Justice Parke.—I agree with the rest of the Court, that there ought to be no new trial. I think it was competent for the defendant to set up this defence in answer to the action upon the contract, although he did not return the goods. The rule as to returning goods in such cases is not inflexible, but must depend in some measure upon the nature of the property; that was the case in *Sinclair v. Bowles* (8). But, upon the question as to the right of the plaintiff to shape his case upon the *quantum meruit*, I think he would be entitled to do so; but I do not think he has a right to shape his case upon the express contract, and, finding himself unsuccessful in that, to turn round and rely upon the implied contract of a *quantum meruit*. Even if he could do so, and the question had been left to the jury in this case, the probability is, that they would have found the seed to be worth nothing.

Rule discharged.

1829. }
May 14. } WANSSELL V. SOUTHWOOD.

Arbitration—Witness.

1. *A witness attending an arbitrator upon a reference, is protected from arrest, in the same manner as a witness who is attending a court in obedience to a subpoena.*
2. *But no one is compellable to attend before an arbitrator as a witness.*

Mr. Chitty moved for a rule to compel a person to attend as a witness before the arbitrator, to whom this cause had been referred by order of *Nisi Prius*.

Mr. Chitty admitted, that he had not found any case in which such a rule had been granted; but, upon principle, he submitted, that the Court would exercise its power to give effect to the reference. As a witness was protected from arrest while attending an arbitrator, *Randall v. Gurney* (1), in the same manner as when he was attending a court in obedience to a subpoena, his duty to attend the one should be similar to

(8) 9 B. & C. 98; 7 Law Journ. K.B. 178.

(1) 3 Barn. & Ald. 252; 1 Chitty's Rep. 679.—See the cases in *Watson on Arbitration*, 78.

his duty and privilege in attending the other.

Mr. Justice Bayley.—It is impossible to suppose, that, since the statute of 9 & 10 William 3, many instances have not occurred in which the Court would have been called upon to exercise its power in this manner, if they had the power by law. That alone would be sufficient to induce us to pause, before we granted the rule; but I believe we have no power to make it.

Rule refused.

1829. } MOYSEY AND ANOTHER, EXEC-
May 14. } CUTORS, v. WHITTAKER.

Stamp—Promissory Note.

A promissory note for 100l. and interest, made payable to M. S. or order, on demand, held to be properly stamped with a stamp for 3s. 6d. under the Stamp Act 55 Geo. 3. c. 184, schedule, part 1, title "Promissory Note," c. 2.

This was an action on a promissory note, made by the defendant to one Margaret Scott, as whose executors the plaintiffs sued.

The cause was tried, at the Yorkshire Spring Assises for 1829, before Mr. Justice Bayley.

The note was dated 21st of February 1822, and the defendant thereby promised on demand to pay to Margaret Scott, or order, 100l. with lawful interest. The stamp on this note was 3s. 6d. It was objected, on the authority of the case of *Keates v. Wheildon* (1), that the stamp was insufficient (2); subject to this point, the plaintiff obtained a verdict.

Mr. Tomlinson now moved to set aside that verdict. The case of *Keates v. Wheildon* is in point. There the note was payable to the bearer on demand; yet, the Court held, that it came within the first class of promissory notes in the Stamp Act 55 G. 3.

c. 184, sched. part 1; and the note being between and under 20l., was held liable to a 2s. stamp; whereas, if it came within the second class, the stamp which it had of 1s. 6d. would have been sufficient. That decision, therefore, seems to turn entirely upon the fact of the note being payable on demand. This note has been stamped, as if it belonged to the second class of notes; payable "in any other manner than to the bearer on demand; but not exceeding two months after date, or sixty days after sight." But that expression means, at a time certain within two months; and therefore the expression, "on demand," does not bring it within the second class. This was the interpretation given to the expression, "on demand," in the case of *Keates v. Wheildon*. This too is obvious from the scale of duties given by the third class of notes; for by that class, which is of notes exceeding two months after date, a note of 100l. is liable to a duty of 4s. 6d.; and it is not to be supposed that a note like this which might be in circulation for years, should have a less duty than a note at three months.

Mr. Justice Bayley.—It seems to me, that this case is not exactly that of *Keates v. Wheildon*; I think this note properly comes within the second class, as payable at a time not exceeding two months. It is payable on demand, and you cannot therefore predicate of it, that it is payable at a time exceeding two months after date. This note is payable to order on demand, which was not the case in *Keates v. Wheildon*; and the note in that case might have been re-issued.

Mr. Justice Littledale.—I am of the same opinion; the case is not exactly that of *Keates v. Wheildon*.

Mr. Justice Parke.—I concur in opinion with my learned Brothers; but I think that the case of *Keates v. Wheildon* may hereafter require consideration.

Rule refused.

(1) 8 B. & C. 7; 6 Law Journ. K.B. 226; 2 M. & R. 8, by the name of East v. —.

(2) As there is some variance in the different reports of the above case, as to the terms in which the note was couched, we have made inquiry, and we find that the copy given in the Law Journal was correct.

[Note.—The Court of Common Pleas, in the case of *Armitage v. Berry*, (7 Law Journ. C.P.) came to a decision similar to that in the case above reported; and conflicting with that of *Keates v. Wheildon*.]

1829. } JARDINE AND OTHERS, ASSIGNEES
May 17. } &c. v. LEWIS.

Welsh Judicature—Costs.

1. *The Court in banco have no power to assist a defendant under the 5th Geo. 4. c. 106. s. 21, unless the Judge who tried the cause has certified.*

2. *Nor will they decide the question whether certain special facts, which are stated in the certificate, bring the case within the act or not. The Judge who tried the cause is himself to decide upon those facts, and is either to grant or refuse the certificate in the terms given by the act.*

The cause was tried in an English county, the cause of action having arisen in Wales. The plaintiff having recovered less than 50*l.*, the Judge gave the following certificate on the back of the *Nisi Prius* record:

"I do hereby certify, that it appeared upon the evidence given on the trial of this cause, that the cause of action arose in the principality of Wales, and it was proved by persons who lived a few miles from the defendant's place of residence, that he had been resident for the last ten years in the dominion of Wales; that applications for payment were made by the bankrupt before the bankruptcy, and by the assignees after the bankruptcy, by letters directed to the defendant in Wales, and it did not appear that he had any other place of residence, or was ever out of Wales, but no evidence was given of the issuing or service of the writ, or other mesne process in this action, or of the place in which the defendant actually was at the time of the service of such writ or other mesne process.

"S. Gaselee."

Upon this certificate, the defendant obtained a rule, calling on the plaintiff to shew cause why a nonsuit should not be entered; this rule was obtained, upon the authority of the 5th Geo. 4. c. 106. s. 21, which section is in the following terms:—

"In all actions upon the case, for words, action of debt, and all transitory actions which shall be brought in any of His Majesty's courts of record out of the principality of Wales, and the debt or damages found by the jury shall not amount to the

sum of 50*l.*, and it shall appear, upon the evidence given on the trial of the said cause, that the cause of action arose in the principality of Wales, and that the defendant was resident in the dominion of Wales at the time of the service of any writ, or other mesne process served on him in such action; and it shall be so testified, under the hand of the Judge who tried such cause, upon the back of the record of *Nisi Prius*, (on such facts being suggested on the record or judgment roll,) a judgment of nonsuit shall be entered thereon against the plaintiff, and the plaintiff shall pay to the defendant in such action his costs of suit."

Mr. Campbell now shewed cause against the rule.—This certificate is not sufficient; it does not include all the facts necessary to give the defendant the benefit of the statute in question. The facts here stated, are perfectly consistent with the fact of the defendant having been served with process out of Wales, and having kept out of Wales to avoid the being served with the process there. Two cases, where the facts were similar to the present, occurred upon the Oxford circuit, before *Mr. Serjeant Bosanquet*; and he, upon those facts, refused to give such a certificate as would entitle the defendant to a nonsuit. It is, in such a case, incumbent on the defendant to shew by evidence, to the satisfaction of the Judge, that he was resident in Wales at the time of the service of the mesne process; and in the case of *Jones v. Kendrick* (1), (which seems to be expressly in point,) Lord Tenterden, for want of such evidence, refused to give the certificate. That case also decided, that the Court above will not interfere with the course to be taken by the Judge at *Nisi Prius*; and if, therefore, the Judge in the present instance thought the facts amounted to such a case as to entitle the defendant to a nonsuit, he would have given the certificate in the very terms of the act of parliament. The language of the certificate would rather shew that his opinion was against the defendant; for he says "no evidence was given of the issuing or service of the writ, or of the place in which the defendant was at the time of the service."

(1) 8 B. & C. 337; 6 Law Journ. K.B. 329.

Mr. Joshua Evans, on the same side, was stopped.

Mr. Serjeant Russell, *contra*.—The learned Judge stated the facts specially, in order that the opinion of the Court might be taken; and if the Court think that the facts warrant his doing so, he is willing to give a certificate in the terms of the act of parliament. But the present certificate itself is sufficient to entitle the defendant to a nonsuit. It expressly states, as a fact, that he was resident in Wales; that it did not appear that he had any other residence, or that he was ever out of Wales. This surely is sufficient; and is all that a defendant can be expected to shew. If, at the time of the trial, it does not appear that the defendant was ever out of Wales, is it not irresistible, as a consequence, that, at the earlier period, that is, the time of his being served with the writ, he was in Wales? It is not within the power of the defendant to prove more than this; he cannot be expected to know the person who has served him with the process.

Lord Tenterden.—It would be dangerous to consider that certificates under this act, which do not use the words of the act itself, may be equivalent in point of meaning to those words. We cannot lay down as a rule, that we will decide upon the special facts. The learned Judge who tries each cause, must draw his own conclusion from them; and certify or not, according to the terms of the act of parliament. Here, the learned Judge has not so certified; and the defendant thereupon does not apply to this court with the certificate which is necessary to entitle him to the present rule. With regard to the suggestion of my Brother Russell, that the learned Judge wished for our opinion upon the special facts, it appears to us that there must be some misapprehension on that point. If the learned Judge wished for our opinion with a view to his own guidance, he, in all probability, would have asked for it in another way. We cannot, at all events, act upon any such suggestion; we must deal with the certificate as it is presented to us, and in our opinion it is insufficient.

Rule discharged.

1829. }
May 22. } ROTHSCHILD v. HENNINGS.

Stock—Consideration.

1. *In a contract for the purchase of stock, time is of the essence of the contract.*
2. *Where a contract is made, by which a party binds himself to deliver stock, upon condition of the payment of certain sums, at certain times, and the terms of the contract do not render it obligatory upon the other party to accept the stock, but leave him an option to take or reject it; if he do not afterwards perform the condition, he cannot, in an action, recover back any deposit he has made at the time of entering into the contract.*

Writ of error from the Common Pleas. The case, and arguments, with the judgment of that Court, will be found at length in 5 Law Journ. C.P. 182.

The case was now argued by *Mr. F. Pollock*, for *Mr. Rothschild*; and by *Mr. Comyns*, for the plaintiff below.

The arguments urged on behalf of *Rothschild*, the defendant below, were chiefly those which were urged in the Court of Common Pleas. They resolved themselves into two points: first, that the plaintiff had had a full consideration for his money in the option which he had of taking up the certificates or not, as he thought best for his interest. Secondly, that, at all events, an action could not be maintained in the form of money had and received; because, if the original contract were binding, it could not be allowed for the plaintiff to repudiate his own contract, and make his doing so the foundation of an action. But a case was referred to, which was not cited in the Common Pleas: it was the case of *Doloret v. Rothschild* (1). It was a case arising out of a dispute between *Rothschild* and another holder of scrip receipts, in respect of the same loan. The facts between the parties were nearly the same as they were in the present case; and the holder of the scrip receipts there filed a bill against *Rothschild*, seeking to charge the defendant with the value of the stock, which he had refused to deliver to the plaintiff. The prayer of the bill, among other things, was also, that,

(1) 1 Sim. & Stu. 590; 2 Law Journ. Chanc. 125.

in case the Court should consider the plaintiff entitled to no other relief, the defendant should, at all events, be decreed to account for the original deposit, with interest. The defendant demurred to the bill.—The judgment delivered by the Vice Chancellor will be found *verbatim* in 2 Law Journ. Chanc. 127. The following is the passage from that judgment, which was relied upon in this case, in support of the argument, that the plaintiff had had a sufficient consideration for his deposit :—"There is another kind of relief, to which, it has been contended, the plaintiff may possibly be entitled, though it is not specifically prayed for: 'Is he not entitled,' say they, 'to call back that 10*l.* per cent., which the defendant originally received when he issued these scrip receipts, and which he now holds without any consideration? for he certainly holds the money without consideration if he is not bound to give certificates.' Now, let us suppose, that the plaintiff was the person to whom this scrip receipt was originally delivered, and that he had brought an action against Rothschild; what is the answer that would be given to such an action in a court of law? It would be this: 'you claim in consequence of Rothschild not having given you a consideration; but Rothschild has, in fact, given you a valuable consideration for this 10*l.* per cent.; he has given you an option of taking a transfer of a certain quantity of stock at a stipulated price, provided you pay 90*l.* per cent., on the first of February 1823; that option formed a valuable consideration, although you did not avail yourself of it. It might possibly have been a loss to you; but, on the other hand, you might have possibly doubled your capital.' If such would be the answer given in a court of law, to the action for money had and received, it must also be an answer to a bill in equity; for the only ground, on which the plaintiff could be entitled here, in respect of this species of relief, to come into a court of equity, would be the equitable nature of his title."

The arguments urged on behalf of the plaintiff were the same as those urged in the court below. But, with reference to the new matter which was suggested by the other side, it was contended, that the dealing between the parties did *not* give the plaintiff the option which the defendant's

counsel assumed that he had: and that the defendant, by his own conduct, shewed, that that was not his interpretation of the dealing; inasmuch as he had caused his attorney to write to the plaintiff, threatening proceedings against him, if he did not pay up the balance.

The Court took time to consider; and this day, the judgment was delivered in the follow terms, by—

Lord Tenterden, C. J.—This was a writ of error from the Common Pleas to reverse the judgment of that Court. Hennings, the plaintiff below, brought an action for money had and received, to which Rothschild pleaded the general issue. A special verdict was found, by which it appeared, a person of the name of Lowe paid to Rothschild, the plaintiff in error, a large sum of money, as a deposit for the purchase of a quantity of Neapolitan scrip, for which Rothschild signed receipts, which are set forth at length in the special verdict. The present action was brought to recover back the money so paid. These receipts were dated the 14th of October 1822, and it is expressed in them, that, upon payment of the balance on or before the 1st of February 1823, with 4*l.* per cent. interest thereon, from the 15th October 1822, the bearer will be entitled to certificates for the amount of stock therein mentioned, with interest coupons from the 1st of July 1822. Lowe did not sign any paper on the 2d of November 1822; he deposited the receipts with Hennings as security for money advanced by Hennings upon the credit of the receipts; and, on the 3d of December 1822, Hennings, upon the settlement of accounts with Lowe, took the receipts of Lowe in part payment of the advance, and thus became the absolute owner and bearer of them. On the 14th and 15th of January 1823, Rothschild published an advertisement in the *Times* newspaper, of which Hennings had notice. It ran in these terms :—"Mr. N. M. Rothschild begs to notify to the holders of the deposit receipts of this loan, that the parties may either pay them in full, on the 1st of February next, according to agreement, or that this period may be extended at their option, on condition of a further payment of 10*l.* per cent. on the stock being made on the 1st of February next, with the in-

terest due on the receipts up to that day; 10*l.* per cent. on ditto, on the 1st of March next; 20*l.* per cent. on ditto, on the 15th of April next; 10*l.* per cent. on ditto, on the 15th of May next; and the remainder on the 15th of July next, with interest at the rate of 4*l.* per cent. from the 1st of February, payable as the amounts become due. At the time the foregoing payments are made, the parties will be allowed to receive bonds equivalent to the amount paid, or as nearly so as the case will admit. Those persons who intend availing themselves of the extension here granted, are desired to leave their receipts at Mr. Rothschild's counting-house any day between the 20th and 25th inst., in order that the same may be duly marked, and other receipts prepared for delivery on the 1st of February." On the 21st of January, Hennings sent six receipts to Rothschild, with a letter, expressing his wish to avail himself of the offer to pay, on the 1st of February, 10*l.* per cent. only; and he requests, that certificates may be prepared to that effect. The six receipts inclosed in that letter were accordingly left at Rothschild's counting-house to be marked; and they were marked on the following day, by Rothschild's authority, in pursuance of the advertisement of the 11th of January, "4500 ducats, per C. F. Hennings;" and the receipts so marked were re-delivered by Rothschild to Hennings. On the 24th of January 1823, Rothschild published another advertisement in the following terms:—"At the request of several of the holders of the Neapolitan scrip receipts, a further extension for the payment of the balances will be granted by N. M. Rothschild, as follows, viz.:—

5 <i>l.</i> per cent. to be paid on the	} With interest at the rate of 4 <i>l.</i> per cent. from the 1st February, payable as these amounts become due.
1st March next	
10 <i>l.</i> ditto 15th April	
10 <i>l.</i> ditto 15th May	
10 <i>l.</i> ditto 15th June	
10 <i>l.</i> ditto 15th July	
And the balance 15th August	

"The parties who intend availing themselves of this arrangement will leave their receipts at Mr. Rothschild's counting-house, as pointed out in the advertisement of the 11th inst., in order that new scrip receipts of corresponding amounts may be prepared for delivery on the 1st of February next." On the 5th of February 1823, another

advertisement was published, as follows:—

"Many of the holders of the Neapolitan deposit receipts having failed to comply with the tenour of their engagements, by which the parties were required to pay the balances thereof, on the 1st of February 1823, with the interest accruing up to that day, and, not having availed themselves of the terms proposed for their accommodation in the advertisements of the 11th and 23d of January last, public notice is given by N. M. Rothschild, that such receipts are void; that the deposit money is forfeited; and that all obligation has ceased on his part to deliver certificates at a future period. Being desirous, however, that no individual should suffer unknowingly on this occasion, Mr. Rothschild hereby notifies, that he will grant to the holders of his receipts an indulgence of one week from this date, either to pay the balances due by them on the 1st inst., or to make the further deposits called for by the advertisements of the 11th and 23d of January last."

On the 11th February, another advertisement was published,—“Referring to the several advertisements of the 11th and 23d of January last, and 5th of February inst., which have appeared in the public papers, giving an extension of time for payment of the balances due upon scrip receipts for the Neapolitan loan, N. M. Rothschild informs the holders of the scrip receipts, that the loan contracted for has been paid, and the stock certificates are ready for delivery; and he begs that those who have not accepted the terms of extension of payment, will take notice, that, unless the terms are accepted, or the balance and interest thereon paid, on or before the 20th of February inst., he will consider, that such holders of scrip receipts do not intend to complete their contracts, and will not hereafter claim the certificates. N. M. Rothschild will, therefore, after the 20th inst., dispose of, or keep the certificates, and put the proceeds or value of them to the credit of the holders on account of the balances and interest due, and hold them answerable to him for any loss or deficiency.” On the 11th of March, William Henry Green, Rothschild's attorney, wrote to Hennings, expressing Rothschild's surprise, that further payments on the scrip had not been made, and threatening to commence proceedings forthwith, if the

payments were not immediately made. On the 14th of May, Hennings called upon Rothschild, and told him he came to receive or pay up the Neapolitan certificates, and then tendered to Rothschild 11,375*l.*, which was equal to the amount of the instalments stipulated by the receipts to be paid, and 5*l.* per cent. interest thereon. Rothschild refused to accept this sum, and said, "I do not know you; I have nothing to do with you; you are too late; you must go to my lawyer:" upon which Hennings said, "Why, Mr. Rothschild, your lawyer wrote me a letter." On the 3d of June 1823, Hennings wrote a letter to Mr. Rothschild, offering to pay the balance, with interest up to that time remaining due upon the scrip receipts, upon the stock certificates, with interest coupons, being delivered to him; and, if he continued to refuse to deliver the stock certificates, requiring an immediate return of the deposit money, with interest; and stating, that if he declined to do either, he would commence an action to recover them. The Neapolitan scrip began to fall on the 21st of February 1823, and continued to fall until the latter end of April, and fell to 67; but, at the beginning of May following, the entry of the French army into Madrid occasioned a rise in the price of about 8*l.* per cent. from its lowest price.

These are the facts. In the argument before us, the learned counsel for Mr. Rothschild, the plaintiff in error, contended, that an action in this form could not be maintained by a purchaser of receipts; but he chose to risk his client's case rather upon the general merits than upon the form of the action; and he contended, that Hennings, not having complied either with the terms of the original agreement, or with those which were afterwards offered, had himself broken the contract, and was not entitled to recover damages for the non-performance of it, or to treat it as rescinded, and claim a return of the money, Mr. Rothschild's engagement to deliver certificates upon receipt of the further sum being, in itself, a sufficient consideration for the payments of the deposits; and he cited the case of *Doloret v. Rothschild*, decided by Sir John Leach, the Vice Chancellor, in the year 1824. That case was not quoted in the argument in this case in the Court of Common Pleas. It was a bill filed by an-

Vol. VII. K.B.

other holder of similar receipts, who had, in like manner, neglected to make any payment after the first, until the month of June 1823; and he, by his bill, prayed, that Mr. Rothschild might be decreed either to deliver the certificates, or return the deposits. His Honour observes, that time is material in a case like the present; because, from the nature of the subject, the value is exposed to vary a great deal; and, although the time originally mentioned in the scrip receipts had been waived by Mr. Rothschild, the waiver was only on condition, that the payments should be made at the extended time, which had not been done; and, he added, that the claim of the plaintiff to a return of the original deposit of 10*l.* per cent., as being retained by the defendant without consideration, could not be maintained; because the plaintiff had full consideration for that deposit, in the option which the scrip receipts gave him, to become a proprietor of so much stock, by payment of the balance of the stipulated price on a certain day. This, he said, was not the less a consideration, because the plaintiff did not think fit to avail himself of the option. My Brother Parke having been concerned as counsel in the cause, has taken no part in our deliberations. My other learned Brothers and I agree entirely in the opinion of his Honour; and we cannot express that opinion in better terms than those which are contained in that report. The judgment of the Court of Common Pleas, therefore, must be reversed.

Judgment reversed.

1829. } THE EARL OF DALHOUSIE
May 14. } V. CHAPMAN.

Assumpsit—Army Accounts—Off-Reckonings.

The Colonel of a regiment, by power of attorney, authorized his agent to receive the allowances, issued by the Paymaster-General of the Forces, for the supply of clothing and accoutrements to the regiment. The agent assigned the certificates, which authorized the issue, to his banker as a security for his account, and the banker received the money. The agent directed the supply, by the tradesmen, of the clothing and accoutrements; and he, from time to time, transmitted accounts

2 H

to the Colonel, representing those supplies as having been paid for; but, in fact, they had not been. The agent became bankrupt; the tradesmen sued the Colonel for the amount of the supplies; and the Colonel brought an action against the banker to recover the money for those supplies:—Held, that, at all events, the action could not be maintained against the banker until the Colonel had paid the tradesmen.—Whether it could be then maintained—Quære.

This was an action for money had and received by the defendant to the plaintiff's use.

Plea—The general issue.

The cause was tried, before Lord Tenterden, at the Middlesex Sittings before Easter term, when the following appeared to be the principal facts:—

The Earl of Dalhousie was Colonel of the 26th regiment of foot; and he had appointed a gentleman of the name of Gordon as his agent, and had given him a power of attorney to receive all his pay and allowances. By the regulations of the army, the money for the clothing of the regiment is paid to the Colonel or his order; and the practice is, that it is not paid to him, but he makes an assignment of it to some other person. The clothing is supplied by the clothiers; it is inspected by a board of officers; and, upon their inspection, and a certificate of its conformity to the regulations required, a warrant for the payment of the money is signed by the Secretary of War.

This action was brought against Mr. Chapman, who was a partner in a banking-house in Westminster, to recover the sum of 5000*l.*, which he had received under these circumstances:—Mr. Gordon, under his power of attorney, had made an assignment of the off-reckonings, a military allowance, to Mr. Chapman; and the terms of that assignment were as follows:—"Know all men, that I, John Gordon, by virtue of the letters of attorney of Lord Dalhousie, for and in consideration of the clothing and appointments provided and delivered, or to be provided and delivered, by or under the orders of William Chapman, for the use of the said regiment, have assigned, transferred, and made over, and do assign, &c. to the said William Chapman, his executors, administrators, and assigns, all the off-reckon-

ings, or clothing allowance of the aforesaid regiment, commencing the 25th of December 1823, and ending the 24th of December 1824, both days inclusive, amounting to the sum of 1793*l.* 15*s.* 10*d.*" [The remainder of the assignment was merely formal.] The clothing is sent in half-yearly, and the warrants made out accordingly. The clothing was supplied by persons named Carder & Cane; and they were appointed by Lord Dalhousie, and the business transacted between Mr. Gordon, and Carder & Cane. The certificate, by the general officers of the Clothing Board, is in this form:—"We, the undersigned general officers, appointed by his Majesty's warrant to inspect and regulate the clothing of the army, do hereby certify, that the clothing of the 26th regiment of foot, commanded by the Earl of Dalhousie, for the year —, has been viewed, and found conformable to his Majesty's regulations. We do, therefore, desire you to comply with the payment of this assignment, amounting to —*l.*, the same being for the off-reckoning or clothing allowance of the said regiment for the period." [The remainder is merely formal.] Upon this certificate being taken to the War Office, the Secretary at War signs this warrant:—"You are hereby authorized and directed, out of such monies as are or shall come into your hand applicable to army services, to issue to Mr. William Chapman, or to his assigns, the sum of 868*l.*, without deduction and without account, the same being due to him under an assignment for six months' allowance for clothing, terminating on the 24th of June 1824, for the 26th regiment of foot." Under that warrant, the defendant signed this receipt:—"Received of the Paymaster-General, the above sum. William Chapman."

The clothing was regularly supplied, inspected, and approved; and the warrants made every half-year; the money paid, and Mr. Chapman's receipt given. The clothier has not been paid, and the clothier had made a claim on Lord Dalhousie for the money. Mr. Gordon had become a bankrupt; Lord Dalhousie now resorted to Mr. Chapman; and the answer given was, that the banking-house, of which Mr. Chapman was a member, had taken the assignment in the name of Mr. Chapman, as a security for their house from Mr. Gordon.

It was proved, that the accounts had been transmitted to Lord Dalhousie by Gordon, the agent. The course had been, that the business was transacted between the Colonel and his agent. The assignment is made to any person whom the Colonel, or his agent intrusted with his power of attorney, may think proper,—who may be a clothier, or may be a stranger, or may be the agent's clerk.

It was contended, on the part of the defendant, that he, the defendant, had nothing to do with the application of the money; and that, by the course of business, he was not required to see that the clothier was paid.

On the part of the plaintiff, it was contended, that, by the terms of the written instrument, an obligation devolved upon him to see to the application of the money, or that, at least, he placed himself in the same situation as the agent, liable to all the equities of the agent; and that if the plaintiff could recover this money from the agent, he could recover it from the defendant; and that, from the agent he could unquestionably recover it; that if Mr. Gordon, being himself the person receiving the off-reckonings, had deposited the money at his banker's, and then became bankrupt, Lord Dalhousie must have been in the same situation with every other creditor, and proved against the estate: but that, if the banker would, for his own security, place himself in a different situation, he must take the consequences; that the present defendant had, for his own security, accepted an assignment of the off-reckonings in these terms: "in consideration of clothing and appointments provided and delivered by or under the order of William Chapman." There was no proof that the defendant ever saw this assignment; but, as he signed the receipt under the certificate, "You are authorized and directed to issue to Mr. William Chapman, so much money, the same being due to him *under an assignment for six months' allowance for clothing*," he must, it was contended, be bound by the terms of that assignment.

On the part of the defendant, it was contended, that the plaintiff had reposed a confidence in Mr. Gordon; that he had taken for granted, that Mr. Gordon would pay it; and it appeared, that there had been one in-

stance of a clothier interposing, when he was not paid, and the Secretary at War considered him as having a lien upon the off-reckonings; and he ordered it to be stopped till the clothier was satisfied. It appeared that an account had been rendered to Lord Dalhousie, representing the clothiers to have been paid; but the plaintiff contended, that the fact of Mr. Gordon having rendered false accounts to Lord Dalhousie, would not exonerate Mr. Chapman.

Under these circumstances, it was submitted, on the part of the plaintiff, that the case of *Knowles and others, assignees, &c. v. Mailand* (1), was a case that bore, in some degree, upon this point. The substance of that case, as given in the marginal note, is, "By power of attorney, the Colonel of a regiment appointed A. B. his agent, for him, and in his name, to ask and receive from the Paymaster-General of the Forces, all such payment and allowances as might become due and payable unto him. A. B. having received a sum of money from the Paymaster-General under this authority, afterwards became bankrupt, the Colonel being then indebted to him for clothing furnished to the regiment." Then, the question was, in what character did the Colonel stand with respect to the estate, and whether he was entitled to set off against a claim for clothing, the money which the agent had received; and it was held, "that A. B. must be taken to have received the money from the Paymaster-General, in his character of agent to the Colonel; and that the latter was entitled to set off, in an action brought by the assignees for a sum due for clothing, the money received from the Paymaster-General, by the agent, before his bankruptcy." By analogy to that case, it was contended, that Mr. Chapman had chosen to receive the money upon those terms; and that if he had so received the money, he must take the consequences; that the money was issued for the express purpose of paying for the clothing; and, therefore, that the plaintiff was entitled to pursue the money in Mr. Chapman's hands, and say, "You are possessed of my money; you have not received this money from Mr. Gordon, as Mr. Gordon's money; but you received

(1) 4 B. & C. 173; 6 D. & R. 313.

it from the War Office, as the money issued to Lord Dalhousie for the clothing of his regiment; you have received it with that notice; you have received it under an assignment made to you for that very clothing, and it is not paid for." The plaintiff has a right to treat him as Gordon for this purpose; for he, who is the assignee of Gordon, can be in no better condition than Gordon himself.

Lord Tenterden, however, being of opinion, that the plaintiff could not recover, directed a nonsuit.

Mr. Gurney now moved for a rule to shew cause why the nonsuit should not be set aside, and a new trial granted.—He submitted, that the principle laid down in *Knowles v. Maitland* was applicable to the present.

[Mr. Justice Bayley.—In that case, the assignees of Gilpin claimed from the Colonel of the regiment, who had appointed Gilpin his agent, 1650*l.* for army clothing; the defendant said, "You have got in your hands, applicable to the payment of army clothing, 1650*l.*; therefore I do not owe you a farthing;" that was all.]

So here, the plaintiff is entitled to say to Chapman, "You have received so much money expressly for the payment for army clothing; you have signed a receipt that you received it under a warrant to you for clothing provided by you. If you have not provided the clothing, you ought to have seen to its payment; and it not having been paid for, you must take the consequence. It has not been paid for; the purpose for which you received it has not been answered; you received it from the Paymaster of the Forces upon the terms of the assignment, on the ground of your having supplied the clothing. Then, if you have so far trusted the matter to Mr. Gordon as not to see that he paid it, Lord Dalhousie has a right to call on you to pay it."

[Mr. Justice Bayley.—Has Lord Dalhousie been forced to pay?]

He has not paid it yet; but an action is now pending.

Lord Tenterden, C. J.—I am quite satisfied, that the case of *Knowles v. Maitland* has no bearing of importance on the present question. There, Knowles was the assignee of Gilpin, Gilpin was the agent of

the regiment; Gilpin had provided the clothing; and, I suppose, paid for it; and his assignee brought the action against the Colonel of the regiment to recover the price of the clothing,—an action for goods sold and delivered. In answer to that, the defendant said, "You have received from the government the very money that is due." Then, if Gilpin was to be considered, not merely the agent of the Colonel, but the agent of the public, and treated as responsible to the public for the money intrusted into his hands, that does not appear to me, in any degree, to govern the present case. I will read my note of the evidence; and if my learned Brothers think, that there should be a new trial, I shall feel no objection.—[His Lordship read the note of the evidence.]

Mr. Justice Bayley.—The reason why Carder & Cane were not paid was, that there was a private account between them and Gordon. It may turn out that Carder & Cane have no claim at all; but none, at all events, upon Chapman. Chapman was in the habit of receiving under this assignment; they looked to Gordon. At present, it does not appear to me, that the plaintiff is entitled to sustain any action. If Carder & Cane shall hereafter sue him, and be enabled to recover against him, that, by possibility, may raise the question; at present, the time for raising the question is not properly arrived.

Mr. Justice Littledale.—I am decidedly of the same opinion. It does not appear to me, that the defendant kept any account with the plaintiff. It was never meant he should account with the plaintiff. It appears to me, as the case stands at present, there is no cause whatever of action against the defendant.

Mr. Justice Parke.—I was concerned in this case at the bar: and, therefore, take no part in the decision of it.

Rule refused.

1829. }
May 19. } ROBINSON v. READ.

Debtor and Creditor — Principal and Agent.

Where a creditor takes a bill from the agent of the debtor for the amount of the debt, and

renews it from time to time at the request of the agent, his so doing will not discharge the debtor, unless the latter shew that he dealt with his agent upon the faith of the money being paid; or that, in some other mode, he has been prejudiced by the fact of the creditor so dealing with the agent.

Accordingly, goods were sold upon a certain credit; before the time for credit expired, the creditor applied to the agent of the debtor to give him a bill, deducting the discount in respect of the credit unexpired. The agent accordingly gave his acceptance, deducting the discount. At this time, the agent had money in hand sufficient to pay more than the debt. When the bill became due, it was renewed, and again renewed; and the renewals carried the time beyond the expiration of the credit. There had been no adjustment of accounts between the agent and his principal, the debtor. The agent failed, largely in debt to his principal:—Held, that, inasmuch as it did not appear, that the debtor had sustained any prejudice, or been misled by this course of dealing with his agent, the creditor had a right to recover against him for the unsatisfied debt.

This was an action of assumpsit for board and lodging, clothing, medicine, and necessaries provided by the plaintiff for the defendant, and for goods sold and delivered.

The defendant pleaded the general issue: and the cause was tried, at the adjourned Sittings before Michaelmas term, before the Lord Chief Justice, when the jury found a verdict for the plaintiff,—damages 216*l.* 17*s.* 10*d.*; subject to the opinion of the Court on the following

CASE.

The defendant, in the month of October 1825, was owner of the East India ship, called the *Providence*, which arrived from the East Indies in that month with several Lascars, who had served on board in the voyage; and whom the first officer of the ship, by the order of Edmund Read, the brother of the defendant, (and who was employed by him as broker and ship's husband for the said ship, and in that character received the freight and earnings of the said ship,) delivered to the plaintiff to be fed and clothed, and taken

care of till a ship should be provided to take them back to India; and, on that account, a debt was incurred, amounting to 146*l.* 16*s.* The said Edmund Read, as such broker and ship's husband, also purchased for the use of the said ship, slops, bedding, and seamen's clothing, to the amount of 77*l.* 13*s.* 5*d.* After these supplies, the plaintiff delivered to the said Edmund Read his two bills for the said amounts, respectively, headed as follows:—

Depôt, Dec. 26th, 1825.

72, High-street, Poplar.

The captain and owners of the East India ship *Providence*

To Francis Robinson.

[Here followed the items of the bills, the whole amounting to 224*l.* 9*s.* 5*d.*]

About the same time, the plaintiff had an account against the captain and owners of the East India ship *Darius*, and who were indebted to him in 44*l.* 7*s.* 10*d.* The said Edmund Read was also broker and agent for the said ship.

A credit of two or three months is usual on such accounts; and the dealings upon which the plaintiff's demand arose was upon such credit. Before the expiration of such credit, as to any part of the demand, the plaintiff came to Edmund Read, and said, "it would be an accommodation to him, the plaintiff, if Edmund Read would give him an acceptance for the amount of all the bills, in preference to waiting till they were due. Edmund Read agreed to give his acceptance accordingly, on discount being allowed; and the plaintiff deducted, by way of discount, from the 224*l.* 9*s.* 5*d.*, the sum of 8*l.* 3*s.* 7*d.*, reducing the demand to 216*l.* 5*s.* 10*d.*

Discount was likewise allowed by the plaintiff, upon the demand, in respect of the *Darius*, reducing the aggregate of the demand, in respect of both ships, from 268*l.* 10*s.* to 257*l.* 10*s.* 1*d.* For this amount, Edmund Read, at the request of the plaintiff, accepted a bill of exchange, drawn on him by the plaintiff, of which the following is a copy:—

£257.16*s.* 1*d.* London, Dec. 28th, 1825.

Three months after date (31st March) pay to my order, two hundred and fifty-

seven pounds sixteen shillings and a penny,
for value received.

To Mr. Edmund Read,
Riches-court, Lime-
street.

At Messrs. Fry and
Clayman's,
Edmund Read.

F. Robinson.

When Edmund Read gave the plaintiff the said acceptance, he had money in his hands belonging to the defendant to a much larger amount than sufficient to pay the plaintiff's demand. Edmund Read then debited the defendant's account with the said sum of 21*l.* 5*s.* 10*d.* : but it did not appear that the defendant had seen the books.

On the 31st of March 1826, when this bill of exchange became due, Edmund Read requested the plaintiff to renew it, which the plaintiff agreed to do, interest being added. E. Read consented to add interest, and, accordingly, he accepted a similar bill at three months, with the interest added.

When the second bill became due, it was in like manner renewed, on an agreement to add interest ; and Edmund Read accepted a similar bill (with interest added) at two months.

At the time of the acceptance of the second, and also of the third bill, the balance in the hands of Edmund Read, in favour of the defendant, had increased. He did not debit the defendant with any interest ; he failed soon after the third bill fell due, and was made a bankrupt, and then owed the defendant 500*l.*

Before the third bill became due, the plaintiff indorsed it for value to one Francis, and, the bill being dishonoured when due, Francis brought an action, and arrested Edmund Read upon it ; Edmund Read put in, and justified bail.

E. Read, in October 1825, became a bankrupt, and afterwards obtained his certificate ; whereupon the plaintiff took up the said bill, and paid the said Francis the principal money, interest, and costs incurred before the commencement of the action.

After the bankruptcy of the said Edmund Read, the defendant was applied to by the plaintiff's attorney for the payment of the said plaintiff's accounts, when the defendant said he knew nothing about them ; for that he left all matters relating to the

ship to his brother, the said Edmund Read, who was then making up his accounts ; he desired the matter might stand over till the accounts were made up, and, if found to be right, they would be paid.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover. If the Court thought that he was, the verdict was to stand ; otherwise, a nonsuit was to be entered.

The point raised by the defendant was, that the credit appeared to have been originally given to the defendant's brother, Edmund Read ; and, at all events, that the defendant was discharged by the credit afterwards given by the plaintiff to Edmund Read, and adopting him as his debtor, when Edmund Read had in his hands ample funds belonging to defendant wherewith to have discharged the plaintiff's claim, and which proceeds thereby became lost to the defendant.

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tiff sought, for his own accommodation, to make the arrangement which was entered into with the agent. The case of *Everett v. Collins* can be supported only on the supposition, that the cheque there mentioned was taken as cash. In *Clarke v. Noel*, no accommodation was sought by the creditor. The case of *David v. Ellice* has no bearing whatever upon the case. It was there a question, whether, under particular circumstances, a partner, who had retired, continued liable for an old partnership balance due from the firm. The cases which appear to be in point are, *Evans v. Drummoud* (9), (where Lord Kenyon held, that the taking of the separate bill of one partner, in lieu of a bill of the firm, discharged the firm); and *Read v. White* (10), the substance of which is contained thus in the marginal note:—"If a person who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband (a part owner) only, and settles with him alone, he discharges the other owners, particularly if the bill be renewed." That case proceeded on the opinion of Lord Ellenborough, who tried the cause. The case of *Smith v. Ferrand* (11) decided, that, where a creditor has a right to immediate payment, and takes a bill accepted by a person other than the debtor, he waives his right of demand against the debtor. That case is an authority to shew, that the dealing in the bills with Edmund, after the time of credit had expired, was a waiver of all claim upon the defendant, and an adoption of Edmund as his debtor.

Mr. Chitty, in reply.—In the last cited case, the money was offered to the plaintiff, who chose the bill in preference.

Lord Tenterden, C. J.—If the defendant had shewn, that he had sustained any injury by the dealing which took place between his agent and the plaintiff, in respect of these bills, he would have given the case a very different appearance from that which it has at present. But it is a fact in the case, that it does not appear he ever looked into the account which charged him with the supposed payment, by his agent, of the plaintiff's debt; still less, of course, does it

appear, that he altered his situation with the agent by reason of that account. He, therefore, must be taken to have sustained no injury whatever by this mode of dealing. The question, then, is, whether it can be said, that, in any way, the agent alone is the debtor. The only case bearing upon the point is that of *Strong v. Hart*; but there, the creditor chose to take a bill upon a stranger, he having the option to take cash. It was the same there as if the debtor had had the money put into his hand, and had given it back for the bill. Here, the creditor has not had his debt paid; the debtor has sustained no prejudice, and the creditor has gained no advantage by dealing with the agent; for it cannot be said to be an advantage to obtain a bill, which, after two renewals, is never paid.

Mr. Justice Bayley.—The dealing between principal and agent is such, that the principal should call for the vouchers of the sums charged by his agent as having been paid. Here, it does not appear that the defendant examined the vouchers, or called for the accounts; and it seems to me, therefore, impossible to consider him as having been in any way injured by the plaintiff taking the bill from Edmund Read, and, from time to time, renewing it. This was not taking a bill instead of money; for it does not appear, that, at any one time, the plaintiff could have obtained his money from the agent. This circumstance distinguishes the case from all those which have been cited on behalf of the defendant.

Mr. Justice Littledale.—I am of the same opinion, inasmuch as nothing that has been done between the plaintiff and Edmund Read seems to have caused any prejudice to the defendant, or to have been calculated to mislead him. Indeed, I think, from the account of the discount taken when the first bill was given, that the credit really agreed for was longer than has been supposed. But my opinion upon the case proceeds upon the ground, that the defendant has sustained no prejudice by the course of dealing between the plaintiff and the defendant's agent.

Mr. Justice Parke.—I am of the same opinion. I think, that, in order to such a defence as this being available, there should be facts which might be put upon the record in the form of a plea. Now, trying it by

(9) 4 Esp. N.P.C. 91.

(10) 5 Esp. N.P.C. 122.

(11) 7 B. & C. 19; 5 Law Journ. K.B. 335.

this test, has there been payment of the debt? It cannot be said that the facts amount to payment, for the reason given in *Wyatt v. the Marquis of Hertford*, that the defendant's situation was in nowise altered by what was done by the agent. Was there an option of having money, instead of the bill?—for that might be equal to payment. There was not. Was there accord and satisfaction, so that Edmund should be the debtor to the plaintiff, instead of the defendant, and that the defendant should thereupon be debtor to Edmund? There is no fact to shew that the defendant knew anything about it; still less, that he assented to it. The case stands, therefore, merely as an unsatisfied debt.

Postea to the plaintiff.

[The following cases occurred at the close of the last year; but we were not able to give them in the order of time for the want of briefs; and we know our readers will agree with us, that it is advisable to give the larger quantity of important matter whenever it be ready, rather than keep it back for the minor object of preserving the exact order of time.]

1828. { EVANS V. WHITEHEAD AND
GOLDBY. *

Practice—Joinder of Defendants.

The rule of court which requires a plaintiff to insert in his writ the names of all the defendants in the action, does not prevent his issuing a writ against two, and declaring against one only, in case the other does not appear, and the plaintiff does not appear for him.

A rule had been obtained by Mr. Chitty, calling upon the plaintiff to shew cause why the writ, and all subsequent proceedings, or why the notice of declaration, and all subsequent proceedings, should not be set aside for irregularity, with costs. It was stated by the affidavits that the writ was against both the defendants, and was a non-bailable process. Common bail had been put in for the defendant, Whitehead, and the declara-

tion was against him only, but the notice of declaration, which had been served on him was entitled as against *both* defendants, namely, "Take notice that a declaration has been filed against you." Goldby had not filed common bail, nor had the plaintiff filed it for him according to the statute.

Mr. Carrington shewed cause.—There is no ground for setting aside the writ, or the declaration. The writ is in the common form; and, by the practice of this court, a party may sue out a non-bailable writ against two, and declare against one only. The notice of declaration is certainly inaccurate, but not calculated to deceive or mislead; because, if Whitehead, the defendant, has notice that a declaration is filed against him, it is to him immaterial, if, at the same time, he is informed that a declaration is also filed against some other person.

Mr. Chitty supported the rule. He cited and relied upon the rule of court of Easter Term 1827, as clearly shewing the declaration to be irregular.

Lord Tenterden.—If the plaintiff had filed two separate declarations against these two defendants, that would clearly have been irregular, under the rule of court referred to; but, I am decidedly of opinion, that a plaintiff may sue out his writ against two defendants, and declare against one only, dropping his proceedings against the other entirely. The notice of this declaration, however, is certainly bad, and the service of it must be set aside; but, under the circumstances of this case, without costs on either side.

Rule accordingly.

[See *Beeston v. Beckett and Others*, 7 Law Journ. K.B. 193.]

1828. { COCKS V. PEACHY. *

Costs—Special finding by Jury.

Where the jury return a verdict for the plaintiff upon a particular part of his count, the Master is justified in not allowing the

* S. C. 2 M. & R. 367.

VOL. VII. K.B.

* S. C. 2 M. & R. 420.

costs relating to the remainder of the count; although the verdict be taken and the judgment be entered generally; without noticing the special finding of the jury.

This was a special action on the case. The declaration contained three counts:—the first, charging the defendant with erecting and continuing a foundery, and workshops adjoining the plaintiff's dwelling-house, and causing great noise, and smoke to enter the dwelling-house; the second, for keeping and continuing a certain foundery and workshops, and causing, &c.; and the third, generally, for causing noise, and smoke to enter the plaintiff's premises.

The defendant pleaded the general issue.

At the trial, before Lord Tenterden, at the Sittings at Guildhall after Michaelmas term 1828, the plaintiff gave evidence of the annoyance which arose from the defendant's original foundery and workshops, and evidence of the injury which resulted from some new works recently added by the defendant. A verdict was found for the plaintiff,—it being said by the jury, that they found for the plaintiff, as to the new works erected by the defendant. When the costs were taxed, there was an objection made by the defendant's attorney to the allowance of the expenses of witnesses, who had been called to prove the damage done to the plaintiff's premises, by the original foundery and workshop. He contended that the jury had not given any compensation for such damage. These expenses were disallowed by the Master.

Mr. Comyn moved for a rule calling upon the plaintiff to shew cause why the Master should not review his taxation. The verdict, he contended, had been entered generally; and the plaintiff is entitled to the whole of the costs incurred in proving the facts stated in his declaration. The only cases in which part of the plaintiff's costs have been disallowed, have been where a verdict has been found for the defendant upon some particular counts.

Mr. Justice Holroyd.—The Master does not give costs against you, which might perhaps be reasonable; but you have no right to the costs of that which has not been found in your favour.

Mr. Justice Littledale.—It is the same thing, as if there had been a verdict for the defendant upon this part of the case.

Rule refused.

[Lord Tenterden and Mr. Justice Bayley were not in court.]

1828. } LOFTUS v. HUDSON.*

Evidence—Compromise.

A landlord was sued for repairs done upon his estate; the plaintiff failed in endeavouring to prove that the defendant had given orders for the repairs. He then offered evidence of an agreement made after the action was brought, between the plaintiff, the defendant, and the landlord's tenant, by which the tenant was to pay to the plaintiff 100l. out of the rent which he would have to pay the defendant; and that the defendant should pay two thirds of the plaintiff's costs. The tenant paid the plaintiff the 100l.; but the defendant did not pay the two thirds of the costs. The plaintiff then carried down the record for trial, and now contended that he was entitled upon this evidence to a verdict, with nominal damages.

Held, by Mr. Justice Littledale and Mr. Justice Holroyd, that even if the evidence were admissible in an action upon the agreement, it was not evidence in the present action to charge the defendant with a nominal verdict.

Held, by Mr. Justice Bayley, that it was evidence to go to the jury in this action, upon the question whether the defendant had admitted a general liability.

This was an action of assumpsit for goods sold and delivered, and work and labour, with the money counts.

Plea—The general issue.

At the trial, before Mr. Baron Garrow, at the last Spring Assizes for the county of Cambridge, it appeared, that notice of trial had been given for the Summer Assizes 1827. Shortly before the commission-day, in July 1827, the plaintiff was applied to

by the defendant to settle the action. The defendant, one Jones, the defendant's tenant, and the plaintiff, went together to the office of an attorney named Archer, and it was there agreed, that upwards of 100*l.* was due to the plaintiff, upon the balance of an account for buildings erected, and for work done by the plaintiff on the defendant's estate, occupied by Jones; that the latter should pay that sum to the plaintiff out of his rents, and that the defendant should pay two thirds of the plaintiff's costs, as soon as they could be ascertained. The 100*l.* was paid by Jones, but no part of the costs had been paid by the defendant, though the account had been furnished to him; and it was for the purpose of recovering such costs that the record was now brought down for trial. The full amount of his costs had been paid by the plaintiff to his attorney. A witness had been called by the plaintiff, to prove that the work had been ordered by the defendant, but the proof was not established. It was, upon this, contended for the defendant, that the plaintiff had mistaken his course, and that he should have brought an action upon the agreement for the recovery of the two thirds of his costs, instead of proceeding to try this cause. It was, however, the opinion of the learned Judge, that, inasmuch as it appeared by the agreement at Archer's, that a contract had been made, and had not been performed, the plaintiff was entitled to a verdict, with nominal damages; but leave was given the defendant to move to enter a nonsuit. A rule was obtained last term for a nonsuit or a new trial.

Mr. Serjeant Storks and Mr. F. Kelly shewed cause.—The debt has been acknowledged by the defendant, and also paid by him. His tenant, through whose hands it was paid, having liberty to reimburse himself, by retaining so much out of the rent, he was therefore merely the agent of the landlord. There is nothing to distinguish this from the ordinary course of proceeding for the costs, where the debt has been paid after action brought, except that here the plaintiff relinquishes his right to one third of the costs, and that is for the advantage of the defendant; application should have been made to the Court by the defendant

to stay proceedings on the payment of the two thirds costs.

Mr. B. Andrews, contra.—An admission made upon a treaty for a compromise, cannot be used for the purpose of establishing a debt: *Gregory v. Howard* (1). To the defendant it might be more desirable to pay two thirds of the costs then incurred, than successfully to defend the action. It was said by the learned Judge, that without the agreement no liability on the part of the defendant had been shewn, nor was there any other evidence of the liability of the defendant. By the Statute of Frauds, this agreement was void; and if it were not, the remedy of the plaintiff would be by action on the agreement.

Mr. Justice Bayley.—The evidence is defective in establishing the original liability of the defendant. But the plaintiff rests upon the agreement made at Archer's. The terms were, that Jones should pay the balance due to the plaintiff out of his rent; he was to be the hand to pay; the whole was to be paid out of the rent. Here was nothing to shew who the landlord was, except what can be collected from the conversation at Archer's. If there had been no dispute who the landlord was, the defendant would be the person out of whose pocket the payment would be ultimately made. But the defendant and Jones, being the only parties who treat with the plaintiff, I think the terms of the arrangement shew that the defendant was the individual by whom the payment was to be ultimately made. The defendant bargains that he shall pay two thirds of the costs only, and the plaintiff agrees to give up the other third. I look upon this as an undertaking by the defendant to pay the whole debt. An agreement to purchase peace only, without the recognition of a liability, ought not to have any influence, or produce any result. I have a difficulty in saying what the effect is where the party agrees to pay the whole debt, and merely abates part of the costs; whether that is such an agreement as comes within the rule. In the case cited there was no acknowledgment of the whole

debt being due. I think it ought to have been left to the jury to say, whether what passed at Archer's was an offer to purchase peace, or an admission of a general liability. This would only entitle the defendant to a new trial; but I believe my learned Brothers are of a different opinion.

Mr. Justice Holroyd.—It seems to me, that we are bound to enter a nonsuit. The learned Judge states, that the plaintiff called his brother-in-law to prove the defendant's liability, but that attempt entirely failed. It is contended, by the plaintiff, that he is entitled to recover damages, on the evidence of the agreement at Archer's, but that was an agreement entered into with a view to a compromise; and, supposing it to be admissible in evidence, it does not shew a right to proceed upon the original cause of action, though it might be evidence to support a new action founded on the agreement; but I think it doubtful, whether the evidence was receivable at all.

Mr. Justice Littledale.—Supposing the evidence to be admissible, it would have had considerable weight if it had stood alone: but, inasmuch as the plaintiff attempted to shew the defendant's original liability, and failed in the attempt, it seems to me, that there was an end of the case. If so, the evidence of what took place at Archer's did not set it up. All the parties who met there, knew that the plaintiff had done the work, and ought to be paid. The work being done on the premises, would naturally benefit the estate. Independently of this being a negotiation for a compromise, there was, therefore, a reason why the parties should enter into an agreement, grounded on the property and interest of the defendant, in the estate which had been benefited.

Rule absolute to enter a nonsuit.

[See the notes to this case in 2 *Man. & Ryland*, 481.]

[The following case is given, although it did not occur in banco; because the opinion expressed was that of all the Judges of the Court.]

1828. }
Dec. 19. } WEBB v. HILL AND ANOTHER.

Malicious Arrest—Evidence of the want of probable cause—Variance—Amendment.

1. In an action on the case for a malicious arrest, evidence that the plaintiff in the action in which the arrest was made suffered a judgment of non pros. is not, of itself, *prima facie* evidence of the want of probable cause.

Aliter, if the plaintiff in that action discontinues by rule of court.

2. An allegation by the plaintiff in his declaration in such an action, that the plaintiff in the action complained of "did not promote his suit, but therein wholly failed, and made default, and thereupon it was considered that he should take nothing by his bill, &c. as by the record, &c. appears," is not proved by the production of a rule to discontinue, taken out by the plaintiff, together with proof that the plaintiff paid the costs.

Semhle—That even had there been no reference to the record, the termination of the suit as alleged would not have been proved by the evidence adduced.

3. The reference to the record mentioned in the last paragraph, held to be essential in the statement as there made; and therefore, that it could not be rejected as surplusage.

4. Such a variance in setting out the termination of the suit, held to be not such a variance as to admit of amendment at *Nisi Prius* under the 9 Geo. 4. c. 15.

This was a case of action for a malicious arrest. It was stated in the declaration that the defendants, "maliciously and without probable cause, sued out a bill of Middlesex, marked for bail for the sum of 15*l.*, upon which the plaintiff was arrested and imprisoned," and the termination of the former suit was averred in the following manner:—"And the said plaintiff in fact saith, that the said defendants did not prosecute their said suit against the said plaintiff, but therein wholly failed and made default; and thereupon, afterwards, to wit, in Michaelmas term, in the first year, &c. it was considered by the said court of our said Lord

the King, before the King himself, that the said defendants should take nothing by the said bill, but that their pledges to prosecute should be in mercy; and that the said plaintiff should go thereof without day, as by the record and proceedings thereof, still remaining in the said court of our said Lord the King himself, at Westminster aforesaid, more fully and at large appears: and the said suit was and is thereby ended and determined, to wit, at &c."

The defendant pleaded the general issue.

A rule of court was put in to prove the allegation as to the determination of the suit, in which the present plaintiff was arrested. It was ordered by this rule (which was dated "On the morrow of St. Martin, in Michaelmas Term, 1 Geo. 4.") that the action should be discontinued on payment of costs. No judgment had ever been entered on the roll, though the costs had been taxed and paid.

Lord Tenterden observed, that this rule did not shew that there was a judgment of the court as stated upon the record.

Mr. Denman and Mr. Carrington, for the plaintiff, cited the case of *Bristol v. Haywood* (1), as shewing that the rule in such a case, with proof of the taxing and of the payment of the costs, was sufficient: or, they submitted, that at all events, the words "as by the record," &c. might be rejected as surplusage. But in case his Lordship should be of a different opinion, they then prayed leave to amend the *Nisi Prius* record, according to the 9th Geo. 4. c. 15.

Lord Tenterden remarked, that, in the case of *Bristol v. Haywood*, the form of the declaration did not appear by the report. Had the declaration been so framed as to meet the case, his Lordship would have held that this rule was *prima facie* evidence of the suit being at an end. But as the other Judges were sitting in the Bail Court, he would consult them on the subject. Accordingly his Lordship left the court, and, after consulting Mr. Justice Bayley, Mr. Justice Littledale, and Mr. Justice Parke, expressed himself, in the following terms:—"I have consulted with my learned Brothers, and we are all of opinion, that I am obliged to nonsuit, the proof varying so entirely

from the allegation. In all actions for malicious prosecution, whether founded on a civil or criminal proceeding, you must not only shew the prior proceeding ended, but you must shew *how* it has been ended. On the part of the plaintiff it was contended, that I might reject the allegation, there being a judgment, and take the residue of the count without it. That would only shew that the parties did not prosecute the suit, but would not shew in what way it was determined. A declaration drawn in that form would be demurrable; but as in this case there can be no demurrer, I must not permit the plaintiff to go on, rejecting such parts of his declaration as would make the rest insufficient on a demurrer. It is also said that the declaration states that the defendants did not prosecute their suit, but made default. I think that would not do, because the term *default* has a legal meaning. If the defendant makes a default, he has judgment against him; and if the plaintiff makes a default, the judgment is, that he shall take nothing by his bill. Also, in the present case there is a difference, not only in form but in substance; for, if the judgment be a mere judgment of *non pros.*, as is alleged here, the mere judgment is not enough to raise even a presumption of the want of probable cause, as a plaintiff may have that judgment against him, from a mistake, or from the negligence of his attorney, in not proceeding with sufficient dispatch. In the case of *Sinclair v. Eldred* (2), it was held, that a judgment of *non pros.* was no proof of a want of probable cause; but in the case of *Nicholson v. Coghill* (3), the Judges all take this distinction, that a judgment of *non pros.* does not shew a want of probable cause, but that a discontinuance is to be considered as *prima facie* evidence of the want of probable cause; the latter is the plaintiff's own act, and the former but an omission. In this case, therefore, there is not only a variance in form, but in substance: the proof should vary according to the mode in which the original action had been determined. I have also consulted with my learned Brothers respecting the point as to amending the record: and they are of opinion that this is not a case in which I can give leave

(2) 4 Taunt. 7.

(3) 4 B. & C. 22; 6 D. & R. 12.

(1) 4 Campb. 214.

to amend under the act of parliament, as this is not the misstating of a written instrument, but a statement of a judgment of the Court, of which there is no proof. I regret it, but I am obliged to call the plaintiff.

The plaintiff was accordingly nonsuited; and the nonsuit was of course acquiesced in.

1829. } POPE, ASSIGNER, &c. v. BIGGS,
April 25. } GENT. ONE &c.

Mortgagor and Mortgagee—Subsequent tenancy.

1. *A mortgagee is entitled either to affirm or disaffirm a tenancy created subsequent to the mortgage, between the mortgagor and his tenant.*

2. *If he affirm it, he is entitled to all rent which may become due after he gives notice of his affirming the tenancy.*

3. *Whether, in case of his affirming it, the tenant be justified in paying him not only the rent which may become due subsequent to the notice, but also rent which had become due before the notice, but had not been paid—quære. Semble, that he would; but at all events he would, if the mortgagee added a threat to proceed in case of non-payment. The tenant, being liable to ejectment, and to payment of the amount of such rent as mesne profits, is not bound to incur the expense of an ejectment.*

Debt for the use and occupation of a dwelling-house and buildings, with the usual money counts.

Plea—The general issue, with notice of set-off upon the money counts.

The cause was tried at the Summer Assizes for the county of Berks, 1828, before Mr. Justice Gaselee; when the following appeared to be the principal facts:—

The plaintiff sued as the assignee of Garbett, a bankrupt. The defendant was an attorney; some time previously to the bankruptcy of Garbett, the defendant acted as his agent in respect of several houses belonging to Garbett. Those houses had been mortgaged by Garbett to Messrs. Gardner and Smith, and to a Miss Terry; but Garbett was left in possession, he paying the

interest. The houses were let to different tenants, except one, of which the defendant himself was tenant to Garbett. All these lettings were subsequent to the mortgages. Subsequent to the bankruptcy, the mortgagees served the defendant with notice, requiring him to pay them the amount of their interest, in part of the rent due in respect of the house he occupied, as tenant to Garbett; and so as to all future rent which might become due. He accordingly did so; and the rents which he subsequently received for the other houses, he appropriated in the paying of the ground rents, and in keeping down the interest of the mortgages, for payment of which he was applied to. The details need not be stated, as they might embarrass the case; but in the result, they raised the following questions:—

First—Whether the defendant, as tenant of the house which he himself occupied, was justified in paying rent to the mortgagee? If he was, whether he was justified in paying the rent which had become due before the notice had been given by the mortgagee.

Secondly—Whether the defendant, as to the other houses, might not be considered by Garbett's assignee, as his agent; and consequently, whether the rents of those houses were not recoverable, as money had and received by the defendant to the use of the plaintiff as assignee, subsequent to the bankruptcy.

The learned Judge was of opinion against the plaintiff on both points, and directed a nonsuit; reserving leave to the plaintiff to move to enter a verdict in his favour. A rule having been obtained accordingly in Michaelmas term last—

Mr. Talfourd now shewed cause.—As to the first question, the mortgagee had a right to step in and receive the rent; although the tenancy was created subsequent to the mortgage. The case of *Moss v. Gallimore* (1) establishes this point, unless the fact of the tenancy being subsequent to the mortgage, creates any difference. But there is no substantial distinction; the mortgagor is a mere disseizor, if the mortgagee chose so to treat him: *Doe d. Roby v. Maisey* (2).

(1) 1 Doug. 279.

(2) 8 B. & C. 792; s.c. as *Doe d. Griffith v. Mayo*, 7 Law Journ. K.B. 84.

That case establishes that the mortgagor may be treated as a trespasser at any time; and ejectment maintained against him without any demand of possession. And, according to the expression of Mr. Justice Ashlurst, in *Moss v. Gallimore*, "the mortgagor is only a receiver of the rent for the mortgagee, who may at any time countermand the implied authority, by giving notice to the tenant not to pay him any longer." So, on the other hand, the mortgagee may affirm or disaffirm the contract of tenancy made subsequent to the mortgage by the mortgagor. In *Galliers v. Moss* (3), which was argued upon a point different from the present, the rule *nisi* was moved for, by Mr. Serjeant Russell, upon this very ground among others; and he sought to maintain the distinction between a tenancy prior, and a tenancy subsequent to the mortgage. The Court, however, held that the mortgagee might, if he pleased, affirm the subsequent tenancy; and upon that ground the rule obtained by the learned Serjeant was confined to the other points. The mortgagee was therefore entitled to call upon the defendants to pay their rent to him. This applies as well to the rent due before the notice was given, as to that which became due afterwards; because as the mortgagee might maintain ejectment without demanding possession, he could recover the by-gone rent in the form of damages in an action for mesne profits. Upon the second point, for the same reason the defendant is not liable to the plaintiff as assignee for the other rents, because he was liable to pay them to the mortgagees, who were entitled to receive them. They might affirm the receipt by the defendant, and treat the money as money had and received to their use. The defendant cannot be considered as the agent of the plaintiff in the receiving those rents; because the agency, as between the bankrupt and the defendant, was countermanded by the bankruptcy; and there is no evidence that the defendant was ever appointed agent by the plaintiff. For these reasons the case is clearly distinguishable from that of *Alchorne v. Gomme* (4). Here the question is between the mortgagor and the mortgagee; and in that case it did not ap-

pear that the mortgagee had given notice to the tenant.

Mr. Curwood, contra.—The situation of a mortgagor in possession has never been well defined; but at all events, a title which he grants cannot be contravened without notice from the mortgagee. The defendant is an agent of the mortgagor in the receipt of the rents; and was himself a tenant of one of the houses. In this respect the case differs from that of *Moss v. Gallimore*. It may be admitted that the mortgagee has it in his option to treat the person in possession, either as a tenant or as a trespasser; but if he chose to treat him as tenant, he can claim the rent only from the time he gives notice. Consequently, even if the defendant was justified in paying the rent which accrued due after the notice, he is liable for that which accrued due before; and for that sum, at least, the plaintiff is entitled to a verdict.

Mr. Justice Bayley.—I have no doubt that a person who becomes tenant after a mortgage made by his landlord, may hold until there be an intervention by the mortgagee. But the mortgagee is at liberty to give notice to the tenant, and make him tenant to him, the mortgagee. This will be perfectly consistent with the old rule, that a lessee receiving possession from a lessor, cannot afterwards be allowed to prove that the lessor had no title at the time; but he may shew that that title has since been determined. Upon this point there are many cases. Another rule is, that the mortgagor cannot dispute the mortgagee's title. It is equally clear that the mortgagee may at any time put an end to the possession of the mortgagor. The case of *Keech v. Hall* (5), and subsequent cases are clear upon this point. The mortgagor is merely allowed to be in possession as a substitute for the mortgagee; and therefore, although a tenant could not say to the mortgagor, from whom he had received possession, "You had no right to put me in;" yet he may say, "When you put me in, you had a defeasible title, and that title has since been defeated." Now, upon the application of those rules to the present case, it is clear that the mortgagees might have maintained

(3) 7 Law Journ. K.B. 109.

(4) 2 Bing. 54; 9 Law Journ. C.P. 112.

(5) 1 Doug. 21.

ejection against the defendant and the other tenants; and thence, I think, it follows, that it is not necessary for the mortgagee to go through the form of an ejectment. An arrangement may be made with the tenant, and the right of the mortgagor will then *pro tanto* be destroyed. And, I think, that the notice served upon the defendant bound not only the accruing, but also the accrued rent. Upon the other point, I do not think the defendant can be considered as receiving the rent as agent for the plaintiff, the assignee. He was never appointed receiver by the assignee; and the authority he received from the bankrupt was destroyed by the bankruptcy. The defendant, therefore, held the subsequent rent for the persons who were entitled to it; and those persons were the mortgagees. I think, therefore, that the plaintiff was rightly nonsuited.

Mr. Justice Littledale.—I am of the same opinion. I think the case of *Moss v. Gallimore* is inapplicable to the present. A mortgage in possession is not strictly a tenant; though his possession somewhat resembles that of a tenant by sufferance. It is not material to define the situation of a mortgagee in possession. It is a peculiar relation, so that the mortgagor can do no effectual act without the concurrence of the mortgagee. This was held in *Keech v. Douglas*, to which my Brother Bayley has referred. The same principle applies I think, to by-gone rents due, but not paid over before the mortgagee gives notice to the tenant. If the tenant acquiesce, he from that time becomes the tenant of the mortgagee: for until the tenancy be agreed upon, the person holding possession is strictly a trespasser, as far as regards the mortgagee; and the rents might be recovered from him as mesne profits. The mortgagee may therefore receive the rents without going through the form of an ejectment, if the tenant will consent to pay them: of course, rents which had been actually paid over to the mortgagor before notice, could not be recovered back; but, as regards the rents not paid over prior to the notice, the tenant might, as against the mortgagor, plead eviction by title paramount. The notice in this case therefore reaches the by-gone rents, and the plaintiff was properly nonsuited.

Mr. Justice Parke.—Upon the main question, whether a mortgagor can recover from his tenant rent due prior to the time of notice given by the mortgagee, I am of opinion that he cannot; and that eviction by title paramount is an answer to such a claim. The interference of the mortgagee by notice is, in such a case, equivalent to eviction. The case, in this respect, without breaking in upon the rule that a tenant shall not dispute his landlord's title, resembles the cases of *Taylor v. Zamira* (6), and *Sapsford v. Fletcher* (7), where the tenant was allowed to shew payment to persons who had title paramount to his own landlord, consistently with his receiving possession from that landlord. The payment in the case of *Taylor v. Zamira*, was made in consequence of a threat made by the person who had the paramount title. The mere outstanding legal title would not be sufficient; but the notice given by the mortgagee, combined with the fact of the outstanding title, make a complete defence. It would, I think, be very dangerous to hold that it is necessary for a mortgagee to go through the expensive ceremony of an ejectment. The situation of mortgagor and mortgagee is a very peculiar one; it is one in which Lord Mansfield observed, the mortgagor was merely an agent or a receiver for the mortgagee. There was an express countermand of the agency by the notice to the tenant. At first sight, the case of *Alchorne v. Gomme* seems to be contrary to this; but that was not a case in which the mortgagor was seeking to enforce payment of the rent; and the Court of Common Pleas there thought that the tenant had no right, unnecessarily, as he did, to attorn and become tenant to the mortgagee. There was no threat held out by the mortgagee; there was merely a notice to the tenant of his claim. In the present case, and in that of *Taylor v. Zamira*, there was a threat to proceed. This circumstance, therefore, sufficiently distinguishes the present case from *Alchorne v. Gomme*, so as to prevent its being any authority in favour of the plaintiff. Upon the other point, I do not think there are any special circumstances in the case, from which it

(6) 6 Taunt. 524.

(7) 4 Term Rep. 513.

appears that the defendant received the other rents as agent of the plaintiff. On the contrary, I think he must be considered to have received them as agent for the mortgagees, if they choose, (as indeed they have) to his having so received them. The notice given by the mortgagees, protected the tenants of those houses; and the defendant as to his own house, was, as I have already stated, in the same situation as the tenants in the cases of *Taylor v. Zamira*, and *Sapsford v. Fletcher*.

Mr. Justice Bayley.—I find that I made a note to the case of *Alchorne v. Gomme*, that there was no threat held out to the tenant.

Rule discharged.

1829. }
April 30. }
July 2. } *HARDY v. EYLE, ESQ.*

Justice of Peace—Jurisdiction—Conviction—Computation of Time—Silk-weaver.

In computing the six months limited by 24 Geo. 2. c. 44. s. 8, for bringing an action against a Magistrate for false imprisonment, the day of discharge from imprisonment is to be reckoned exclusively.

Therefore, where a party, discharged on the 14th of December, sued out a writ on the 14th of June following,—it was held, that the action was commenced in time.

Quære—Whether a silk-weaver is within the statute 4 Geo. 4. c. 34.

To bring a person within the jurisdiction of a Magistrate, under the 4th section of that statute, he must have contracted to serve under a written contract, or must actually have entered the complainant's service before the time of the complaint made, and in such a manner as will create the relationship of master and servant.

Therefore, a silk-weaver, who had agreed to work up, at his own house, certain materials for a master manufacturer,—held to have been improperly convicted under the above act.

[This case will be found in 7 Law Journ. Mag. Cases, p. 118.]

1829. }
May 22. } *CHANTER, CLERK, v. GLUEB
AND ANOTHER.*

Highway Rates—Tithes.

The lessee for years, or other person receiving the benefit of tithes, is liable, in respect of them, to the highway rates, although he compound with the tithe-payers for the amount, and the tithe is not, in fact, severed.

[This case, which lays down the above proposition, will be found in 7 Law Journ. Mag. Cases, p. 114.]

1829. }
May 23. } *THE COLLEGE OF PHYSICIANS
v. HARRISON.*

Costs—Penal Action.

1. Where a plaintiff would be entitled to costs, had he succeeded, he is liable to costs where he fails.

2. Where a statute imposes a certain penalty to be recovered by action, and vests the right of action in a particular person, or collection of persons, the withholding of the penalty is an injury which gives a right to costs of suit, as well as to the penalty.—*Aliter*, where the penalty, or the persons who are to sue for it, be uncertain.

This was an action of debt, brought by the College of Physicians, suing as well for the King as for themselves, to recover several penalties of 5*l.* each, at the rate of 5*l.* for every month, by reason of the defendant having for some time practised as a physician in the city of London, or within seven miles round, without a license from the plaintiffs. The plaintiffs' claim was founded upon a charter granted to them by King Henry the 8th, confirmed by the statute of the 14th and 15th Henry 8. c. 5. The declaration, after stating the necessary matter to entitle them to recover, concluded in the form usually adopted, where an informer sues for a penalty, not praying for any damage by reason of the detention of the alleged debt. On the trial of the cause, a verdict was found for the defendant,—the plaintiffs failing in their evidence to prove that the defendant had practised as a physician within the limited distance.

The Master, upon consideration, and having read the opinions of learned persons on the point, which opinions had been taken by the several parties, thought that the defendant was entitled to his costs, and he taxed them accordingly; and, a rule having, in a former term, been obtained on behalf of the College, calling upon the defendant to shew cause why the Master should not review his taxation,—

Mr. Campbell and Mr. Armstrong shewed cause.—If the plaintiffs would have been entitled to costs, in case they had succeeded, it follows that the defendant is entitled to costs, now that they have failed: stat. 4 James 1. c. 3. s. 2. (1) They would have been so entitled. This is an action by the party grieved; because, the charter of the College confirmed by act of parliament, gives them the right of action, in case of any person practising within the limited distance, without being licensed by them. This circumstance would entitle the plaintiffs to costs: *Tyle v. Glode* (2). The construction put upon this act by the plaintiffs themselves in former actions, shews that they have considered themselves entitled to costs; for in Dr. Goodall's book, published by the authority of the college in 1684, it is stated, that, in actions which they brought against Dr. Bonham, Dr. Gardner, and Dr. Harder, they recovered costs. The plaintiffs' declaration, which is artfully framed, and does not pray damages, does not alter the question; for the merely not praying for damages, would not deprive the party of his right to have them afterwards. But it is sufficient for the present purpose, that the plaintiffs, being the parties grieved, would be entitled to costs. This was laid down in the case already cited of *Tyle v. Glode*, and in *Ward v. Snell* (3), and *The Mayor, &c. of Plymouth v. Werring* (4). In the latter case, the defendant had his costs. So, in the case of *The Company of Cutlers in Yorkshire v. Ruslin* (5). That was an action upon a private act of parliament, for a penalty given by that act for retaining an apprentice against the provisions

of the act. It was held, by Chief Justice Holt, and the whole of the Court, that, 'where a statute gives a penalty to the party grieved, to be recovered by action, bill, plaint, &c.; this being a duty to the party, vested before the action brought, he shall have costs against the defendant, because he is put by the defendant to the cost and trouble of a suit; but, in a *qui tam* or other popular action, where the duty is not vested till the suit or information brought, there his interest commencing by the suit, and not being a duty vested before, there he shall not have costs against the defendant.' That rule applies exactly to the present case; for supposing there to be any right of action at all, it vested in the plaintiffs alone, and they alone could sue. If it be said that the public are the aggrieved parties, and not the plaintiffs, still the plaintiffs represent the public, and have alone the right to sue; or, it may be considered that the plaintiffs have a privilege beneficial to themselves, the infringing upon which, renders them parties aggrieved, and gives them the right of action. In either view of the case, the plaintiffs would be entitled to costs had they succeeded.

Mr. Attorney General and Mr. Brougham, contra.—Most of the cases cited by the other side, were upon the statute 18 Eliz. c. 5; the sixth section of which, exempts from its operation all bodies corporate, and consequently exempting the present plaintiffs. And in those cases the parties who sued were clearly the parties aggrieved. The plaintiffs deny that they sued as the parties aggrieved, for they were not the defendant's patients, nor does it appear that they ever took any of his medicines. Nor does the case in *Skinner* apply, though its authority may be admitted. It applies to cases where the benefit of the penalty goes to the plaintiffs. Here the penalty goes half to the King and half to the College.

The Court took time to consider; and on the 25th of May, the judgment was delivered by

Lord Tenterden.—It was not denied in the argument, that the test by which to try the plaintiffs' liability to pay the costs by reason of their failure, would be in the question, whether they would have been entitled to receive costs had they succeeded.

(1) See the statutes, and the cases therein collected in Chitty's Statutes, title "Costs."

(2) 7 Term Rep. 268.

(3) 1 H. Bl. 10.

(4) Willes, 440.

(5) Skinner, 363.

We have considered the case with reference to that question, and we are of opinion, that if the plaintiffs had succeeded, they would have been entitled to costs. Where a right to a penalty vests in a particular person, the withholding the amount from him, is, in point of law, an injury, for which he is entitled to recover damages. There are several cases upon this subject; the leading one of which was cited from *Skinner's Reports*; and in which we concur. The case of *North v. Wingate* (6), is to the same effect, and proceeds upon the same principle. In that case the judgment of the Court is in these words,—“When a statute gives a penalty certain, and gives an action of debt, then if the defendant doth not pay it upon demand, but enforceth the party into a suit, and he recovers by action of debt, *ex consequenti*, he shall recover his damages, because he did not pay the duty due by the statute upon demand; and he shall also recover costs, for otherwise he should be at a loss to expend more than he recovers, which the statute never intended.” The judgment goes on to shew that the case is otherwise, where the duty is uncertain, as where the action is to recover treble damages upon the Statute of Waste, and so on. That would also be the case of a common informer, who seeks to avail himself of a right given to any person to sue for a penalty. No injury is done to the informer by not paying the penalty to him, any more than by not paying it to any other person; for the right to payment is vested in that particular person, not by the offence, but by the action brought to recover the penalty. This seems to have been the doctrine also in the case of *The Corporation of Plymouth v. Werring*, which was cited in the argument. Upon the principle laid down by those cases, and to which we accede, we are of opinion that the plaintiffs, had they succeeded, would have been entitled to receive costs; and having failed, as a consequence, they are liable to pay costs. It was proposed in the argument, to treat the right granted to the plaintiffs as a monopoly; but we do not consider that the privileges granted to that learned body can be properly viewed in that light. The members have no monopoly; for they can-

not maintain any action for their fees, any more than the learned members of the bar, to whom, as well as to physicians, the compensation given, in one case by the patient, and in the other by the client, is voluntary; the service performed being entirely of an honorary nature. For these reasons, we are of opinion that the present rule must be discharged.

Rule discharged.

1829. } MANDERSTON v. ROBERTSON
May 22. } AND ANOTHER.

Statute of Limitations—Joint Contractors.

1. *Payment on account of a debt by one joint contractor will bind the other, so as to deprive him of the benefit of the Statute of Limitations, although he may have no notice of such payment.*

2. *But where an acknowledgment of a debt by one joint contractor is relied upon to charge the other, and the terms of the acknowledgment are such as to leave it doubtful, whether it applies to the joint or to some other debt—semble, that the onus of shewing to what debt it applies, will lie upon the plaintiff.*

This was an action of assumpsit, brought to recover the principal and interest alleged to be due on a promissory note, dated the 9th of July 1817, and made by the above-named defendants, whereby they promised to pay to the above-named plaintiff, one day after date, the sum of 600*l*.

The declaration contained counts on the note, and the usual common counts for money lent, money paid, had and received, and money due upon an account stated.

The defendant Robertson suffered judgment by default, and the defendant Reid pleaded the general issue, and the Statute of Limitations—upon which issues were joined.

Upon the trial, a verdict was found for the plaintiff for 695*l*, subject to the opinion of the Court upon the following

CASE.

On the 9th of July 1817, the defendants signed the above-mentioned note, of which the following is a copy:—

"£600. London, July 9, 1817.

"One day after date, we promise to pay to Mrs. Ann Archer Manderston, at the Bank of Scotland, Edinburgh, the sum of six hundred pounds, value received.

"Wm. Robertson.

"T. Reid."

The plaintiff proved the following account, and letter sent by the defendant Robertson to the plaintiff on the 1st of June 1825.

Dr.—MRS. MANDERSTON in Account with WILLIAM ROBERTSON,—Cr.

1823.		£.	s.	d.
Aug. 11.	To Bank Post Bill	15	0	0
Nov. 13.	Do.....do.....	25	0	0
1824.				
Jan. 25.	Bank Note	10	0	0
April 23.	.. do.	10	0	0
May 20.	.. do.	20	0	0
Nov. 29.	.. do.	20	0	0
1825.				
May 3.	Bank Note, 16,329, per } Mr. W. Mather	10	0	0
31.	Bank Note	20	0	0
	Balance.....	665	5	7
		£795	5	7

1823.		£.	s.	d.
May 28.	By Balance	635	5	7
Aug. 13.	Second Qrs. Pension, 1823..	12	10	0
Nov. 13.	Third do.	12	10	0
1824.				
Feb. 12.	Fourth do.	12	10	0
May 12.	First do. 1824	12	10	0
Aug. 11.	Second do.	12	10	0
Nov. 11.	Third do.	12	10	0
1825.				
Feb. 10.	Fourth do.	12	10	0
May 31.	Interest on 600l. from Jan. } 1, 1825, to this date, } 5 per cent.	72	10	0
		795	5	7

Balance.....£665 5 7

June 1, 1825.

"My dearest Madam,—I have been waiting for some days in expectation of again hearing from you, relative to Mr. Mather's arrival at Hamilton. The fact of the matter is, I sent a letter by the *James Watt*, addressed to you, and to the care of Mr. Mather. I went down with it myself to Blackwall, and went on board the steam-vessel about eight o'clock, in hopes of seeing Mr. M.; and after waiting some time without this pleasure, I gave my letter into the hands of the captain, who promised to deliver it to Mr. M. immediately on his arrival on board—this letter enclosed a bank note, for 10l. No. 16,329, which, notwithstanding my not hearing of its safe arrival, am in strong hopes such is the case. I now without further delay enclose a Bank of England note, No. 8966, 20l. and statement of account annexed up to the present time, and shall be glad to hear from you early for two reasons: first, your own health, which I sincerely hope is now in good condition; secondly to learn the fate of my letter, per *James Watt*. I shall write more fully after hearing from you, but do not wish to lose another post. I have never had any communication from Mrs. Baillie

on what we talked about, but am well convinced, that, if not forgotten, nothing has offered to speak of.

"Yours most sincerely and affectionately,
"William Robertson."

"Mrs. P. Manderston,
Patrick Brae,
By Hamilton, Lanarkshire."

The plaintiff also called a witness named Archer, her brother-in-law, who proved, that in the summer of the year 1826, he had conversed with Reid upon the subject of the note; when Reid said, there was such a thing as the note, but that it was made so long ago, that he, Reid, had almost forgot it, and at the same time requested the witness to procure for him a copy of it.

The witness also further stated, that, afterwards, he accordingly did procure for Reid a copy of the note; and that when he delivered such copy to Reid, Reid observed, that when the note was given, he was assured by Robertson that the money would never be called for. The plaintiff also called another witness, who proved, that the son of the defendant Reid sent him to the former witness, Archer; that he afterwards saw Reid, and told him he had

spoken to Archer, who was going to commence legal proceedings for the amount, but if he would put any proposition in writing, Archer would forward it to his sister; to which Reid said, he did not consider himself liable for the amount, and would do no such thing.

The question for the opinion of the Court was, whether the above-stated evidence was sufficient to take the case out of the Statute of Limitations as against Reid. If the Court should be of opinion that it was, the verdict was to stand; if the Court should be of opinion that the evidence was insufficient, a nonsuit to be entered.

Mr. Platt, for the plaintiff.—There was enough in this case to take it out of the Statute of Limitations. What was done by Robertson was sufficient for this purpose; so that there is no necessity to place any reliance upon what was said or done by the other defendant. It is well established, that a payment made by one of two persons, jointly liable, is, in law, the payment of both; and all the legal consequences must equally affect both. This was laid down as early as the case of *Whitcomb v. Whiting* (1), and was followed by *Jackson v. Fairbank* (2), *Perham v. Raynel* (3), *Wood and another v. Braddick* (4); and see this point, in the recent case of *Burleigh v. Stott* (5). The statute presses equally against the plaintiff, where there are co-plaintiffs; for in the case of *Perry and others v. Jackson* (6), it was held, that if one plaintiff be abroad, and the others in England, the action must be brought within six years after the cause of action arises. The case of *Pittman v. Foster* (7), may be relied on by the other side; but it is mainly distinguishable from the present case. There, the acknowledgment was made by one, and sought to be charged against the other, who at that time was under a disability of making a promise herself; she having become a married woman.

(1) Dougl. 650.

(2) 2 H. Bl. 340.

(3) 2 Bing. 306; 9 Moore, 566.

(4) 1 Taunt. 104.

(5) 8 B. & C. 36; 2 M. & R. 93; 6 Law Journ. K.B. 282.

(6) 4 Term Rep. 516.

(7) 1 B. & C. 248; 2 D. & R. 363; 1 Law Journ. K.B. 81.

Mr. Adolphus, contra.—The evidence was not sufficient to take the case out of the Statute of Limitations, as regards the defendant Reid, who was a perfect stranger to all those acknowledgments made by his co-defendant, and who cannot come prepared on the trial to explain them:—for this reason,—although it may be admitted that a clear and express acknowledgment made by one of two persons, jointly liable, will be sufficient to charge the other, yet in this case the acknowledgment is not clear and express; for it is impossible to say that the account rendered by Robertson, or his letter to the plaintiff, refers to the promissory note, upon which this action is brought. There is no mention made of the note; nor anything which of necessity refers to it. The plaintiff was bound to shew by extrinsic evidence, if she could, that the account referred to the promissory note, and to no other transaction. For aught that appears to the contrary, the account may relate to a transaction perfectly distinct, between the plaintiff and Robertson alone. The failure of the plaintiff's evidence in this respect, brings the case precisely within the principle of *Holme v. Green* (8). It was an action by the indorsee of a promissory note, against the maker; the note, bearing date the 25th of March 1805, was made jointly by Green and Salter, who was dead, for the payment of 300*l.* to Holme & Wilson; and by them indorsed to Holme, the plaintiff, on his private account. The defendant had pleaded the general issue, and the Statute of Limitations. Replication—that the suit was commenced within six years after the promise. The facts were these:—Salter being the clerk of Holme and Wilson, the latter advanced to him the sum of 600*l.* for securing the repayment of 300*l.* of which the note in question was given by Salter, and by Green, the defendant as his surety. In order to take the case out of the statute, the plaintiff relied principally on the fact, that on the 19th of February 1810, a cheque had been paid by Holme & Wilson to Salter, who was still in their service, and that this had been paid in on Holme's the plaintiff's private account. It was also in evidence, that when the defen-

(8) 1 Stark. Rep. 488.

dant was applied to for payment of the note, he said, he understood that it had been paid. It was contended that the payment of the 50*l.* cheque on the account of the plaintiff, must be attributed to his claim upon the bill, unless it could be shewn by the defendant, that some other account existed between the parties. Now the observation made by Lord Ellenborough upon this is peculiarly forcible: he said, "There would be no such thing as the Statute of Limitations, if this doctrine were to prevail. An acknowledgment to bind a partner, ought to be clear and distinct. This would be an extravagant extension of the case of *Whitcomb v. Whiting*. Unless there be an express and unequivocal acknowledgment of an existing debt by one partner, it will not bind the other. To admit evidence to shew to what particular account a payment related, so as to make it operate as an acknowledgment, would be attended with all the difficulty and mischief of opening and unsettling complicated accounts. If this were to be admitted, it would operate as a recipe for taking a case out of the statute, by means of obscure and unsatisfactory evidence. I shall certainly intimate to the jury that this is not enough to take the case out of the statute." His Lordship advised the jury accordingly, and they found a verdict for the defendant.

The necessity of requiring clear and express evidence, that the acknowledgment relied upon had reference to no other than the debt in question, was also pointed out by the same learned Judge in the case of *Brandram and others v. Wharton* (9). His Lordship then said, "This doctrine of rebutting the Statute of Limitations by an acknowledgment other than that of the party himself, began with the case of *Whitcomb v. Whiting*. By that decision, (where however there was an express acknowledgment, by the actual payment of a part of the debt by one of the parties liable,) I am bound. But that case was full of hardship; for this inconvenience may follow from it: suppose a person liable, jointly with thirty or forty others to a debt; he may have actually paid it, may have had in his possession the document by which that payment was proved, but may have lost his receipt:

then, though this was one of the very cases which the statute was passed to protect, he may still be bound, and his liability be revived by a random acknowledgment, made by some one of the thirty or forty others, who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party of the advantage given him by the statute, by means of an implied acknowledgment."

Mr. Platt, in reply.—The jury were warranted in believing that the account referred only to the debt in question; as it was not suggested that it could refer to any thing else.

Lord Tenterden.—It seems to have been taken for granted on the trial, that the payment referred to the promissory note in question; and the case which is now cited from *Starkie's Reports* was not there quoted. If the payments made by Robertson were applicable to the promissory note, the last case, of *Burleigh v. Stott*, is expressly in point. To what else than the promissory note could the payments apply? There is this difference between the present case and that in *Starkie*; that, in that case, the note was made to Holme & Wilson, and was afterwards by them indorsed to Holme alone. Now, when Salter made the payment on Holme's private account, it does not appear that he *knew* the note had been indorsed to Holme alone; so that that fact was wanting, in order to justify the inference that Salter was making the payment on account of the note. There is that difference in the two cases; but certainly, on the trial of this cause, no question was made, as to whether the payments made, and the accounts rendered, by Robertson, referred to anything but the note in question.

Mr. Justice Bayley.—What was done by Robertson takes the case out of the Statute of Limitations, by reason of the joint liability of Robertson and the present defendant: that is to say, assuming that the account rendered by Robertson applied to the note in question. There was no evidence of any other transaction between the parties to which it could apply. The question, indeed, is one of fact rather than of law.

Mr. Justice Littledale concurred,

Mr. Justice Parke.—I concur with the rest of the Court in the judgment, which is to be given in the present case; but I do so, because, upon the trial of the cause, there was no dispute as to the fact, that the payments made, and the account rendered by Robertson, applied to the note in question. I entirely agree in the observations made by Lord Ellenborough with respect to cases of this description.

Postea to the plaintiff.

[See the act, 9 Geo. 4. c. 14: (commonly called Lord Tenterden's Act), and the cases upon the Statute of Limitations, collected in 2 Chitty's Statutes, title, "Limitations," p. 709. Many of the decisions before that act will be applicable to cases which may occur hereafter.]

1829. { *MAN v. OWEN, KNT. AND OTHERS.*

Naval Articles of War—Purser.

A purser in the navy, charged with making false entries in the ship's books, for the purposes of fraud, is liable to be tried by a Naval Court Martial, under the 36th of the articles incorporated in the 22 Geo. 2. c. 33.

This was an action of trespass, commenced in Michaelmas term, 1826. The declaration stated, that the defendants, on the 7th of January 1825, together with certain other persons, being then under the control and command of the defendants, with force and arms, made an assault upon the plaintiff, and imprisoned, and caused and procured him to be kept and detained in prison there for three days. Special damage was assigned, having reference to the plaintiff's loss of rank, &c. as a purser in his Majesty's Navy.

The declaration contained two other counts, in each of which, the same cause of action was differently stated.

In Hilary term 1827, the defendants pleaded,—first, the general issue, Not Guilty; and five other pleas, only the second and fourth of which, it appears, are material to be stated in this case; but either party is at liberty to refer to the

pleadings. The second plea states, that the plaintiff was a person in and belonging to the fleet of our Lord the King, and in actual service and full pay in the said fleet, viz. an officer in and of his Majesty's naval service, to wit, a purser in his said Majesty's naval service, and, as such officer and purser, was employed in his said Majesty's naval service, as purser of a certain ship of war of his said Majesty, to wit, the ship *Perseus*; and that said plaintiff, being such officer and purser in such actual service and full pay as aforesaid, and so employed as aforesaid, before the said time, when, &c. to wit, on the day and year aforesaid, on board the said ship *Perseus*, the same then being within the jurisdiction of the Admiralty of England, to wit, in the River Thames, committed and was guilty of a certain offence, and breach of his duty as such officer and purser as aforesaid, cognizable by a Naval Court Martial, to wit, of fraudulently and unlawfully charging twenty-six blankets against twenty-six supernumerary seamen, to whom notice had been issued, and of making, in order to such fraudulent charge, certain false entries in a certain book of the said ship *Perseus*.—And the plea goes on to state the complaint duly made to the Lords Commissioners of the Admiralty, within three years after the committing of the said offence; their Lordships' order duly issued to assemble a Court Martial, defendant Owen being president; the due summoning and assembling of the same; that defendants, with others, duly held the same, for the purpose of trying the plaintiff on board his Majesty's ship *Prince Regent*, in the port of Chatham; that the said Court did duly try him for the said offence; and that having weighed and considered the evidence produced against the plaintiff, and his statement and evidence in his defence,—the Court was of opinion, that the charge of the said offence had been proved against the plaintiff, and, in consequence thereof, did adjudge him to be dismissed from his Majesty's service, and rendered incapable of ever serving as a purser in the navy of his Majesty, his heirs and successors; that the defendants, with the other members of the Court Martial, did, within the Admiralty jurisdiction, to wit, in the said port, on board the said ship, cause the plaintiff to be taken into custody

with no unnecessary violence, and detained on board the said ship during his trial, for the purpose of such trial, as they lawfully might for the cause aforesaid, which are the same supposed trespasses, &c. The fourth plea is the same with the second, except that, instead of averring the plaintiff to have committed the offence mentioned in the second plea, it merely avers complaint in writing to have been duly made to the Admiralty of his having committed that offence.

The replication joins issue on the first plea, and as to all the other pleas, replies *de injuriâ*, whereupon the second, third, fourth, fifth, and sixth issues are joined.

At the adjourned Sittings for London, after Trinity term 1827, the cause came on to be tried at Guildhall, before Lord Tenterden; upon which trial, all the facts stated in the fourth plea were proved or admitted, and all the facts stated in the second plea, except the fact therein stated—that the plaintiff had committed the offence with which he was charged; and it was also proved to be the invariable practice in all Naval Courts Martial, for the party accused to be in custody during the trial.

The plaintiff was nonsuited.

In Michaelmas term last, the Lord Chief Justice was, upon hearing the attornies or agents, pleased to order, that, instead of the nonsuit in this cause, a verdict should be entered for the defendants on the second and fourth issues, and for the plaintiff on the other issues.

In Hilary term following, a rule was granted to shew cause why the judgment in this cause should not be entered for the plaintiff on the whole of the counts in the declaration, notwithstanding the verdict; which rule coming on to be heard, the Court suggested that the points in question in this cause should be made the subject-matter of a special case, and a rule for that purpose was thereupon made.

The naval article of war, viz. the 36th, mentioned in the statute of 22 Geo. 2. c. 33, and upon which the defendants principally relied, is as follows:—"All other crimes, not capital, committed by any person or persons in the fleet, which are not mentioned in this act, or for which no punishment is hereby directed to be inflicted,

ed, shall be punishable according to the laws and customs in such cases used at sea."

The question for the opinion of the Court was—Whether, under the circumstances above stated, the defendants are entitled to judgment. If the Court shall be of opinion that they are not, such order to be made herein, as to the Court should seem fit.

Mr. Barnewall, for the plaintiff.—The question is, whether the offence committed by the plaintiff as a purser, was such an offence as gave jurisdiction to a Naval Court Martial, according to the terms of the 36th of the articles incorporated in the 22 Geo. 2. c. 33. The offence committed by the plaintiff was, no doubt, an indictable misdemeanor, and punishable at the common law. These articles, which are to give authority to a jurisdiction out of the common law, are to be construed strictly. The article relied upon by the other side, the 36th, is the last in point of order. Several of the others relate to the military profession. The 24th, 33rd, and the 36th, are the material articles.

The following are the twenty-fourth and thirty-third articles.

24th. There shall be no wasteful expense of any powder, shot, ammunition, or other stores in the fleet, nor any embezzlement thereof; but the stores and provisions shall be carefully preserved; upon pain of such punishment, to be inflicted upon the offenders, abettors, buyers, and receivers (being persons subject to naval discipline), as shall be by a Court Martial found just in that behalf.

33rd. If any flag officer, captain or commander, or lieutenant belonging to the fleet, shall be convicted before a Court Martial of behaving in a scandalous, infamous, cruel, oppressive or *fraudulent* manner, unbecoming the character of an officer, he shall be dismissed from his Majesty's service.

The 36th article, relied on by the other side, is mentioned in the special case; but it may be here repeated.

36th. All other crimes, not capital, committed by any person or persons in the fleet, which are not mentioned in this act, or for which no punishment is hereby directed to be inflicted, shall be punished according to,

the laws and customs in such cases used at sea.

Now, in legal works of the highest authority, a distinction is taken between the word "crime," and the word "misdemeanor"; and although, in common parlance, the former is understood to be the generic term, and to include the latter, yet it is not so understood in law. The word "crime" is understood to be applicable to offences of a higher class than that of misdemeanor. It is so treated by Blackstone, in his *Fourth Commentaries*, c. 1, and by Mr. Serjeant Russell, in his work on the Criminal Law. He entitles his treatise, "*On Crimes and Misdemeanors*." The expression, "other crimes," therefore, as it is used in the 36th article, must be understood to mean offences of a higher class than those merely of misdemeanor. This interpretation seems to be strengthened by the words "not capital," after the word "crimes," evidently shewing, that offences of a serious nature were in contemplation. But, independent of this, there is another objection to the proceeding of this Court Martial, under the 36th article. The provision is, in respect of all crimes, not capital, "which are not mentioned in this act;" but the offence charged against the plaintiff, supposing it to be a crime within the meaning of the words in the introductory part of the article, had been mentioned in the act before, it being expressly included in the 33rd article, as it was a charge of fraudulent conduct, unbecoming the character of an officer.

Mr. Maule, contra.—Lord Tenterden, who tried this cause, had no doubt that the Court Martial had authority under the 36th article. If the persons who commit this offence be not punishable by the articles of war, they would not be punishable at all, whenever the offence was committed at sea; because, the Admiralty jurisdiction did not extend to misdemeanors, until recent acts of parliament gave it to them. But, looking to the whole of the articles, can there be a doubt that this offence is within their scope?—[Here he was stopped.]

Mr. Justice Bayley.—It is conceded by Mr. Barnewall, that this is an indictable
Vol. VII. K.B.

misdemeanor. It is the making false entries in a book, for the purpose of defrauding the public. Then, does the 36th article apply to such a case? It says, "all other crimes not capital." Crime is the generic term, not merely in common parlance, but in law. Misdemeanor is but a subdivision; for every misdemeanor is a crime. Undoubtedly, Mr. Justice Blackstone has used the expression "crimes and misdemeanors," in various parts of his first chapter in the 4th vol. of his *Commentaries*; but that chapter is headed "*Of the nature of Crimes*," (not saying *and Misdemeanors*,) and their punishment. But he goes on, and treats of misdemeanor as a subdivision of crime. There is really no foundation whatever for this distinction, as applied to the argument of this case. The next point is, that the case cannot be within the 36th article, because the crime has been mentioned before in the 33rd article. But in the 33rd article it is mentioned in terms totally inapplicable to the plaintiff; the expression "unbecoming an officer" as there used, at the end of the article, applies evidently to officers of the degree mentioned in the previous part of the article, which is altogether silent as to frauds committed by officers and persons of a lower description. The expression in the 36th article, "not mentioned in this act,"

means, not mentioned with reference to the particular persons who are mentioned as the objects of punishment. The construction which Mr. Barnewall wishes us to give to the act, would leave a number of officers unpunished. The expression "not mentioned," means, "for which no punishment is authorized by this act." For these reasons, I am of opinion, that the pleas are good in law, and furnish an answer to the action.

Mr. Justice Littledale and *Mr. Justice Parke* concurred.

Judgment for the defendants.

1829. }
June 1. } EDWARDS v. MINCHIN.

Practice.—Irregularity.

1. *The plaintiff cannot sign judgment after plea in abatement, because the affidavit to verify the plea was sworn before the defendant's attorney. He should apply to the Court to set aside the plea.*

2. *Such a plea, filed before common bail has been filed, is warranted by common bail filed on the same day; so that the plaintiff cannot sign judgment on a following day.*

The defendant pleaded misnomer in abatement. The plaintiff signed judgment; and against a rule for setting it aside—

Mr. Chitty now shewed cause.—There are two objections to this plea in abatement. First, the affidavit to verify it was sworn before the defendant's attorney.

Mr. Comyn, contra, referred to *Horsfall v. Matthewman* (1), as in point, that the plaintiff should have applied to the Court to set aside the plea, and could not treat the plea as a nullity.

The Court acceded to this.

Mr. Chitty.—The second objection is, that although common bail was filed on the same day, yet it was not until after the plea had been filed. But, by—

The Court.—No matter; the whole was on one day; and the plea was warranted by the common bail.

Rule absolute.

1829. }
June 1. } SWEETING v. HALSE.

Practice.—Amendment—New Counts.

Where a plaintiff sued upon a bill of exchange given to him, and it appeared on the trial that, by agreement between the parties, the bill had been cancelled, and another bill given, which had not been declared upon, and a verdict thereupon passed for the defendant, the Court refused afterwards to allow the

plaintiff to amend, upon payment of the costs of the trial, by adding counts upon the new bill.

(This case, upon the discussion of the rule for a new trial, will be found in 7 Law Journ. K.B. 156.)

The rule which had been obtained by the plaintiff for a new trial having been discharged, the plaintiff sought to amend his declaration by adding counts upon the bill or special agreement relating to the new four per cent. stock; treating the cancelling of the old bill as the consideration for the new. The application for leave to make this amendment was made in the first instance before Mr. Justice Littledale and Mr. Justice Parke at chambers; but, being by them refused, a rule to shew cause why the amendment should not be allowed upon payment of the costs of the trial, was obtained by Sir James Scarlett; against which,

Mr. Campbell and *Mr. Barstow* now shewed cause.—The Court, if they allow this amendment, will go farther than has ever yet been gone according to any precedent. This is the case of a plaintiff, who, having declared upon a particular contract, gone to trial, failed, moved for a new trial, and failed, now seeks to engraft upon this section, a new action founded upon an entirely new contract. No case has gone the length of authorizing this. The case which has gone the farthest on this subject is that of *Atkinson v. Bell* (1). The plaintiffs were precluded from recovering in an action for goods bargained and sold; but were permitted, on payment of costs, to add a count for not accepting the goods. In that case it was stated by Mr. Justice Bayley, (according to the report in *Danson & Lloyd*), that the amendment was allowed in consequence of the very peculiar circumstances of the case, which was not to be drawn into a precedent for the future. But, even if that case could be drawn into a precedent, it does not go the length which is required in the present case. There was in that case but one contract; and the difficulty under which the plaintiff laboured, was in not having stated his case in the declaration, so as

(1) 8 B. & C. 277; 2 M. & R. 293; 1 Danson & Lloyd, 93; 6 Law Journ. K.B. 258.

(1) 3 Maul. & Selw 154.

to let in evidence of what the contract really was. So that, upon the contract, as it existed between the parties, the plaintiff was entitled to recover. Here, the case is essentially different. There have been two distinct contracts between the parties. The plaintiff made his election to proceed upon one; but he failed, because it appeared that that contract had been rescinded, and a new contract with different terms, entered into. So that the contract upon which the plaintiff commenced his action, does not entitle him to recover, in any form of pleading. His action upon the old contract has entirely failed, and he finds he must proceed upon the new contract. It is submitted that he must do this by a fresh action; and that the Court will not go so far as to allow of this amendment; the allowing of which will lead to other applications, carrying the doctrine of amendment still further. The very usual answer given to applications to set aside nonsuits, is appropriate to the present one. That answer generally is, "You are but nonsuited; you are not concluded; you may bring a fresh action." Here, the plaintiff is not concluded, because, although there is, in point of form, a verdict, the plaintiff may bring a fresh action, and the judgment on the present verdict will be no bar to that action, if it be founded upon the new contract. If this amendment be allowed, the defendant may be saddled with the earlier costs of the cause; because he may have no defence to the new counts; and he may have tried the cause, relying solely upon the former objection.

Sir James Scarlett and Mr. Chitty, contra. Even if there be no precedent for this application, the Court, in the exercise of that discretion which regulates all motions to amend, will permit this amendment. The objection taken on the trial was against the merits of the case; and the opposition to this motion is the same. The allowing of the amendment cannot injure the defendant in any way; his defence, if any he has, can be as available, whether it be offered to the new counts if allowed in this action, or to the same counts presented in point of form in another action. But this application is not without precedent. The Court are in the daily habit of allowing declarations

in ejectment to be amended, by adding counts upon new demises, on terms which the Court may think reasonable. In those cases, a new action is, in point of substance, as well as of form, allowed to be ingrafted upon the old; and it often happens that where an ejectment has been brought, it is discovered that the lessor of the plaintiff had not the legal title, and he afterwards recovers upon the demise which he has been allowed to add upon payment of costs. The circumstance of the cause being so far advanced, does not affect the principle; the only difference it produces, is in the amount of the costs which the plaintiff has to pay. The case of *Atkinson v. Bell* shews, that the advanced stage of a cause is not an insuperable objection to amendment being allowed, if the Court think the justice of the case calls for it. The best test to try, whether the justice of the case calls for it here, is, to see whether the defendant will consent to suffer judgment by default upon the new counts. If he will, the plaintiff will consent to pay the whole costs of this cause: [This was not agreed to.] The refusal to adopt this proposal shews that the defendant cannot be prejudiced by the amendment; and that he has, or conceives he has, a defence to the new action. It follows that he cannot be supposed to have defended this cause solely upon the ground of the former objection.

Lord Tenterden.—I think, if we were to make this rule absolute, we should be going farther than has been gone hitherto in cases of this description. There will be no termination to applications of this nature, if they be yielded to. The safer course, and that which will compel parties to pay some attention to their own cases, will, in my opinion, be to refuse to assist them in so advanced a stage of the cause. The plaintiff must be left to his remedy by a new action. I am sorry for it; because the objection to the amendment is against the merits of the case.

The other Judges concurring,—

Rule discharged.

1829. }
May 15. } PARRY v. ABERDEIN.

Insurance—Total loss—Abandonment.

1. *Where a ship is left by the crew under a fair and reasonable apprehension of her sinking, the right of the assured to recover for a total loss in respect of the goods, will not be affected by the circumstance of her afterwards being taken in charge, and saved by the crew of another vessel.*

2. *Where, under such circumstances, the goods are of a perishable nature, and cannot be carried to their place of destination, except at an expense greater than their value, the circumstance of the goods being thus saved in specie does not deprive the assured of their right to recover, as for a total loss.*

This was an action on a policy of insurance, dated 17th of November 1823, on goods by the *Isabella*, at and from Trieste to Liverpool, including risk in boats and craft from shore to shore, with leave to load, land, and exchange goods, without being deemed a deviation. The insurance was declared to be—

£.	s.
368 oncurrants, valued at	54 0 per ton.
350 on red Smyrna raisins,	3 10 per barl.
132 on black ditto . . .	1 15 per barl.
40 on figs	20 0 per ton.

On the 5th of December, the following memorandum was written on the policy, and subscribed by the defendant:—

"The sum insured on raisins by this policy is declared to be £42*l.* in place of 48*l.* and the valuations for the red Smyrna 3*l.* 18*s.*, and for the black ditto, 2*l.* 14*s.* per barrel."

The policy contained the usual warranty, of free from average, unless general, or the ship should be stranded. The declaration alleged a total loss by the perils of the sea.

The defendant paid the proper proportion of general average before the commencement of the action, amounting to 6*l.* 5*s.* 10*d.* per cent.; and, having pleaded the general issue, the cause came on for trial before the Lord Chief Justice of this court, at the Sittings after Trinity term 1826, when a verdict was found for the plaintiff, damages 153*l.* 17*s.* 8*d.*, subject to the opinion of the Court on the following

CASE.

The defendant subscribed the policy mentioned in the declaration for 200*l.*

On the 16th of November 1823, the ship sailed from Trieste for Liverpool, with the goods specified in the policy on board, the property of the person in whom the interest was alleged. On the following day she encountered a violent storm, which laid her upon her beam ends; three of her crew were drowned, and the remainder saved themselves by clinging to the foretop. On the 19th they were taken off by some fishermen, and carried into the port of Ancona. When they left the ship, the whole of her hull was under water, except a small part of her bows. The master, on his arrival at Ancona, hired a boat to look after her, and on the 20th proceeded to sea for that purpose. On the 21st, they picked up her long-boat; and concluded from that circumstance that she had foundered, but as they were returning towards Ancona, they saw some fishermen who had fallen in with the *Isabella*, and were then towing her into the port of Ancona. She was in the same state, as when the crew had abandoned her, the whole of her hull being under water, except a small part of the bows. On the 22nd she was towed in this condition into Ancona, and remained with her cargo in possession of the salvors, who instituted a claim of salvage in the tribunal of commerce of Ancona. The cargo was placed by the salvors in the government stores, and the master and the crew were not allowed to interfere in any manner with the landing of the cargo. The cargo had been entirely under water for eight days, and when landed, was found considerably damaged by the salt water. After the cargo had been landed, the crew were obliged to live on shore: she was delivered to the captain in the middle of April; no repairs were allowed to be done, till the beginning of that month. She required new masts and sails, but her hull was not at all injured. She afterwards proceeded on a voyage to Palermo, and from thence to London; there was no other ship in which the cargo could have been forwarded to England, and if another ship could have been found when the cargo was landed at Ancona, it was so much injured by having been so long under water, that it would have been worth nothing

at its port of destination. The cargo was sold by public auction about the middle of April, when security was given to the salvors; it was sold by the agent for Lloyd's, who also acted as agent for the ship; and the following is an account of the sums which the articles insured produced, and the charges upon them.

	£.	s.	d.
The raisins produced	33	15	9
Less freight	57	11	7
<hr/>			
The figs produced	0	19	7
Less freight	6	18	7
<hr/>			
The currants produced	268	6	4
Less freight	51	6	6
<hr/>			
	216	19	10
<hr/>			

The salvors claimed 5000 dollars for salvage; the tribunal, in the middle of December, decreed that they should be allowed 1200 dollars and expenses. The salvors appealed from this decree, but the same was confirmed in the month of April following. The assured, residing in Liverpool, having heard of what had befallen the ship, and, before they heard of her being found again and towed into Ancona, gave directions for a notice of abandonment being served upon the underwriters; the notice was dated at Liverpool, on the 11th of December, and was served on the 18th of that month in London; but the underwriters refused to accept the abandonment. On the 12th of December, the ship was mentioned in Lloyd's List, as having been brought into Ancona on the 24th of November. The question for the opinion of the Court is, whether the plaintiff is entitled to recover; if the Court think the plaintiff was entitled to recover, the verdict to stand; otherwise, a nonsuit to be entered.

The case was argued on the 3rd of February, by *Mr. Campbell* for the plaintiff, and by *Mr. F. Pollock* for the defendant.

For the plaintiff.—In this case, there was a total loss, in point of fact, when the crew were compelled to quit the ship, and to abandon her at sea. Notice of the abandonment was given by the assured, upon

their receiving intelligence of this event; and at that time the underwriters were liable to pay for a total loss: then, has any thing since occurred to prevent its being a total loss, and to alter the liability of the parties? The insured property has never been in a situation to be restored beneficially to its owners, though the vessel was picked up by the fishermen. The plaintiff could not claim for a total loss if the voyage had been merely retarded, notwithstanding the abandonment: *Anderson v. Wallis* (1); but where there has once been an actual total loss, that cannot be redeemed unless the property insured be restored beneficially: *Holdsworth v. Wise* (2). In *Thornley v. Hebson* (3), which will probably be cited on the other side, there never was a total loss, the ship was never deserted at sea, and the insurance itself was on the ship. In that case, too, some blame was fairly attributable to the owners: here, there is none.

For the defendant.—This is a case merely of average loss; although the crew were justified in quitting the ship, it does not follow that the loss was a total loss. According to subsequent events, the loss might turn out total, or partial only; for instance, there cannot be a total loss, if the goods ultimately arrive at their place of destination. The goods were warranted free from average, and although undoubtedly much injured, they remained in *specie*, and the mere injury to them cannot make the loss total: *Thompson v. the Royal Exchange Assurance* (4). Neither can the loss of the voyage for the season give the assured a right to abandon and claim for a total loss; this seems warranted by the opinion of Mr. Justice Bayley in the case of *Hunt v. the Royal Exchange Assurance* (5), in which the principle laid down in *Thompson v. the Royal Exchange Assurance* was recognized. If that case be law, it decides the principle which is to govern this case. How can it be said that there is a total loss, when the matter is at the time in a state of uncertainty, and afterwards it appears that

(1) 2 M. & S. 240.

(2) 7 B. & C. 794; 1 M. & R. 673; 6 Law J. K.B. 134.

(3) 2 Barn. & Ald. 513.

(4) 16 East, 214.

(5) 5 Maul. & Selw. 47.

the goods are not lost, but delivered? The assured must not be allowed to make a total loss, in order to find an excuse for casting the liability on the underwriters.

For the plaintiff, in reply.—In *Thompson v. the Royal Exchange Assurance*, there was clearly a total loss. In *Wilson v. the Royal Exchange Assurance* (6), where the insurance was upon wheat, a perishable commodity like the present, and another vessel could not be procured to forward the wheat to its place of destination, the defendants were held liable for a total loss. The case of *Manning v. Newnham*, in a note to the last case, (before Lord Mansfield,) is to the same effect.

The Court took time to consider, and on this day the judgment was delivered in the following terms, by—

Lord Tenterden.—After stating the facts, his Lordship observed: These being the facts, we are of opinion, that the plaintiff is entitled to recover: this case is not distinguishable from the case of *Gernon v. the Royal Exchange Assurance* (7), or the case of *Holdsworth and another v. Wise*; in both of which the plaintiffs recovered. The first of these cases was an insurance on sugar: the ship returned in a short time to the port of loading; the cargo was damaged, and not in a fit state to be sent to the place of destination, and the assured abandoned, the whole still remaining in *specie*, though deteriorated. The second of those cases was an insurance on the ship, which sailed from St. Andrew's in America to England, and received so much injury that the crew abandoned her, and were taken on board another vessel. On the next morning, a third vessel met with her, and some men from it went on board, and succeeded in taking her to New York,—from which place she came to Liverpool, charged with a heavy sum for salvage, and with another sum requisite to repair some injury received in going into Liverpool, the two sums together exceeding the value in the policy. There was an abandonment. The Court held, that the loss was total on the desertion of the crew, and that it was not turned into a partial loss by the subsequent events,

the effect of which could be of no real benefit to the assured. In the case now before the Court, the ship was deserted by her crew in the utmost distress, carried into a port out of the course of her voyage some days afterwards, and there, with her cargo, detained many months for salvage: the cargo (perishable goods) was so much damaged as not to be worth sending to the place of destination, if a ship could have been found, and none could be. The assured abandoned, after knowledge of the loss, and before intelligence of the subsequent facts arrived. Can any person say, that the goods, although remaining in *specie*, were not as effectually lost to the assured when the ship was deserted, as if they had then gone to the bottom of the sea, or that the subsequent events produced a restoration of them to the owners? This therefore is not a mere loss of the voyage and the adventure, but in reality, a loss of the thing assured. In the case of *Hunt v. the Royal Exchange Assurance Company*, the ship put back to her port of lading; the principal part of her cargo being flour, was undamaged, and might have been sent to the place of destination by another ship at the end of three or four months, so that there was no actual loss of the cargo, and a delay only, rather than a loss, of the voyage. It was held, that this was not a case for abandonment; and also, upon the particular facts, that the abandonment was too late. In the case of *Thornley and another v. Hebson*, the ship, which was the subject of the insurance, sustained great damage on her voyage from New York to Hull; and the crew, exhausted from fatigue, were taken on board another vessel, from which six fresh men went to her, and carried her to Rhode Island, where she was sold to pay the salvage. The assured resided at New York; they might have prevented the sale if they would have paid the salvage; and there was nothing to shew that they were unable to do so; they sent notice of abandonment as soon as they heard of the desertion of the crew, and before they knew that the vessel had arrived at Rhode Island. Under the circumstances, the Court thought that there was not a total loss before the sale; and, as the owners might have prevented the sale, they could not make the loss total by their own neglect. These last two cases,

(6) 2 Campb. 624.

(7) 6 Taunt. 363.

therefore, are very distinguishable from the present; and our judgment ought to be governed by the first two which I have referred to, and by the sound and legal principles on which they were decided.

Postea to the plaintiff.

1829. }
May 7. } *DOE d. AMBLER v. WOODBRIDGE.*

Ejectment—Forfeiture—Waiver.

A forfeiture of a lease occasioned by the USING of the premises, in a manner prohibited by the covenant, is not waived by a subsequent receipt of rent, if the prohibited user be continued afterwards.

This was an ejectment for a house in the city of London. The case was tried before the Lord Chief Justice, at the Sittings after Hilary term, when the following appeared to be the principal facts:—

¶ The lessor of the plaintiff was owner of the house in question; it was occupied by the defendant under a lease, containing a covenant, that the tenant should not alter, convert, or use the rooms thereof, then used as bed-rooms, or either of them, into or for any other purpose than bed or sitting-rooms, for the occupation of himself, his executors, &c. or his or their family, without the licence of the lessor in writing; the lease contained a clause of forfeiture for breach of any covenant. The defendant had let part of the house to a lodger, who occupied, up to the time of the trial, the rooms specified in the covenant above set out; but the lessor, who lived next door, after he knew of such occupation, had received rent under the lease.

¶ Upon these facts, the question was, whether, by thus accepting rent, he had waived the forfeiture? The Lord Chief Justice thought there was a continuing breach, as long as the rooms were occupied contrary to the covenant, and directed the jury to find for the plaintiff,—but reserved leave to the defendant to move to enter a nonsuit. Accordingly,

Mr. Denman now moved to set aside the verdict. The receipt of rent by the landlord was a waiver of forfeiture. The case

of *Doe v. Bancks* (1), appears at first sight to be against the defendant: there, the subsequent receipt of rent was held not to be a waiver of a forfeiture; but the reason there given shews that the present case is distinguishable. The breach of covenant was in ceasing to work a coal-mine for a certain period; and it appeared the breach was not complete at the time the rent was received. Here, the breach was complete at the time of the receipt of the rent. In the case of *Doe d. Sheppard v. Allen* (2), an ejectment was brought for a forfeiture incurred by carrying on a trade prohibited by the lease. Here, the defendant was unable to prove the payment of any rent after the commencement of the business; but it seems to have been taken for granted by the Court, that such proof would have been an answer to the action. In *Doe d. Boscamen and Another v. Bliss* (3), the payment of rent was held not to be a waiver; but there the breach of covenant consisted of an under-letting; and the case put there by Sir James Mansfield of not repairing, would be the case of a constant injury to the premises. The clause which here works the forfeiture, is merely a stipulation for an arbitrary right; and the waiver does no injury to the landlord. In *Roe v. Paine* (4), it was held, that a notice to repair was not a waiver of a forfeiture for not repairing; but this went upon the same principle, that the act which worked the forfeiture was injurious to the premises.

Lord Tenterden.—Upon the particular language of this covenant, I am of opinion that the verdict was right. It is not denied that a forfeiture was occasioned by the use of the rooms contrary to the terms of the lease; nor is it to be assumed that this was no inconvenience to the landlord, who lived next door. The demise in the declaration was dated the 22nd of October; and the rent was not received until November. But, upon the ground alone, that there was a continuing breach, I think the verdict should not be disturbed.

(1) 4 Barn. & Ald. 401.

(2) 3 Taunt. 78.

(3) 4 Id. 735.

(4) 2 Campb. 520.

Mr. Justice Parke.—I am of the same opinion. If the breach had been the converting of a house into a shop, it would be complete; and a forfeiture thereby incurred, would be waived by a subsequent acceptance of rent. But this covenant is, that the rooms shall not be used for certain purposes; there was therefore a new breach of covenant every day, during the time that they were so used, of which the landlord might take advantage; and the verdict, which has proceeded on the particular words of this covenant, is right.

Rule refused.

For other cases concerning forfeiture, see—

Doe v. Meux, 4 B. & C. 606; 7 D. & R. 98; 4 Law Journ. K.B. 4.

Arnsby v. Woodward, 6 B. & C. 519; 5 Law Journ. K.B. 199.

Rede v. Farr, 6 M. & S. 121.

1829. }
May 8. } OXENDALE v. WETHERELL.

Contract—Part-performance.

Where a contract is made to sell and deliver a certain quantity of goods, and a smaller quantity be sent to the buyer, and received and retained by him; the seller may, at the expiration of the time agreed for the delivery, maintain an action to recover the value of the quantity which he has delivered, although he may be subject to an action at the suit of the buyer, for damages for breach of the original contract.

This was an action of assumpsit, for wheat and other corn, goods, wares and merchandizes, sold and delivered. The following appear to be the principal facts of the case, which was tried before Mr. Justice Bayley, at the Spring Assizes for the county of York, 1829.

The action was brought to recover the price of one hundred and thirty bushels of wheat, alleged to have been sold and delivered by the plaintiff to the defendant, at 8s. per bushel. On the part of the plain-

tiff, evidence was given to shew, that, on the 17th of September 1828, he had sold to the defendant all the old wheat which he had to spare, at 8s. per bushel; and that he had delivered to the defendant one hundred and thirty bushels. The defendant gave evidence to shew, that he had made an absolute contract for two hundred and fifty bushels, to be delivered within six weeks; that the price of corn at the time of the contract, was 8s. per bushel; and that it afterwards rose to 10s. On his part, it was insisted, that, the contract being entire, the plaintiff, not having delivered more than one hundred and thirty bushels, had not performed his part of the contract, and therefore could not recover for that quantity. It was contended by the other side, that the vendor having delivered, and the vendee having retained part, the contract was severed *pro tanto*, and that the plaintiff was entitled to recover the value. The learned Judge was of opinion, that, even if the contract was entire, as the defendant had not returned the one hundred and thirty bushels, and the time for completing the contract had expired before the action was brought, the plaintiff was entitled to recover the value of the one hundred and thirty bushels, which had been delivered to, and accepted by the defendant; but he desired the jury to say, whether the contract for two hundred and fifty bushels was entire, and that only one hundred and thirty bushels had been delivered; and they found that it was. A verdict was therefore taken for the plaintiff; and the defendant had liberty to move to enter a nonsuit, if the Court should be of opinion that the plaintiff was not entitled to recover, on the ground that he had not performed the contract; and now—

Mr. Brougham moved for a nonsuit. In the case of *Walker v. Dixon* (1), the plaintiff having contracted for the sale of one hundred sacks of flour, at 94s. 6d. per sack, delivered part, but refused to deliver the residue, the defendant being willing to receive and pay for the whole; Lord Ellenborough held, that the plaintiff could not recover for the part delivered; and nonsuited him.

(1) 2 Starkie, 281.

[*Mr. Justice Bayley*.—There was a case of *Waddington v. Oliver* (2), on this subject.—The Court there appeared to think, that, after the expiration of the time, the plaintiff might recover for what he had delivered.]

It became unnecessary for the Court to decide that point, as the action was brought before the time had expired. But the Court there expressly said, that the contract was entire.—The defendant might sustain an action against the plaintiff for his breach of contract; and, according to *Templer v. M'Lachlan* (3), and that class of cases, it seems doubtful, whether the party who himself breaks the contract can sue upon it. The declaration, in its present form, is the same as would be adopted if the plaintiff had fully performed his contract.

Lord Tenterden.—I think, in this case, no rule should be granted. With regard to the case of *Walker v. Dixon*, which has been cited to us as an authority in favour of the defendant, it appears by *Mr. Manning's Digest*, p. 389, that, in that case, the Court afterwards set aside the nonsuit.—If the rule, which has been contended for, were to prevail, it really must follow, that, if there had been a contract for 250 bushels of wheat, and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole. The defendant ought to pay for what he has had; and bring an action against the plaintiff for the non-performance of his contract in not delivering the whole.

Mr. Justice Bayley concurred.

Mr. Justice Parke.—I am of the same opinion.—The case which has been referred to, of *Waddington v. Oliver*, proceeds upon the known distinction, which I take to be this:—where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered; but,

if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered. Thus, if the contract is to deliver three articles, and the seller sends but one, the buyer may, if he please, refuse to receive it: but, if he receive it, he must pay for it, though the contract to deliver the three be not performed. For the breach of that contract he must resort to his action.

Mr. Justice Littledale concurred.

See further on the subject of entire contract—

Sinclair v. Bowles, 9 B. & C. 92; 7 Law Journ. K.B. 178.

Poulton v. Lattimore, 9 B. & C. 259; 7 Law Journ. K.B. 225.

1829. } WINKS AND ANOTHER, ASSIGNEES
May 2. } OF WHITE, A BANKRUPT, v.
 } HASSALL AND ANOTHER.

Bankrupt—Buyer and Seller—Lien.

Agreement by a trader for the purchase of two pipes of wine. They were lying in a bonded warehouse, in the names of two persons, who had given bond for the duties. It was a part of the agreement that the buyer should pay the duties. The seller gave to the buyer an order on the warehousemen to deliver the wine. There never was any actual delivery or transfer of the wine. The warehousemen, on the duties becoming payable, paid the duties, and were repaid by the seller, who thereupon wrote to the buyer, informing him that they had discharged the duties, and added the amount to the account, and requiring payment. The wines had now been removed to the warehouse of the warehousemen, who had thus given bond, and paid the duties. The buyer sold one of the pipes of wine; and it was delivered to his order by the warehousemen, who charged him warehouse rent from the time of the purchase.

The buyer afterwards became bankrupt; and, in an action of trover by his assignees against the warehousemen to recover the other pipe:—it was held, that they were not entitled to recover without payment of the debt, for which the seller, through the warehousemen, had a lien.

(2) 2 New Rep. 61.

(3) 2 Id. 136.

This was an action of trover for a pipe of wine.

Plea—Not guilty.

The case was tried before Lord Tenterden, at the London Sittings after Hilary term, when the following facts appeared in evidence:—

Stroud & Smith were wine-merchants in London; and, in December 1824, White purchased of them two pipes of port-wine, then lying in a bonded warehouse at Chester in the names of the defendants, who had given a bond. The traveller of Stroud & Smith at the time of the purchase, delivered to White the following order:—"Messrs. Hassall & Foulkes (the defendants), will you please deliver Mr. T. White, or his order, two pipes of port wine, *ex Wakefield*, marked [the marks described], free of all expenses of freight and bonding, for which will thank you to value on the house in London." It was agreed, that White should pay the duties, and get the wine out of bond. The wine was never transferred to White in the defendant's books. The duties became payable in 1827, and were paid by the defendants in discharge of their bond, and the money was afterwards repaid to them by Stroud & Smith. The wine was removed by the defendants to their own warehouse, after they had paid the duties. In November 1827, White resold one of the pipes, and it was delivered by the defendants to his order. He was charged with warehouse rent from the time of his purchase to the time of the delivery, which he paid. In June 1828, the following letter was addressed to him by Stroud: "Messrs. Hassall & Co. having written me early in last November, to request me to remit the amount of duties, as the wines had run out the time allowed under the bond; I immediately, for your accommodation, remitted the amount. I have therefore added it to the account furnished you." The letter concluded, by desiring payment. Stroud wrote to the defendants in July 1828, giving them orders not to deliver the pipe of wine still remaining in their custody without the amount of the duty being first paid to them. White afterwards became a bankrupt; and a commission was issued against him. The plaintiffs were duly chosen assignees under this commission, and demanded of the de-

fendants the pipe of wine in their custody; at the same time they tendered the amount of their charges for warehouse rent, &c. The defendants would not deliver the wine, unless the amount of the duty was likewise paid. A nonsuit was directed by the learned Judge, because he was of opinion that the plaintiffs had no right to the wine without paying the duty; but he reserved leave to the plaintiffs to move to enter a verdict in their favour.

Mr. Campbell accordingly moved.—The defendants held the wine as agents for White, and not for the vendor, from the time when the contract for the sale of the wine was made, and the order for delivery given. That they considered themselves as his agent, appears from their having charged him with warehouse rent from the date of the delivery order. The transfer was therefore complete, and no lien on the wine could be obtained by the vendor after that time.

[*Mr. Justice Bayley*.—Suppose White had, immediately after the purchase, demanded the wine—what must he have paid?]

The duty, certainly; for the defendants, having given bond, had a lien for the duty; but they afterwards paid the duty, which payment was reimbursed to them by Stroud & Smith. That payment, was however, a voluntary one, or, as it is said by Stroud, "for the accommodation of White," and it could not therefore confer a right of lien.

[*Lord Tenterden*.—It appeared that the wine was never transferred to the bankrupt in the books of the defendants.]

It is immaterial whether the warehouseman makes the transfer or not, provided a delivery order is given by the vendor. The warehouseman may, as soon as he knows of it, consider himself as agent for the purchaser, and charge him with warehouse rent, and the defendants did so in this instance; thus shewing, by their own act, that they so considered themselves as the agents of the purchaser.

Lord Tenterden.—The wine at the time of the sale was lying in a bonded warehouse; and, unless the duties had been paid by the vendor or the defendants, the bankrupt could never have obtained the wine without discharging them. It is said that the money was paid voluntarily for the

accommodation of the bankrupt. This is not the case.—The defendants were not strangers. They were under bond to pay the duties, and I think the repayment by Stroud to them, cannot be considered as a voluntary payment. That being so, and the payment being for the benefit of the bankrupt, and without which he never could have obtained the wine, I think that, in law and justice, the assignees were precluded from demanding the wine before they had repaid the money.

Mr. Justice Bayley.—I think this is a case in which the law and the justice are all against the plaintiffs. By the original contract, White was bound to pay the duty, and the delivery order did not entitle him to the possession of the wine until he had paid it. He never did pay; and the obligors to the crown were obliged to do so; and then called upon the vendors to repay, which they did. Without putting the case on the ground of lien, it seems clear that the assignees cannot claim the wine, neither they nor the bankrupt having paid that which he originally engaged to pay.

Mr. Justice Littledale.—I am of the same opinion. I think the delivery order did not entitle White to get possession of the wine, without paying the duties; and the charge of warehouse rent does not constitute such a delivery as to relieve the plaintiffs from the necessity of paying the duty to entitle them to a delivery of the wine.

Mr. Justice Parke.—It is clear, that, by the contract, the bankrupt was to pay a certain price for the wine, and the duty also. The duty was in substance an additional part of the price to be paid before the vendee could have possession. Stroud, therefore, is in the situation of an unpaid vendor. It is said, nevertheless, that he waived his right of lien by giving the delivery order; but I am clearly of opinion, that it had no such effect; it was never acted on, and, White proving insolvent, the vendor had a right to resort to the possession of the goods to secure himself. The other objection assumes that there has been a transfer of the goods. If there had been, this would have been a circumstance of great weight in favour of the plaintiffs; but it does not appear that White ever even required a transfer of the goods.

The case of *Bloxam v. Sanders* (1) shews, that the mere demand of warehouse rent did not make the possession of the warehouseman the possession of the bankrupt. It is merely a fact to be taken into consideration with the other facts of the case. The nonsuit was therefore right.

Rule refused.

1829. }
May 8. } PAGE V. NEWMAN.

Interest.

Interest not allowed upon money secured by a written instrument, unless it be expressly reserved on the face of the instrument, or necessarily implied from usage, in respect of instruments of that nature.

Not allowed upon a promissory note made in France, payable in one month after the return of the maker to England.

This case, in its earlier stages, will be found in 8 B. & C. 489, 5 Law Journ. K.B. 263, and 6 Law Journ. K.B. 1.—It was an action brought to recover the sum of 135*l.* due upon a paper in the following words:

“Guerèt, April 18th, 1814.

“In one month after my arrival in England, I promise to pay Captain W. E. Page, or order, the sum of 135*l.* as sterling for value received.”

In the first count of the declaration, the instrument was treated as an agreement; and in the second, as a promissory note. There was also a count upon an account stated. The defendants pleaded, first, the general issue; and, secondly, the Statute of Limitations. To the last plea, the plaintiff replied, that the plaintiff had commenced this suit in 1819, by latitat, and continued it by a bill of Middlesex, to which there was a demurrer and judgment for the plaintiff. The following appeared to be the principal facts of the case, when tried before Lord Tenterden, at the Middlesex Sittings after last term.

In the year 1814, the plaintiff and the

(1) 4 B. & C. 941; 7 D. & R. 396.

ticular one, containing the libel in question. The 11th section of the statute says, that the plaintiff need not prove that the newspaper, to which the trial relates, was purchased at any house, shop, or office, belonging to, or occupied by, the defendant or his servant, or where he carries on his business of printing or publishing the paper, or where the same is usually sold; therefore, the necessity of that particular description of proof of publication is dispensed with; and, by sect. 17, another description of proof is substituted. That section requires every printer or publisher of a paper to deliver to the Commissioners of Stamps one of the papers so published, signed by the printer or publisher in his handwriting, with his name and place of abode; and the same is to be kept by the Commissioners in their office; and, upon application by any person, in order that the same may be produced in evidence, the Commissioners are to cause the same to be produced in court. As far as practice can be relied on to shew what has been generally understood to be the meaning of this section, it may be observed, that, since the statute, the practice in all proceedings against the proprietors of newspapers, has been to produce the newspaper, signed by the defendant, and lodged at the Stamp-office. This was done in *Rez v. Hart and another* (1). In *Rez v. Amphitt* (2), the delivery to the officer of the stamps, was held to be sufficient evidence of a publication; because he would have an opportunity of reading the libel himself. But this reason appears to admit the necessity of shewing *some* publication by the defendant.

Lord Tenterden.—I think the 11th and 17th sections are perfectly distinct from each other; the 17th section furnishes means of producing a newspaper, which the party may not otherwise have the means of producing, but it does not make the copy of a newspaper, which may be so produced, the only evidence of it. The 11th section provides, that it shall not be necessary, after any such affidavit, &c. shall have been produced in evidence against the person who signed and made such affidavit, or is therein

named; and after a newspaper shall have been produced in evidence, intitled in the same manner as the newspaper or other paper mentioned in such affidavit or copy is intitled, for the plaintiff or prosecutor to prove that the newspaper was purchased at any house, shop, or office, belonging to or occupied by the defendant, or where he usually carries on the business of printing or publishing such paper, or where the same is usually sold:—a purchase of a newspaper at the house, shop, or office of the defendant, *would*, in ordinary cases, be evidence of publication. Here, the plaintiff or prosecutor is, by the express terms of the statute, exempted from bringing such evidence, after having produced the affidavit lodged at the Stamp-office, and a newspaper corresponding in certain respects with that mentioned in the affidavit. The evidence of publication was therefore sufficient.

Mr. Justice Bayley.—I think the fair and clear meaning of the words is, that if a paper corresponding with the paper described in the affidavit, is produced, the party producing it, is to be in the same situation, as if he had proved that the paper had been bought at the house, shop, or place of business of the defendant. The evidence is only *prima facie*; and proof of fraud, or of inadvertence, would rebut it.

Mr. Justice Littledale concurred.

Rule refused.



1829. } ROTHSCHILD v. CORNEY AND
May 9. } OTHERS.

Bills of Exchange—Banker's Cheque—Bonâ fide Holder.

A person who, bonâ fide, takes in payment, or otherwise deals with a banker's cheque, after the day on which it is dated, is not thereby bound (by analogy to bills of exchange,) to rest upon the title of the person from whom he took it.

The question in such a case is, whether the person has acted bonâ fide, and with due caution, in taking the cheque; and the date is a circumstance for the consideration of the jury upon that question.

(1) 10 East, 94.
(2) 4 B. & C. 35; s.c. 6 D. & R. 125. (See the cases collected in Chitty's Statutes, p. 299.)

This was an action of *assumpsit* for money had and received to the plaintiff's use.

Plea—Non *assumpsit*.

On the trial, before Lord Chief Justice Tenterden, at the London Sittings after Hilary term, the following appeared to be the principal facts :—

The action was brought to recover the sum of 1330*l.* being the amount of two cheques drawn by the plaintiff on his bankers, Masterman & Co., which had been obtained from him, and afterwards passed to the defendants under the following circumstances :—

The plaintiff was agent for paying the dividends on the Prussian loan contracted in 1818. The securities given by the Prussian government were bonds, to which a number of dividend warrants, called coupons, were annexed. As the dividends from time to time become due, the holder of bonds delivers the coupons then due, together with a list, and his own name and address, to the plaintiff. The coupons and lists are then compared, and, if they be correct, the coupons are cancelled, and a cheque drawn by the plaintiff for the amount. The plaintiff was also agent for a Prussian Company, called the Sechandling Company, who, in January, transmitted to him coupons to the amount of 15,371*l.* to be received by him on their account. These coupons were compared with the list by one Burne, a clerk of the plaintiff, who then drew a cheque for the amount, which was signed by the plaintiff and sent to his bankers, who placed it to the credit of the Sechandling Company's account, and debited the plaintiff's private account with it. Burne, instead of destroying all the coupons, fraudulently preserved a part, amounting to 1330*l.*, and procured two lists to be made out, one in names (which, for anything that appeared, were fictitious), amounting to 792*l.* 5*s.*; the other in other names (to which the same observation is applicable), amounting to 534*l.* 15*s.* Burne then pretended to compare those lists with the coupons fraudulently preserved by him, and, on the 19th of January, drew two cheques for the amount, which, apparently, in the ordinary course, were offered for signature to and were signed by the plaintiff; and the words "and Co." were written

across, to indicate that they must be presented to Masterman & Co. through some banking-house. On the 24th of January one Blayney, a wine-merchant and broker, carried these cheques to the defendants, who were wine-merchants, and told them, that payment could only be obtained by a banker; and that, as he did not keep an account at any banker's, he wished them to give him cash for the cheques, and to get them presented by their bankers, Remington & Co. One of the defendants, who knew Blayney personally, but was not acquainted with his residence, consented to do so, feeling confident that cheques drawn by the plaintiff would be paid. He, accordingly, gave Blayney money for the cheques, and handed them to Remington & Co., who, on the same day, presented them and obtained payment from Masterman & Co. Blayney received the cheques from his son, and at his request procured cash for them, with which the son afterwards absconded. Evidence was offered to shew the respectable character borne by the defendants. Upon these facts, it was admitted, that the defendants had acted *bonâ fide*, but it was contended by the plaintiff that they acted without due caution in taking the cheques, and that, as they were six days old when handed to them, they must be considered as overdue, and, therefore, that the defendants could have no better title than Blayney, from whom they were received. Lord Tenterden left it to the jury to find for the plaintiff, if they thought that the circumstances of the case were such as ought to have excited the suspicions of prudent men, and that the defendants, under the circumstances, had not acted with reasonable caution; but otherwise, to find for the defendants. The jury found for the defendants.

Sir James Scarlett now moved for a new trial on three points: first, that the jury ought not have found that the defendants used due caution; secondly, that the Lord Chief Justice ought to have told them that the cheques were overdue, and that, consequently, the defendants took them at their peril, and could have no better claim than Blayney; and, thirdly, that evidence of the good character of the defendants ought not to have been received. But, upon Lord Tenterden observing, that such evi-

ticular one, containing the libel in question. The 11th section of the statute says, that the plaintiff need not prove that the newspaper, to which the trial relates, was purchased at any house, shop, or office, belonging to, or occupied by, the defendant or his servant, or where he carries on his business of printing or publishing the paper, or where the same is usually sold; therefore, the necessity of that particular description of proof of publication is dispensed with; and, by sect. 17, another description of proof is substituted. That section requires every printer or publisher of a paper to deliver to the Commissioners of Stamps one of the papers so published, signed by the printer or publisher in his handwriting, with his name and place of abode; and the same is to be kept by the Commissioners in their office; and, upon application by any person, in order that the same may be produced in evidence, the Commissioners are to cause the same to be produced in court. As far as practice can be relied on to shew what has been generally understood to be the meaning of this section, it may be observed, that, since the statute, the practice in all proceedings against the proprietors of newspapers, has been to produce the newspaper, signed by the defendant, and lodged at the Stamp-office. This was done in *Rez v. Hart and another* (1). In *Rez v. Amphitt* (2), the delivery to the officer of the stamps, was held to be sufficient evidence of a publication; because he would have an opportunity of reading the libel himself. But this reason appears to admit the necessity of shewing some publication by the defendant.

Lord Tenterden.—I think the 11th and 17th sections are perfectly distinct from each other; the 17th section furnishes means of producing a newspaper, which the party may not otherwise have the means of producing, but it does not make the copy of a newspaper, which may be so produced, the only evidence of it. The 11th section provides, that it shall not be necessary, after any such affidavit, &c. shall have been produced in evidence against the person who signed and made such affidavit, or is therein

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Mr. Justice Bayley.—I think the fair and clear meaning of the words is, that if a paper corresponding with the paper described in the affidavit, is produced, the party producing it, is to be in the same situation, as if he had proved that the paper had been bought at the house, shop, or place of business of the defendant. The evidence is only *prima facie*; and proof of fraud, or of inadvertence, would rebut it.

Mr. Justice Littledale concurred.

Rule refused.



1829. } ROTHSCHILD v. CORNEY AND
May 9. } OTHERS.

Bills of Exchange—Banker's Cheque—Bonâ fide Holder.

A person who, bonâ fide, takes in payment, or otherwise deals with a banker's cheque, after the day on which it is dated, is not thereby bound (by analogy to bills of exchange,) to rest upon the title of the person from whom he took it.

The question in such a case is, whether the person has acted bonâ fide, and with due caution, in taking the cheque; and the date is a circumstance for the consideration of the jury upon that question.

(1) 10 East, 94.

(2) 4 B. & C. 35; s.c. 6 D. & R. 125. (See the cases collected in Chitty's Statutes, p. 299.)

This was an action of assumpsit for money had and received to the plaintiff's use.

Plea—Non assumpsit.

On the trial, before Lord Chief Justice Tenterden, at the London Sittings after Hilary term, the following appeared to be the principal facts :—

The action was brought to recover the sum of 1330*l.* being the amount of two cheques drawn by the plaintiff on his bankers, Masterman & Co., which had been obtained from him, and afterwards passed to the defendants under the following circumstances :—

The plaintiff was agent for paying the dividends on the Prussian loan contracted in 1818. The securities given by the Prussian government were bonds, to which a number of dividend warrants, called coupons, were annexed. As the dividends from time to time become due, the holder of bonds delivers the coupons then due, together with a list, and his own name and address, to the plaintiff. The coupons and lists are then compared, and, if they be correct, the coupons are cancelled, and a cheque drawn by the plaintiff for the amount. The plaintiff was also agent for a Prussian Company, called the Sechandling Company, who, in January, transmitted to him coupons to the amount of 15,371*l.* to be received by him on their account. These coupons were compared with the list by one Burne, a clerk of the plaintiff, who then drew a cheque for the amount, which was signed by the plaintiff and sent to his bankers, who placed it to the credit of the Sechandling Company's account, and debited the plaintiff's private account with it. Burne, instead of destroying all the coupons, fraudulently preserved a part, amounting to 1330*l.*, and procured two lists to be made out, one in names (which, for anything that appeared, were fictitious), amounting to 792*l.* 5*s.*; the other in other names (to which the same observation is applicable), amounting to 534*l.* 15*s.* Burne then pretended to compare those lists with the coupons fraudulently preserved by him, and, on the 19th of January, drew two cheques for the amount, which, apparently, in the ordinary course, were offered for signature to and were signed by the plaintiff; and the words "and Co." were written

across, to indicate that they must be presented to Masterman & Co. through some banking-house. On the 24th of January one Blayney, a wine-merchant and broker, carried these cheques to the defendants, who were wine-merchants, and told them, that payment could only be obtained by a banker; and that, as he did not keep an account at any banker's, he wished them to give him cash for the cheques, and to get them presented by their bankers, Remington & Co. One of the defendants, who knew Blayney personally, but was not acquainted with his residence, consented to do so, feeling confident that cheques drawn by the plaintiff would be paid. He, accordingly, gave Blayney money for the cheques, and handed them to Remington & Co., who, on the same day, presented them and obtained payment from Masterman & Co. Blayney received the cheques from his son, and at his request procured cash for them, with which the son afterwards absconded. Evidence was offered to shew the respectable character borne by the defendants. Upon these facts, it was admitted, that the defendants had acted *bona fide*, but it was contended by the plaintiff that they acted without due caution in taking the cheques, and that, as they were six days old when handed to them, they must be considered as overdue, and, therefore, that the defendants could have no better title than Blayney, from whom they were received. Lord Tenterden left it to the jury to find for the plaintiff, if they thought that the circumstances of the case were such as ought to have excited the suspicions of prudent men, and that the defendants, under the circumstances, had not acted with reasonable caution; but otherwise, to find for the defendants. The jury found for the defendants.

Sir James Scarlett now moved for a new trial on three points: first, that the jury ought not have found that the defendants used due caution; secondly, that the Lord Chief Justice ought to have told them that the cheques were overdue, and that, consequently, the defendants took them at their peril, and could have no better claim than Blayney; and, thirdly, that evidence of the good character of the defendants ought not to have been received. But, upon Lord Tenterden observing, that such evi-

dence had not been objected to on the trial, the point was not pressed. The argument urged in support of the first point grew out of the evidence. In support of the second, Sir James relied upon the case of *Down v. Halling*(1), contending, that a cheque must, for this purpose, be considered as a bill of exchange, and be governed by the same rules.

Lord Tenterden.—I am of opinion, that we ought not to grant a rule. I think it cannot be laid down as matter of law, that a party taking a cheque after any fixed time from its date, does so at his peril; and, therefore, the mere fact of the defendants having taken the cheques six days after they bore date, from a person who had not given value for them, did not entitle the plaintiff to a verdict. It was, indeed, a circumstance to be taken into consideration by the jury, in determining the question, whether the defendants had taken the cheques under circumstances which ought to have excited the suspicions of prudent men. If we were to send the case to a new trial, the same question must be presented to the jury; and, as we cannot say that their former verdict was wrong, I think we ought not to disturb it.

Mr. Justice Bayley.—I cannot say that the right question was not left to the jury; nor am I quite prepared to say that their decision was wrong, although I should have been better satisfied, had it been the other way.

Mr. Justice Littledale.—I am of opinion, that the direction given the jury was right; and I cannot go so far as to say, that they did wrong in finding for the defendants. It has been contended, as matter of law, that a party taking a cheque overdue, has it with the same title, and no other, as the person from whom he receives it. But, although the rule of law certainly is so, with respect to bills of exchange and promissory notes, I know of no authority laying down, that it is applicable to cheques.

Mr. Justice Parke was counsel in the cause while he was at the bar, and, therefore, gave no opinion.

Rule refused.

(1) 4 B. & C. 330; 6 D. & R. 455; 3 Law Journ. K.B. 234.

1829. }
May 13. } CHILD v. AFFLECK AND UX.

Libel—Privileged Communication—Servant—Evidence.

1. *Where, in answer to an application to a former master for the character of a servant, he writes a letter to the applicant, giving an unfavourable account of the servant during his service, and also stating matter injurious to his character in respect of his conduct out of that service at the time the letter is written, the mere circumstance of the letter going thus far beyond the matter of inquiry, will not deprive it of the protection given to a privileged communication.*

But, if it be shewn that the facts, which are thus stated out of the matter of immediate inquiry, be untrue,—that circumstance may be evidence of malice to go to the jury. The onus of proof in such case appears to lie upon the servant.

2. *Nor, in the case of the writing such a letter, would the circumstance of the master going to persons who had recommended the servant to him, and making statements similar to those contained in the letter, be of itself sufficient evidence of malice to deprive the letter of the protection given to a privileged communication.*

This was an action on the case for a libel.

Plea—Not guilty.

The cause was tried, before Lord Chief Justice Tenterden, at the Middlesex Sitings after Hilary term, when the following appeared to be the principal facts:—

The plaintiff had been in the service of the defendants. Mrs. Affleck, before she received her into her service, obtained a good character of her from two persons. The plaintiff remained with Mrs. Affleck but a few months, and was afterwards hired by another person, who, on inquiring her character from Mrs. Affleck, received the following answer, which was the alleged libel:

"Mrs. A.'s compliments to Mrs. S., and is sorry that, in reply to her inquiries respecting E. Child, nothing can be in justice said in her favour. She lived with Mrs. A. but a few weeks, in which short time she conducted herself disgracefully, and Mrs. A. is concerned to add, that she has, since her dismissal, been credibly informed,

she has been and now is, a prostitute, at Bury."

The plaintiff was discharged from her situation in consequence of this letter. After the writing of the letter, Mrs. Affleck went to the persons by whom the plaintiff had been recommended to her, and made to them a statement nearly similar. It was contended by the defendants, that the plaintiff must be nonsuited upon the evidence; there being no proof of malice. It was replied, that, Mrs. Affleck's statement of what the plaintiff's conduct had been *after* she had left her service, was not a privileged communication; and that, at least, that part of the letter, and the statement that she *voluntarily* made to other persons, and not in answer to any inquiries, were evidence of malice. Lord Tenterden was of opinion, that the latter part of the letter was privileged; and that the other communications, being made to persons who had recommended the plaintiff, were not evidence of malice; and he directed a nonsuit. A new trial was moved for by—

Mr. F. Kelly.—It cannot be successfully contended, that the latter part of Mrs. Affleck's letter was a privileged communication. The inquiry was made, and could properly be made only as to her conduct while in the service of Mrs. Affleck. There was no inquiry as to her subsequent conduct; and the statement, even supposing it to be without malice, was made without just cause, and therefore the plaintiff was entitled to a verdict. This is established by the case of *Blackburn v. Blackburn* (1), and the case for that purpose should, therefore, have gone to the jury. Supposing, however, that it be conceded, that that part of the letter might be considered as a privileged communication if it were written without malice, yet it was an unsolicited statement, and therefore might, in the opinion of the jury, satisfy them that it was written in malice. And, if they should be of that opinion, then, according to the case of *Rogers v. Clifton* (2), the plaintiff would be entitled to recover. If a bad character of a servant be given maliciously, the communication is not privileged: *Edmondson v*

Stevenson (3), and the party must be bound to the truth of his statement. It must be obvious that the plaintiff could not contradict the particular fact of which Mrs. Affleck said she had been "credibly informed," for she did not give the name of her informant. The statements to third persons, made voluntarily and not in answer to any inquiries, proved, however, that the object of Mrs. Affleck was to injure the plaintiff: this, therefore, was sufficient evidence to shew, that the letter was malicious; and, considering that there were all these facts in the case, it should not have been withdrawn from the consideration of the jury.

Mr. Justice Bayley.—It appears to me that the letter complained of was a privileged communication, and that the nonsuit was right. In the case of *Rogers v. Clifton*, evidence of the falsehood of the imputation was given, which, independently of the contents of the alleged libel, raised the question whether they had been written *bonâ fide*. Here there was no evidence *dehors* the letter; none to shew the good conduct of the plaintiff during the time she was in the service of Mrs. Affleck; or of what her conduct was after she had left that service. It has been contended, that the letter should not have contained the statement of the alleged misconduct after the plaintiff had left the defendant's service; and that Mrs. Affleck should not have stated what she had been informed, unless she gave up the name of her informant. But I think that she would have stopped short of her duty in withholding that information, and that she was not bound to disclose the name of the persons from whom she received it. So much for the letter. But reliance was placed upon the two parol communications made by Mrs. Affleck as evidence of malice. But it appeared in evidence, that both the persons to whom they were made had recommended the plaintiff to her service; and it was, therefore, very natural, and by no means malicious, in Mrs. Affleck to inform them of the plaintiff's misconduct. On the contrary, I think she only performed her duty.

(1) 4 Bing. 395; 1 M. & P. 33; 6 Law Journ. S. P. 13.

(2) 3 Bos. & Pul. 567.

Vol. VII. K.B.

(3) Bull. N.P. 8.

Mr. Justice Littledale.—In my opinion, there was not any evidence of malice that ought to have been left to the jury. It is admitted, that an answer to the inquiries made would not have been the subject-matter of an action; but, it is contended, that the latter part of the letter is evidence of express malice. Mrs. Affleck certainly went beyond the bounds of what she knew; but, I think, that if she had received such information, she was bound to state it, and therefore malice is not to be inferred from the letter itself. With regard to the other communications, the question is, whether they prove that Mrs. Affleck acted maliciously in writing the letter: I am of opinion that they do not; for the persons to whom they were made had recommended the plaintiff, and therefore a statement to them of her misconduct cannot be deemed an officious interference. If, indeed, the plaintiff had distinctly proved the falsehood of the statement, the case would have assumed a different shape:—if, for instance, she had shewn that her conduct at the time when the letter was written was unexceptionable, there might be evidence from which the jury would be justified in inferring that Mrs. Affleck had not been informed as she said she had; but, according to the case as it was proved, the nonsuit was right.

Mr. Justice Parke.—I think the rule laid down by Lord Mansfield, in *Edmondson v. Stevenson*, has been followed ever since. It is, that in an action for defamation in giving a character of a servant, "the gist of it must be malice, which is not implied from the occasion of speaking, but should be directly proved." The question then is, whether the plaintiff in this case adduced evidence which, if laid before a jury, could properly lead them to find express malice. That does not appear upon the face of the letter. *Prima facie* it is fair; and undoubtedly a person asked as to the character of a servant, may communicate all that is stated in that letter. Independently of the letter, there was no evidence except of the two persons that had recommended the plaintiff. The communication to them, therefore, was not officious, and Mrs. Affleck was justified in making it. In *Rogers v. Clifton*, evidence of the good conduct of the servant was

given, and the communication also appeared to be officious. There was, therefore, evidence of malice deduced from the falsehood. In *Blackburn v. Blackburn*, the occasion of writing the alleged libel did not distinctly appear; *prima facie*, it was not a privileged communication; it was, therefore, properly left to the jury to say, whether it was confidential and privileged, or not; and they found that it was not. Here, the letter was, undoubtedly, *prima facie* privileged; the plaintiff, therefore, was bound to prove express malice, in order to take away the privilege.

Lord Tenterden.—It is sufficient for me to say, that I entirely concur in what has fallen from the Court, and that the nonsuit ought not to be disturbed.

Rule refused.

[On the same subject, see also *Pattison v. Jones*, 8 B. & C. 578; 7 Law Journ. K.B. 26.]

1829. } BRAITHWAITE AND OTHERS v.
May 13. } SCHOFIELD AND OTHERS.

Joint Stock Company.

The members of a building society held liable for work done in pursuance of a resolution at which they were present, and in which they concurred, although they had no communication with the plaintiffs, who did the work, and although they might be presumed to have an interest in the land upon which the houses were built.

This was an action of assumpsit for work and labour and materials.

Plea—Non assumpsit.

The case was tried, before Mr. Justice Bayley, at the Spring Assizes for York, in the present year. Upon the trial, it appeared that this action was brought to recover the amount of a bill for plasterer's work done by the plaintiff, in houses belonging to a society called "The Prosperous Building Society." It did not appear in evidence that the defendants gave the order for this work; or that they were known to be members of the society; or that they were known to the plaintiffs: neither was it shewn that they had any interest in the

houses, or in the land upon which they were built. But it was in evidence that they had contributed to the funds of the society, and had been present at, and had concurred in, a resolution that the houses upon which the work in question had been done, should be built. The learned Judge thought, that, upon these facts, the plaintiffs were entitled to a verdict, but reserved leave for the defendants to move to enter a nonsuit.

Mr. Blackburne moved for a nonsuit, and relied on the case of *Vice v. Lady Anson* (1), which, he contended, was in point. There the defendant had contributed to the funds of a mining company, and had represented herself as a shareholder; but it did not appear that she had been a party to the order, or that the plaintiffs had given credit to her:—it was held, that they could not recover from her the value of goods furnished for carrying on the mining concern without proving that she actually had an interest in the mine. In this case also, the plaintiffs did not give credit to the defendants, nor was the work done by the order of the defendants, or were they proved to have had an interest in the houses. But if the Court should think that the question there turned upon the fact, that the subject matter was real property, the evidence shews the same degree of interest in houses and lands as appeared to be in the defendant in that case.

Lord Tenterden.—I think the present case is very distinguishable from that which has been cited. There, the plaintiffs could have no right to recover against the defendant, except in respect of her having an interest in the mine, and they failed in the attempt to prove that interest. Here, the plaintiffs had a right to be paid by those who employed them; and the defendants, having joined in a resolution to build the houses, authorized the employment of the workmen. That circumstance, without reference to the title to the land upon which the houses were built, is sufficient to make the defendants liable to this action.

Mr. Justice Littledale.—The case of *Vice*

v. Lady Anson is very different from the present. The defendants in this case gave an express authority for the work to be done upon their credit.

Rule refused.

1829. }
May 16. } THE KING *v.* TIZZAND.

Corporation—Incompatibility—Town Clerk and Alderman.

1. *Whether the offices of town-clerk and alderman are of themselves incompatible, so that they can, under no circumstances, be held by the same person—quære.*

2. *But where the duties of the office of town clerk require that he should attend the corporate meetings, and take minutes of their proceedings, and by the charter he was removable at the pleasure of the corporation,—Held, that this office was incompatible with that of alderman, inasmuch as the town-clerk might, in his character of alderman, have to vote upon a question affecting his own conduct, or touching the retaining of his own situation as town-clerk.*

3. *The fact that the town-clerk had a yearly salary which might be increased, diminished, or taken away, by the corporation, was held, for the same reason, to render the office of town-clerk incompatible with that of alderman.*

4. *The circumstance that, by the charter, the number of aldermen was indefinite, held not to answer the above objections.*

This was an information in the nature of a *quo warranto* for usurping the office of alderman of the borough of Weymouth, in the county of Dorset. The defendant (among other pleas) pleaded, that the late king, by charter, granted, that, in the borough, there should be one mayor, aldermen (not defined in number), two bailiffs, and twenty-four chief burgesses, and that every person having served the office of mayor should become an alderman for life; that the defendant in 1804 was duly appointed to, and served the office of mayor, and so became an alderman. To this there was a replication, that, by the said charter, it was granted that the mayor, aldermen, bailiffs, and chief burgesses, might make bye-laws, and that they should have a recorder, and that the mayor, recorder, and bailiffs, or any two or more of them, of whom the mayor or recorder should be one, should hold sessions; and further, that the mayor, aldermen, bailiffs, bur-

(1) 7 B. & C. 409; 1 M. & R. 113; 6 Law Journ. K.B. 24.

gesses, and commonalty, should have, within the same borough, one discreet and fit man, who should be and be named the common clerk of the borough aforesaid, to continue in the same office during the pleasure of the mayor, aldermen, and bailiffs of the borough; and that afterwards, and after the defendant became an alderman, the office of common clerk became vacant, and the defendant, so being an alderman, was by the then mayor, aldermen, and bailiffs, nominated, elected, and appointed, for the common clerk of the borough, to continue in the same during the pleasure of the mayor, aldermen, and bailiffs; that the defendant took the oaths and became and was common clerk, wherefore, &c. (concluding, as a legal inference, that the former office was vacated by the acceptance of the latter). There were two other replications, in substance the same, but adding certain facts relative to the office of common clerk (which appear in the argument), and thence concluding, that, as the two offices were incompatible, that of alderman was vacated; and there was a fourth, which, after stating the appointment of the defendant to the office of common clerk, and his acceptance of the office, alleged, that, at the time when the defendant was so elected, and took upon himself the said office, a yearly salary of 10*l.* was payable and paid by the mayor, aldermen, bailiffs, burgesses, and commonalty, to the common clerk for the time being, subject to be increased, diminished, or withdrawn altogether, by the mayor, aldermen, and bailiffs, at their pleasure; and that the offices of alderman and town-clerk being, by reason of the premises, incompatible with each other, the defendant thereby then and there resigned and vacated his office of alderman. The fifth replication alleged, that it was the duty of the common clerk to attend and be present as such common clerk at all corporate meetings of the mayor, aldermen, bailiffs, burgesses, and commonalty, and, under their inspection and direction, to draw up in their books, minutes of entries of their resolutions and proceedings; and then averred, that the offices were incompatible, &c. as before.

To these there was a demurrer and a joinder in demurrer.

Mr. Follett appeared, for the defendant, in support of the demurrer. The offices of alderman and common clerk are stated to be incompatible on three grounds:—first, that the aldermen vote at the election of the common clerk; secondly, that when the defendant was appointed, there was a salary annexed to the office, which might be varied in amount, or withdrawn, at the pleasure of the mayor, aldermen, and bailiffs; thirdly, that the clerk must be in attendance at corporate meetings, and take minutes of the business transacted. To prove that the two offices are incompatible with each other, it must be shewn, that the duties to be performed by the person holding one office are inconsistent with the duties to be performed by the person holding the other; it should also be shewn, that the duties are of a public nature, so that the public would sustain an injury by their being improperly discharged. Unless this be done, the Court will not interfere. For instance, a ministerial and a judicial office cannot be held by the same person in the same court; nor can the same person discharge the duties of expending public money and of auditing his own accounts. But there is not any case which decides that a man may not hold two offices, merely because, by virtue of the one, he has a voice in the election to the other: nor merely because, in the one capacity, he may have a voice in fixing the remuneration that he is to receive in the other. A man may vote in his own favour at an election of members of parliament, and at elections to most parish offices. So, he may present himself to a church. In this case, the number of aldermen is indefinite; consequently, the influence of one in fixing the salary of the common clerk must be very trifling, and that is not a public duty. There can no objection arise on account of the offices being judicial and ministerial, for the aldermen are not justices; nor can there be any reasonable objection to one member of any body being employed to take minutes of their proceedings. *In Com. Dig. "Franchise,"* (F. 27,) upon which the other side will probably rely, it is said, that the office of sworn clerk is void if he be made an alderman; and *Dyer*, 332, *b.* is cited. That, however, is not a principal case; but one mentioned in the mar-

gin, where a town-clerk had been elected alderman with a view to the turning him out of the former place, the offices being incompatible; and he was restored to it by the Court of King's Bench; but the respective duties of the two offices are not mentioned. *The King v. Pateman* (1) more nearly resembles this case; but there the aldermen audited the town-clerk's accounts, and they were judicial officers; the town-clerk acted under them; and there Lord Kenyon said, "I do not think that the offices of alderman and town-clerk are necessarily incompatible; for, in some corporations" (as in the present), "the aldermen are not judicial officers;" also, in *Milward v. Thatcher* (2), of the two offices held by the same person, one was judicial, the other ministerial; and for these reasons expressly were the offices held to be incompatible.

Mr. Campbell (with whom were *Mr. R. Bayley* and *Mr. Barston*), contra, was stopped by the Court.

Lord Tenterden.—I am of opinion, that judgment must be given for the Crown. The fifth replication shews, that the common clerk has to attend corporate meetings and take minutes of their proceedings. If that be not done faithfully, he may be removed from his office, and upon that question he would have a vote in his character of alderman. Thus, then, he would fill the two incompatible situations of master and servant. That replication, therefore, is a good answer to the defendant's plea. Again, the fourth replication alleges, that the common clerk has a yearly salary, which may be varied in amount, or altogether discontinued, at the pleasure of the mayor, aldermen, and bailiffs. The defendant, as an alderman, would have to vote upon that question, which duty, I think, he is not competent to perform, being also the party to receive the salary. That replication, therefore, as well as the fifth, is a good answer to the plea.

Mr. Justice Bayley.—I think that the two offices are incompatible where the holder cannot, in every instance, discharge (without any improper bias upon his mind) the duties of each. Now, in the two ques-

tions of amotion and salary, the town-clerk cannot, for the reasons given by my Lord, be competent to discharge the duty of an alderman. The acceptance of the second office, therefore, vacated the first.

Mr. Justice Littledale.—I entirely concur, for the reasons which have been given; but I should also add, that I entertain great doubts whether the holding of two offices by the same person is ever contemplated in the charters granted to corporations.

Judgment for the Crown.

1829. }
May 19. } THE KING v. SALWAY.

Corporation—Charter—Residence.

1. A charter of incorporation directed the election of common councilmen to be made out of the burgesses and inhabitants:—Held, that a person who was a burgess, but not also an inhabitant, was not well elected.

Held also, that the meaning of the charter was too clear to admit of evidence of usage, to give it a contrary interpretation.

2. A charter of restoration, reciting previous charters and a surrender, granted and restored to an immemorial corporation, all elections, nominations, and appointments, which they had before the surrender, by reason or pretence of any charters, or by any other lawful manner, right, or title:—Held, that this did not sanction a practice to elect out of burgesses not inhabitants; the charter, to which the pretence was referred, directing an election out of burgesses and inhabitants.

This was an information, in the nature of a *quo warranto*, for usurping the office of common councilman of the town and borough of Ludlow. The defendant pleaded several pleas:—first, that Queen Elizabeth, by her charter in the 88th year of her reign, granted and ordained, that thenceforth there might and should be within the town and borough of Ludlow, from time to time, thirty-seven of the more discreet and honest burgesses and inhabitants of the town and borough, who should be and be nominated, the common council of the town and borough; of which thirty-seven, twelve of the most honest and discreet should be nominated and reputed aldermen or principal burgesses: of which same twelve aldermen or principal burgesses and inhabitants, one

(1) 2 Term Rep. 777.

(2) Id. 81.

should yearly be elected to be chief bailiff; and of which thirty-seven, the remaining twenty-five, together with the aforesaid twelve, should together be and be called, the common council of the town and borough; of which same twenty-five, one should yearly be elected to be second bailiff; and after thereby assigning, nominating, constituting, and making the persons therein named and specified, to be the first twelve aldermen or principal counsellors of the town and borough aforesaid, and other persons therein also named and specified, to be the first twenty-five of the common council; which same twenty-five, together with the aforesaid twelve aldermen, her Majesty thereby declared should be and be called, the common council of the town and borough; and after declaring her will to be, that the same twelve aldermen should be the principal and more worthy of the same council, her said Majesty willed and granted, that whenever it should happen that the aforesaid twelve aldermen or principal counsellors so as aforesaid nominated, or any of them, or the aforesaid twenty-five common councillors so as aforesaid nominated, or any of them, should die, or from their offices aforesaid, for ill government, should be removed, then, and so often it might be lawful for the residue of the said twelve and twenty-five, being the common council, or the major part of them, to elect, nominate, and prefer one or more other or others of the said number of the twenty-five burgesses and inhabitants of the town and borough, for the time being, in the place or places of any person or persons of the said number of twelve; and also one or more other or others of the burgesses and inhabitants of the town and borough aforesaid, in the place or places of any person or persons of the number of the aforesaid twenty-five, so happening to die or be removed. The plea then averred, that the charter was accepted, and that the office of one of the twenty-five common councilmen was vacant; and defendant, then and there being one of the burgesses (not saying "and inhabitants") of the town and borough aforesaid, was duly elected to it.

The second plea stated the borough to be immemorial, and set out an immemorial custom in the borough. The custom, as set out, appeared to be the same as that set out in the first plea, except that it spoke only of

burgesses, not mentioning the word "inhabitants" in any part of the plea. It then justified under an election of the defendant as one of the burgesses.

The third plea stated, that the town and borough of Ludlow was an ancient town and borough, and that, for three hundred years and more, the burgesses of the said town and borough have been a body corporate, by the name of the bailiffs, burgesses, and commonalty of the town and borough of Ludlow, and that, for all the time in the information mentioned, there had been, and ought to have been, and still ought to be, twelve aldermen or principal burgesses, and twenty-five common councilmen of the said town and borough, &c.; and that heretofore, and whilst the burgesses of the said town and borough were such body politic as aforesaid, to wit, on &c. in the fourth year of the reign of King William and Queen Mary, their Majesties, by letters patent, (after reciting a surrender of all their franchises, by the corporation, in the reign of Charles the Second, and reciting also, that a charter had been granted by James the Second,) granted, restored, and released to the burgesses and inhabitants of Ludlow aforesaid, all and singular the liberties, privileges, powers and immunities, franchises, &c. so surrendered, in as ample manner and form as the said bailiffs, burgesses and commonalty, or their predecessors, had or enjoyed, or ought to have had or enjoyed, the premises, before the said surrender; and their said Majesties did restore, confirm, and ratify to the said bailiffs, burgesses and commonalty, amongst other things, all and singular the offices and elections, nominations, and appointment of officers, and the like liberties, &c. as they had before the said surrender, by reason or pretence of any charters, grants, or letters patent, by any of their said late Majesties' progenitors or ancestors, in any manner before made, granted or confirmed, or by any other lawful manner, right, or title; although the same, or any or either of them, had been forfeited, lost, or surrendered; and although the same, or any or either of them, had been misused, or not used, abused or discontinued, &c. And that, for a long time, to wit, for the space of seventy years, before, and at the time of the date and making of the said deed or instrument

of surrender, the said bailiffs, burgesses and commonalty of the town and borough aforesaid, by reason or pretence of a certain charter before then granted to them, to wit, the said charter or letters patent in the said first plea mentioned, had used and enjoyed, and did then use and enjoy a certain power, franchise, election, and nomination, to wit, as follows: that is to say, that whenever the place or office of one of the said twenty-five common councilmen of the said town and borough, became and was vacant, the said twelve aldermen of the said town and borough, and the residue of the said twenty-five common councilmen thereof, or the major part of the said aldermen and of the said twenty-five common councilmen of the said town and borough, for the time being, had, during the time last aforesaid, elected, nominated and appointed, and, at the time of the date of the said instrument of surrender, were used to, and did elect, nominate and appoint, and thence hitherto continually have elected, nominated and appointed, and used and enjoyed the right, franchise, and privilege of electing, nominating and appointing some one other of the burgesses [not saying "and inhabitants"] of the said town and borough, to become and be one of such twenty-five common councilmen of the said town and borough.

There was a demurrer to the first plea, and joinder in demurrer. To the second plea, there were replications:—first, that before the election of the defendant, the charter of Queen Elizabeth had been accepted, and, at the time of that election, was in full force; and by virtue thereof, the aldermen, and residue of the twenty-five common councilmen, ought to have chosen some one other of the burgesses and inhabitants to the vacant office; traversing that, from time immemorial, it had been the usage to elect one other of the burgesses to that office. This replication led to an issue, in fact, upon the usage. The second replication stated, that the aldermen and common councilmen were not lawfully assembled: issue upon this. The third replication stated, that, long before the supposed election of the defendant, Queen Elizabeth, by charter, granted, as in defendant's plea alleged; and that, under and by virtue thereof, before and at the time of the elec-

tion of defendant, whenever the office of one of the common councilmen became vacant, the aldermen and residue of the common councilmen had elected, and ought to elect, some one other of the burgesses of the town and borough, being an inhabitant thereof, to be common councilman. Rejoinder, that, since the granting of the charter of Elizabeth, the aldermen and residue of the common councilmen had elected, and ought to elect, some other of the burgesses to the vacant office of common councilman: to this there was a demurrer and joinder. To the third plea, there were also replications: first, that the bailiffs, burgesses and commonalty, did not, before and at the time of the surrender in that plea mentioned, use and enjoy the franchise of electing to the vacant office of common councilman, some one other of the burgesses of the said town: issue upon the user. The second replication stated, that, at the time of making that surrender, the charter of Elizabeth was in full force: to this there was a demurrer and joinder. The third replication led to issue upon the question whether the aldermen and common councilmen were duly assembled.

The case was argued on the 16th May.

Mr. Alderson (with whom was *Mr. Campbell*.) was heard in support of the demurrers.—In this case, the substantial question is,—what is the true construction of the charter of Queen Elizabeth? for if that is clear, usage cannot be resorted to; in order to expound it. By that charter, the first bailiff, twelve aldermen, and twenty-five common councilmen, were appointed out of the burgesses and inhabitants; and it was provided, that vacancies in the body of aldermen should be filled up by election out of the twenty-five burgesses and inhabitants; and that any vacancy in the twenty-five, should be filled up by election of one other of the burgesses and inhabitants. As these words are used, they appear to be synonymous with "burgesses being inhabitants," or "burgesses inhabiting." No person, therefore, can be eligible, under that charter, to the offices of common councilman, unless he answers to the whole description of burgess and inhabitant; and it is admitted, that this defendant was not an inhabitant at the time of his election. The

case is parallel with that of *Rex v. Heath* (1). There it was required by the charter of Exeter, that common councilmen should be elected "*de discretioribus avibus, et inhabitantibus civitatis*,"—and it was held, that a freeman, not being an inhabitant, was ineligible. The case of *Rex v. Greet* (2), is the converse of this; there, the jurors of Queenborough were, by the charter, eligible out of the burgesses or inhabitants,—and it was held, that an inhabitant, not being a burgess, was eligible, and that a replication, setting up an usage to elect the jurors out of the burgesses, being inhabitants, as an explanation of the charter, was bad. It appears also, from *Rex v. Miller* (3), and other cases, that usage can be pleaded to explain a charter, only where the language of it is ambiguous.

Mr. Taunton, contra.—The first demurrer turns merely upon the construction to be given to the charter of Elizabeth. The second raises a question (which is only upon the supposition that the Court should not be of opinion with the defendant upon the first,) whether usage can be pleaded to explain the charter. The third introduces a question on the charter of William and Mary, differing from the two preceding. The case of *Rex v. Heath*, as to the charter of Elizabeth, is not so conclusive against the defendant as it is taken to be by the other side; for the matter then in question before the Court was, whether a rule for a *quo warranto* information should be made absolute. Where there is any doubt, such rules are always granted; and it appears, by the proceedings in that case, which have been examined among the records of the court, that an information was filed, and at last there was an issue, whether Heath was an inhabitant as well as a burgess; but no further proceedings can be found, nor does it appear whether the issue was ever tried. The words inhabitant and "burgess," appear to have been taken as synonymous in ancient charters, and not as imposing any qualification of personal residence. In old phraseology, burgess *ex vi termini*, means inhabitant: *Spelman's Glossary*. So, in *Whitelock's Commentary on Parliamentary*

Writs, "burgesses are inhabitants and freemen of boroughs." (Vol. 1, p. 500.) The words must be construed according to the import that they possessed at the time when the charter in which they occur, was granted, and then burgess was merely synonymous with townsman, although a member of a corporation is now implied by the word (4). When burgesses were first incorporated, they were the inhabitants of walled towns; afterwards, they were to be continued by succession, as if the charter had described them as burgesses only. In an anonymous case respecting the city of Gloucester (5), a question was raised, whether persons, not residing, could be made freemen:—and the Court held they might, although a charter of Car. 2. was granted to them as "*cives residentes et inhabitantes*," and that was said to make no difference, for all incorporations were in that manner. It is a matter of mere historical learning, if it were discovered; but it cannot now be discovered, when the perpetual leave of absence, which freemen now make use of, was first established; but absence has long ceased to be a ground of amotion. It cannot then be said, that the usage to elect burgesses, not being inhabitants, to the office of common councilman, is absolutely inconsistent with the charter; and if so, *Rex v. the Mayor, &c. of Chester* (6) is a direct authority in favour of the plea of usage. So, in *Rex v. Williams* (7), it appeared that the charter of the borough of Carmarthen required that the mayor and other officers should be inhabitants and residents within the borough, on pain of forfeiting 100*l.*, and the Court held, that this charter did not require residency as a qualification, but only under a penalty. *Blankly v. Winstanley* (8), and *Gape v. Hendley*, mentioned in the note to that case, are strong authorities for the admissibility of usage to explain, and even to control, charters. It is, moreover, stated by the third plea, that William and Mary, by their charter of restoration, confirmed to this corporation all privileges that they had exercised by reason or pretence of any charter;

(1) 1 Barnard. 416.

(2) 8 B. & C. 363; 6 Law Journ. K.B. 331; 7 Law Journ. K.B. 92.

(3) 6 Term Rep. 268.

(4) Brady on Boroughs, 84.

(5) 1 Barnard. 137.

(6) 1 Maul. & Selw. 101.

(7) 2 Maul. & Selw. 141.

(8) 2 Term Rep. 679.

and, therefore, even conceding this mode of filling up vacancies in the common council, not to be strictly according to the charter of Elizabeth, yet, as it was done by pretence of that charter, it is now rendered legal by the charter of William & Mary.

Mr. Alderson having been heard in reply,

The Court took time to consider; and this day, the judgment was delivered in the following terms, by

Lord Tenterden.—After stating the pleadings, his Lordship proceeded—The first question raised upon this record, depends entirely upon the construction of the charter of Queen Elizabeth, as set out in the defendant's first plea, being the charter by which, according to that plea, the office of common councilman was established in the borough, and under which the defendant claims to exercise the office. By this charter, power is given, in case of vacancies, to elect one or more of the burgesses and inhabitants of the borough to the vacant offices. The plea avers, that the defendant being a burgess, was elected, and does not aver that he was an inhabitant also. And upon this, there is a demurrer by the Crown; so that the question is, whether a person, being a burgess, but not an inhabitant, is eligible to the office: and we are of opinion, that he is not. It may be difficult to say, in what precise sense the word "burgess" is to be understood; in very ancient charters, perhaps, construing those documents according to the usage which has long prevailed in different places, the sense may not always have been the same. In the present charter, the words are "burgesses and inhabitants;" and as there are in many corporations, perhaps in most, burgesses who are not resident in the borough, we think it must have been the intention of the donor, in this case, that the common councilmen should be chosen, not from those who were burgesses only, or inhabitants only, but from those in whom the two characters of burgess and inhabitant were united. And this agrees with the opinion of the Court, in the case of *The King v. Heath*, in *Barnardiston*, which was cited in the argument.

This being, in our opinion, the plain meaning of the charter of Queen Elizabeth, the second question is, whether, assuming the borough to have been incor-

porated from time immemorial, having the same number of common councilmen as those appointed by the charter, and who, both before and since the charter, have been in fact elected from the burgesses without regard to residence, such an election can be valid after acceptance of that charter. And we are of opinion, that the usage in the present case is repugnant to the charter, and that the charter, although it uses affirmative words only, and does not in terms prohibit the election of a burgess not being an inhabitant, does in effect amount to such a prohibition. And we think that this is not like the case of the corporation of Chester, in which the charter only gave a power to elect the principal officers annually; and Lord Ellenborough appears, in that case, to have thought that a mere power to elect annually, given to a corporation, who might before elect for life, did not necessarily import that the power so given should be exercised at all times. Whereas, the charter of Elizabeth in this case, in our opinion, prescribes and fixes the character of the persons to be elected, and therefore necessarily excludes the election of persons not sustaining the character prescribed. In the Chester case, it is to be observed also, that the Court only refused a mandamus to elect, leaving the right of those officers who had held for more than a year to be questioned by a *quo warranto*, which would be the most proper mode of proceeding in a case of any doubt, because the judgment of the Court upon it would be thereby subject to the revision of a court of error, which could not be done where the proceeding was by mandamus.

The remaining question arises upon the construction and effect of the charter of restoration granted by William and Mary after a surrender of the charter of Elizabeth. The defendant contends, that the election of persons not possessing the character required by the charter of Elizabeth, receives validity from the charter of the restoration under the general words, "by reason or pretence of any charter," assuming that a mode of election not consistent with a charter ought to be considered, under this instrument of restoration, as made by pretence of that charter. We think, however, that it cannot be so considered, and that the words "by reason or

pretence," followed as they are with the words "any other lawful manner, right, or title," must be understood of matters not unlawfully done, nor inconsistent with the charter, to the pretence of which the matter is referred. The utmost effect that can, in our opinion, be given to the word "pretence" (*prætextus* is the word in the original Latin,) in such a case must be, to exclude very scrupulous, nice, and subtle inquiry upon doubtful points, not to give validity to matters contrary to clear and unambiguous ordinances.

Judgment for the Crown on the demurrers.

1829. }
May 19. } TUCK V. TOOKE.

In Error.

Bankrupt—Composition—Pleading—Fraud.

1. Semble, that a composition agreed to under the 133d section of the 6th Geo. 4. c. 16, will not bind any creditor, unless, as to him, three facts combine—1st. That he had proved under the commission. 2d. That he was present at the meeting at which the composition was agreed upon. 3d. That he concurred in the agreement for the composition.

Note.—The margin to the 133d section in the printed copy of the above Act, appears not to give the substance of that section correctly, by using the words "which shall bind the rest."

2. Where creditors agree to a composition and release, and, subsequently, the debtor gives to one of the creditors a security for the balance of his debt, those two facts are not of themselves sufficient to render the security void on the ground of its being a fraud upon the other creditors.—A third fact must be shewn, namely, that the security was given in pursuance of an agreement made at the same time with the agreement for the composition.

Accordingly, where, in an action upon such a security, the defendant pleaded the two facts above mentioned, but not the third, as proving that the security was obtained by fraud; and the plea was affirmed by the verdict of the jury:—Held, [by reason that the third part was not shewn] that the plea was insufficient; and that the plaintiff was entitled to judgment *non obstante veredicto*.

This was a writ of error from the Common Pleas.—The pleadings, as to one of the points, and the case in that court, will be found in 5 Law Journ. C.P. 166. The following is the substance of the whole.

The action was in debt upon a bond executed by the defendant in the action below, to the plaintiffs for 1000*l*. The plaintiffs were trustees for one Mary Juler. The defendant, among other pleas, pleaded, that, after the making of the bond, he became bankrupt; that nine-tenths of the creditors assembled at two meetings, called pursuant to the 6th Geo. 4. c. 16. s. 133, had agreed to accept a composition, whereupon the Lord Chancellor superseded the commission; and, that he had always been ready and willing, and had offered, to pay and secure the composition to the plaintiffs. The plea, however, did not allege, that the plaintiffs were present at those meetings, or had agreed to take the composition, or had proved under the commission.—The Court held, that this plea was no answer to the declaration.

The defendant also pleaded, that, before the bond was made, he was indebted to Mary Juler and divers other persons; and, being embarrassed in his circumstances, agreed with them, and Mary Juler, to pay them a composition, and they agreed to release him; that, on the faith of this agreement, several creditors executed a release to the defendant; that the plaintiffs afterwards, as the trustees for Mary Juler, obtained the bond in question for the residue of her debt, by fraud and covin, without the knowledge or consent of the other creditors, and in fraud of them. The plaintiff's replication tendered issue on this plea; and, on the trial, the issue was found for the defendant. But the Court of Common Pleas, being of opinion that the plea was insufficient, gave judgment for the plaintiffs *non obstante veredicto*.

Mr. Kelly was now heard, upon the writ of error, on behalf of the defendant.—This case raises two questions: one, whether the fourth plea is a good bar to the action; the other, whether judgment was properly entered up for the plaintiffs in the court below, notwithstanding the verdict for the defendant on the sixth plea. The facts disclosed in the plea constitute a fraud in law, and were, therefore, a sufficient answer to the action. In that plea, it is alleged, that all the creditors of the defendant below, met together and agreed to take a composition; that it was actually received by many, who, confiding in the resolution

of all the creditors to take the same, executed releases, and after this a bond was given by the defendant to one of the creditors for the residue of the debt due to her. The principle that runs through all the cases on this point is, that, where a general composition is made with creditors, any agreement for a secret advantage to be given to one over the others, is fraudulent and void. It is said by the Lord Chancellor, in *Lord Chesterfield v. Janssen* (1), "In like manner, where a debtor enters into an agreement with a particular creditor for a composition of 10s. in the pound, provided the rest of the creditors agree, and this creditor at the same time makes a private clandestine agreement for his whole debt, and though no particular fraud to the debtor, yet, as it is a fraud on the creditors in general, who entered into the agreement, on the supposition that the composition would be equal to them all, the Court has relieved;" and *Spurrell v. Spiller* (2), and *Middleton v. Onslow* (3), are cited in support of that doctrine. The Court adopted this principle in *Cockshott v. Bennett* (4), and a security given to one for the whole of his debt, held void (5). In this case it appears, Mary Juler did not execute the release before the bond was given: at least it is not to be taken that she did, for the date alleged in the pleadings as the time of agreeing to give the bond is not material; the agreement for it may, for anything that appears, have been entered into immediately after the agreement for the composition. The rule for considering this question is the same at law as it is in equity: *Wood v. Roberts* (6), *Leicester and another v. Rose* (7). But, even if the facts alleged do not constitute a fraud in point of law, that will be immaterial; for, it is alleged in the plea, that the bond was obtained by fraud in point of fact, that is the material part of it; and that was traversed and found for the defendant. It has been decided, that a general plea of fraud and covin is good: *Hill v. Monta-*

gne (8), in which case Lord Ellenborough points out this distinction, between pleas of usury and fraud, and covin. The facts stated in the plea in question, are merely inducement, and are not alleged as the fraud complained of. In *Hancocke v. Prowd* (9), the defendant, an administrator, had pleaded a judgment debt outstanding; the plaintiff replied, that the money had been paid, and the defendant deferred procuring an acknowledgment of satisfaction, with the intention to defraud the plaintiff; it appears from the note, that the material part is the averment of fraud, and that the payment of the money was merely inducement, and not traversable, and that the defendant must traverse the fraud; it was likewise held so in *Veale v. Gatedon* (10). But, independent of the foregoing, there is a question raised by the fourth plea, depending on the 6th Geo. 4. c. 18. s. 185. It is not required by that section, that each creditor should have a particular notice of the meetings, or that every one should attend; but if a composition is agreed to by a certain proportion of those present, the commission is to be superseded. A supersedeas obtained under such circumstances ought to have the same effect as a certificate; and should bind the rest of the creditors.

Mr. Campbell, on the other side, was stopped by the Court.

Lord Tenterden.—As to the 135th section of the Bankrupt Act, I see nothing in it about a composition by some of the creditors binding the rest; though it is so stated in the margin of the clause. All that it states is, that, when a certain proportion of the creditors agree to take a composition, the Lord Chancellor may supersede the commission; but this does not at all interfere with the rights or securities of persons not parties to the agreement. The fourth plea is therefore no answer to the action. Then, as to the first point made in *Mr. Kelly's* argument, I quite agree with all the cases that have been cited, as to unfair advantages obtained by one creditor over others; and I think that

(1) 1 Atk. 352.

(2) 1 Atk. 105; 2 Ves. sen. 156.

(3) 1 P. Wms. 768.

(4) 2 Term Rep. 763.

(5) See also *Smith v. Cuff*, 6 M. & S. 160; and *Coleman v. Waller*, 3 Y. & J. 212.

(6) 2 Stark. N.P.C. 447.

(7) 4 East, 372.

(8) 2 M. & S. 377.

(9) 1 Saund. 328.

(10) Sir W. Jones, 92.

we ought not to allow the effect of them to be avoided by nice distinctions; and that our rule for judging upon them may be the same at law, as it is in equity. But the principle of them is this—that, if one creditor, at the time when he manifests to others that he is about to take a composition, makes a secret bargain that he shall have more, that bargain is void. I do not find in this plea any allegation, that, at the time of the agreement with Mary Juler touching the composition, any such separate bargain was made by her, or on her behalf. The agreement to take the composition, and the subsequent giving of the bond, are alleged as perfectly distinct and separate matters; and the principle of former decisions does not apply to defeat that arrangement. This is my opinion on the facts alleged on the plea; but then, reliance is placed on the finding of the jury, and it is contended that we ought to reject the particular matter, and consider this as a general plea, and the finding of the jury a general finding of fraud and covin; but, if that could be done, a party might allege, that a bond was void for one reason, and prove it so for another. It would be very dangerous to allow a security of so high a nature as a bond, to be avoided in such a manner, as that which is contended for. I therefore think that the defendant was bound to prove the bond void for the reasons deduced from the facts he professed to give: and the reasons deduced from those facts were not sufficient; the verdict found in his favour, which merely affirms those facts, was unavailing; and the judgment of the Court below was correct.

Mr. Justice Bayley.—I concur in opinion with my Lord. I think, that, in a plea of this description, the defendant ought to allege the nature of the fraud imputed, and if that be traversed, to prove it, as alleged. If Mary Juler, at the time when she agreed for the composition, had secretly bargained for the additional security also, that would have been a fraud upon the other creditors. But the plea in question is vicious throughout. It does not state that Mary Juler knew that other creditors were making a composition, nor that the other creditors knew she was agreeing for a composition; nor does it appear that she ever had an

opportunity of receiving the composition money. Then, in stating the subsequent bargain, it is not averred that the bond was obtained by means of any threat or pressure on the defendant. For aught that appears, the bond may have been given voluntarily. It might be considered by the defendant that hers was a particularly hard case; and for that and other good reasons he might give her the bond.—I therefore think, that the facts alleged in the plea do not shew any fraud, and that the judgment below was right.

Mr. Justice Littledale.—I think the facts stated in the plea do not amount to a fraud on the other creditors. I agree, that the day alleged as the time when the bond was given is not material; but we must take it to have been given after the agreement for the composition; and if it were given one hour afterwards without a previous agreement that it should be given, the effect will be the same. The plea, therefore, does not allege that which amounts to fraud and covin; and I agree with my learned Brothers, that the defendant was limited to the proof of that which he alleged.

Mr. Justice Parke.—I am of the same opinion. By the terms of the plea, the defendant was bound to rely upon the particular fraud which he alleged. It is consistent with all the facts stated, that the giving of the bond was wholly unconnected with the agreement for the composition. With regard to the point raised upon the Bankrupt Act, if the 133rd section is binding upon any persons not present, or who do not concur at the meetings therein mentioned, (though I am not prepared to say that it does) it can only be so upon those who have proved under the commission; all the others remain in the same situation as before. It does not appear here that Mary Juler had proved, and therefore the fourth plea is no answer to the action. For these reasons I think the judgment in favour of the plaintiffs below should be affirmed.

Judgment affirmed.

1829. } HEANE V. ROGERS AND
June 2. } ANOTHER.

Bankrupt Laws—Brickmaker—Estoppel.

The making of bricks for sale, from clay taken from a man's own land, does not render him liable to the bankrupt laws, as a trader, although he bought the land for the purpose of making bricks.

Doctrine of estoppel of the bankrupt himself from disputing the commission.

This was an action to recover the value of certain goods belonging to the plaintiff, sold by the defendants under the authority of a commission of bankrupt against the plaintiff, who disputed the validity of the commission.

The cause was tried at the last Summer Assizes for the county of Gloucester, before Mr. Justice Gaselee, when the following appeared to be the principal facts.

The main question was, whether the plaintiff was a trader. He had agreed with Colonel Ollney for the purchase of five acres of land at Cheltenham, for the sum of 2400*l.*; but never had any conveyance made to him of the property. The terms were contained in a memorandum, signed by the plaintiff and Col. Ollney, in which it was agreed that the plaintiff was to pay towards the purchase-money four shillings for every thousand of bricks that should be made upon the ground: and that at all events, the whole of the purchase-money should be paid within five years.

The plaintiff was let into possession under this agreement: and began making bricks, part of which he used in the building of houses for himself at Cheltenham; and the remainder he sold to several persons during the years 1825 and 1826. The plaintiff was previously in partnership with two other persons, in the making and selling of bricks, but it did not distinctly appear whether the business carried on by the partners was such as to render them liable to the bankrupt laws as traders; nor did those persons take any interest in the ground which the plaintiff had so agreed to purchase of Col. Ollney. The plaintiff had admitted that he was in partnership with those persons as brick-makers; and, on his examination before the commissioners, he stated that he had bought the

land of Col. Ollney for the purpose of brick-making. These were the principal facts upon which the question as to the trading was afterwards discussed. No question was made, after the trial, as to the act of bankruptcy, or the petitioning creditor's debt; and the jury found as a fact, that the plaintiff had bought the land for the purpose of making bricks.

These were the facts, upon which it was contended by the defendants, that the plaintiff was a trader within the meaning of the bankrupt laws, and by the plaintiff, that he was not.

But it was contended also, on the part of the defendants, that the plaintiff was not at liberty to raise any question as to his bankruptcy; for that he had, by his own acts, acquiesced in the bankruptcy, and had taken advantage of it for his own purpose; and therefore, that he was estopped from disputing it. The facts which raised this argument were the following:—

It was proved by the defendants, that when the goods were sold at their instance, under the commission, the plaintiff assisted in assorting and lotting them; but the witness who proved this, admitted that what the plaintiff thus did, was nothing more than an endeavour to assist in causing the goods to be sold to the best advantage. The learned Judge was of opinion that this interference of the plaintiff was not such an acquiescence, as to estop him from disputing the commission.

Another fact, relied upon by the defendants for the same purpose, was the following:—The plaintiff, at the time of his alleged bankruptcy, was the lessee for a term of years, of a farm under Messrs. Wilkins. The day after the sale of his goods by the defendants, he gave the following notice to his landlords:—

"I, the undersigned James Heane, of the city of Gloucester, brickmaker, dealer and chapman, a bankrupt, do hereby give you notice that I am ready and willing, and hereby offer to give up and deliver unto you Walter Wilkins, esq. and Walter Wilkins, the younger, esq., a certain indenture, purporting to be a lease of Walsworth Hall estate, dated the 17th of September 1817, made between you, the said Walter Wilkins and Walter Wilkins the younger, of the one part, and myself of the other part; and

also the possession of the messuages, land, hereditaments, and premises therein comprized, dated the 12th of September 1826.

"James Heane."

This notice was addressed to Messrs. Williams, their attornies and stewards; the object of the plaintiff giving it, being, to avail himself of the new provision in the Bankrupt Act, 6 Geo. 4. c. 16. s. 75. But it did not appear in evidence that the assignees had declined to accept the lease previous to the giving of this notice. The learned Judge, however, was of opinion, that this act of the plaintiff estopped him from disputing the commission.

Another objection taken by the defendants to the action was, that it had not been brought within three calendar months next after the fact committed; and consequently, that, according to the 44th section of the Bankrupt Act, the plaintiff was barred from maintaining the action. The benefit of this objection was reserved to the defendants; but, before the argument came on in this court, the case of *Edge v. Parker* (1) had decided, that this clause did not apply to actions against the assignees, or those who claimed through them; and the defendants' counsel did not press the objection.

Upon these facts, the jury, under the direction of the learned Judge, returned a verdict for the defendants; reserving leave to the plaintiff to move to enter a verdict in his favour, for the amount of the goods sold, if the Court should be of opinion that he was entitled to maintain the action.

A rule to shew cause having been accordingly obtained, in Michaelmas term, by *Mr. Serjeant Ludlow*, the case was argued at the Sittings after Easter term, by him and *Mr. Serjeant Russell*, on the part of the plaintiff; and by *Mr. Taunton*, *Mr. Campbell* and *Mr. Phillpotts*, on the part of the defendants.

The arguments adduced by the defendants' counsel upon shewing cause were, in substance, as follows:—

First, the plaintiff was a trader, according to the 6th Geo. 4. c. 16. s. 2. That section, after speaking of several traders, and descriptions of persons who shall be deemed traders, goes on thus—"and all persons who seek their living by buying and selling,

or by buying and letting for hire; or by the workmanship of goods or commodities;" now in order to shew, that the plaintiff, as a brickmaker, does not come within the meaning of those words, the case of *Ex parte Burgess* (2), will be relied on by the plaintiff; but there are many other cases in which this question has been discussed. In *Wells v. Parker* (3), many of the earlier cases were considered. The facts in that case were, that the person rented a brick-ground, and made bricks thereon for public sale; and it was held, that he was thereby a trader. Lord Mansfield, in laying down the principle, there says, "But where the produce of the land is merely the raw material of a manufacture, and used as such, and not according to the usual mode of enjoying the land; in short, where the produce of the land is an insignificant article in comparison of the whole expense of the manufacture, there the person ought to be considered as a trader." And accordingly, his Lordship directed the jury, that, if they thought the plaintiff made the bricks for his own consumption, though he sold the surplus, they ought not to find him a trader; but if they thought he carried on the trade for public sale, then they should find him a trader." The principle there laid down will furnish a solution to the cases decided afterwards. The previous case of *Ex parte Harrison* (4) had decided, that a brickmaker taking the earth off the waste, for which he afterwards paid a consideration, and selling the bricks, was a trader within the bankrupt laws. The case of *Sutton v. Weeley* (5), is no authority against the defendants; because, there the person was held not to be a trader, inasmuch as he took an estate by demise in the premises, whence he took the earth; and he could not therefore be said to have bought and sold. The case of *Ex parte Gallimore* (6) decided, that where a man made bricks from the produce of his own soil and sold them, he was not a trader: but that he would be, if he purchased the materials of his manufacture. It becomes, therefore, a question in this case upon the

(2) 2 Glyn & Jam. s. c. 7 Law J. Chanc. 182.

(3) 1 Term Rep. 34.

(4) 1 Brown's Chancery Reports, 173.

(5) 7 East, 442.

(6) 2 Rose, 424.

(1) 8 B. & C. 697; 7 Law Journ. K.B. 101.

contract entered into by the plaintiff with Col, Ollney, and the partnership between the plaintiff and the two other persons. Under the contract, he may be considered as a purchaser of the materials as he collected them, for he was to pay so much per thousand bricks; though, if he within five years paid a given sum, he would be entitled to a conveyance of the estate; until then he was a purchaser of the materials. He was in partnership too with two other persons, and, as they had no interest whatever in the estate contracted to be bought, they were liable as traders, being brick-makers. And the plaintiff, in his own examination, stated, that he bought the land for the purpose of making and selling bricks therefrom. In this respect, the case is very different from those of *Sutton v. Weeley*, and *Ex parte Burgess*, in the latter of which, it seems to have been the opinion of the Lord Chancellor, that where the land is merely ancillary to the trade, the person is within the bankrupt laws. Besides, the admission made by the plaintiff, that he was in partnership with those two persons, who themselves were liable to the bankrupt laws, comes within the case of *Parker v. Barker* (7); wherein it was held, that an acknowledgment by a person that he was in partnership with another as a trader, who afterwards became bankrupt, was sufficient to constitute a trading within the bankrupt laws; although no acts of buying or selling were proved to have taken place during the partnership. But the defendant is not in a situation to contest the commission, inasmuch as, by his own conduct, he has acquiesced in it. As to his interference in the sale of his effects, the case of *Clarke v. Clarke* (8) is in point. It was there ruled by Mr. Justice Heath, that if a person, against whom a commission issues acquiesces in it, so far as to take a part in the sale of his own effects under the commission, he shall not afterwards be allowed to question it. On the other ground, that of having availed himself of the commission for his own benefit, the case of *Watson v. Wace* (9), is an express authority against the plaintiff. There, the bankrupt ob-

tained his discharge out of custody under the 49 Geo. 3. c. 121. s. 14, on the ground that his detaining creditor had proved his debt under the commission. Here, the plaintiff availed himself of the provision in the new act, of getting rid of his lease, which he could not do unless he were a bankrupt; and, in the notice he gave on that occasion, he described himself as a "brick-maker, dealer and chapman, a bankrupt." The judgment of Lord Tenterden, in the case of *Watson v. Wace*, shews the principle to be, that where a bankrupt has availed himself of the advantage which the law gives him as a bankrupt, he will not be allowed to turn round afterwards upon his assignees, and say, that he is not a bankrupt. The same principle had been previously laid down by the Vice Chancellor, in the case of *Ex parte Cutten* (10), in which it was said, that "the bankrupt's active interference with the administration of his estate, amounted to a pledge to his assignees, that he would not disturb the commission;" and that "his conduct had been calculated to induce the assignees to prosecute the commission in security."

The arguments adduced on behalf of the plaintiff were, in substance, as follows:—First, as to the supposed estoppel of the plaintiff from disputing the commission. His interference in the sale of the property can never be considered as an estoppel; seeing that he had no power to obstruct the sale, and had a right to advance the interest of the sale; whether it should be his creditors or himself that might afterwards obtain the benefit of the proceeds. The case of *Watson v. Wace* is distinguishable; there, the party had obtained the benefit he sought; namely, his discharge out of custody. Here, the notice served by the plaintiff was only a proposal, very naturally made, since his property had been swept away by his assignees the day before. But it cannot bind the plaintiff, unless it would have been of advantage to him; and as it did not appear that the assignees had, in form, renounced the lease, the notice was altogether inoperative. And in *Ex parte Cutten*, the bankrupt had misled his assignees, for he had abandoned a former petition, which he had presented to super-

(7) 1 Brod. & Bing. 9; 3 Moore, 226.

(8) 6 Esp. N.P. Cases, 61,

(9) 5 B. & C. 143; 7 D. & R. 633,

(10) 1 Glyn & Jam. 317.

sede the commission; and had subsequently joined the assignees in conveyances of the property. The plaintiff cannot therefore be estopped; but there is also a very important distinction, as to the notice, between this and all the cases which have been cited. Estoppel applies only between parties or privies to the act which works the estoppel; but the landlord of the plaintiff is no party to this action; and, although the plaintiff may be estopped, as between him and his landlord, by reason of this notice, the defendants, who are strangers to the act, can take no advantage of it. Then, with regard to the admission made by the plaintiff, in respect of which the other side rely upon the case of *Parker v. Barker*; the authority of that case may be undisputed, but it is inapplicable to the present. There, the subject-matter of the admission was clearly a trading which rendered the parties liable to the bankrupt laws: but here, the question still remains, whether the subject-matter of the admission, namely, the trading in bricks, renders the party liable to the bankrupt laws. As to the admission made by the plaintiff in his examination, it was improperly obtained and improperly used; and the case of *Paul v. Dowling* (11), discountenances the obtaining such an admission from a bankrupt in his examination. Upon the main question, whether, under the circumstances, the making and selling of bricks rendered this plaintiff liable to the bankrupt laws, the case of *Ex parte Burgess* is expressly in point; and the Court cannot decide against the plaintiff without overruling that case. It is a strong authority; inasmuch as it contains not only the opinion of the Lord Chancellor; but those of Lord Camden, and Lord Loughborough on this subject, in the cases mentioned in the note to *Ex parte Burgess*.

The Court took time to consider, and on the 5th of June,

Mr. Justice Bayley delivered the judgment of the Court in the following terms:—We are of opinion, that the verdict must be entered for the plaintiff, pursuant to the report of the learned Judge. The case raised two questions;—first, whether the plain-

tiff was estopped from disputing his bankruptcy; and, if he was not, then secondly, whether the commission which had been taken out against him was a valid commission.

Upon the first point, two circumstances were relied upon at the trial, as shewing that the plaintiff was estopped:—First, his personal interference when the assignees made a sale of his goods; that interference being merely a sorting and allotting of the goods, in order that when sold, they might be sold to the best advantage. Secondly, the notice he had served upon his landlord, in which he described himself as a "brick-maker, dealer and chapman, a bankrupt." The learned Judge, thought that the first of these circumstances was merely an interference for the purpose of taking care of the property, and of seeing that it was dealt with to the best advantage. But he thought that the surrender by the plaintiff of his lease, by which surrender he availed himself of the commission, was an estoppel. In the conclusion drawn by the learned Judge from the first of these circumstances we concur: but we think upon consideration, that we cannot acquiesce in the latter. We think the plaintiff should not be concluded, by any particular act, from disputing his bankruptcy, unless some person has been induced by that act to alter his conduct or his situation. In such a case, the plaintiff would be concluded as to that person; but to no other. It has been observed by my Lord Coke, that estoppel binds only parties and privies: and, in pursuance of that rule, it may be admitted that the offer made by the plaintiff in this case to give up his lease, binds him so far as regards his landlord: but the landlord is no party to the present suit. It may be admitted, that in respect of the subject-matter of that notice to the landlord, the plaintiff will not be entitled hereafter to contend, against the landlord, that he, the plaintiff, has never been a bankrupt; to that extent the plaintiff may probably be bound, but no further. There would be great hardship on the plaintiff if he were, by this act, to be estopped from disputing his bankruptcy. If he were not to make this surrender of his lease, within a given time prescribed by the Bankrupt Act, he could not do so afterwards with effect. He could not justify

(11) M. & M. N.P.C. 263.

his omitting to do so, by saying that, at the time in question, he disputed the commission: and yet, while the commission was in dispute, if he were to allow the time to pass without the surrendering of the lease, he would be liable to the payment of the rent and the performance of the covenants in the lease, although he could not derive any advantage from the occupation, while the question as to the taking to the lease remained undecided. All this property had been taken away by the assignees. Under such circumstances, we are of opinion, that a person who is situated as the plaintiff was in this case, has a right to do the best he can to relieve himself from the burthen of a lease; although he may, as against persons other than the landlord, contend that the commission which has been taken out against him is not well founded. Upon this part of the subject, we do not think it necessary to notice all the cases which were cited in argument at the bar, though we may refer to some of the leading ones. In *Clarke v. Clarke*, the bankrupt procured the sale of his own goods: in *Like v. Howe and Rogers*, the plaintiff had, by his own conduct, sought to bring creditors in under the commission, in order to vote for the choice of assignees. The case of *Watson v. Wace* is distinguishable; as there the person, against whom the bankrupt sought to question the commission, was the person at whose suit he, the bankrupt, had sought to be, and had been discharged out of custody, on the ground of the creditor having proved his debt under the commission. There, the act done by the bankrupt was an act between himself and the party in the cause then before the Court; and as to that party, the act of the bankrupt was properly held to bind him.

The second question is, whether the plaintiff was a trader within the meaning of the Bankrupt Act; and we are of opinion that he was not. The plaintiff bought the land for the purpose of making bricks; and no doubt he carried on the business of selling bricks. He purchased in fee, and although he had not obtained the legal estate, he had a good equitable title to the fee; and for the purpose of this argument, we cannot see any sound distinction between a legal and an equitable fee. Looking at the whole of the facts, in the case, we think

it cannot be said that he bought the land for the sole purpose of making bricks from it; though, if he did, we do not think it would be material. The question then, whether this making and selling of bricks renders the party liable to the bankrupt law, is a question upon the *jure positivi*. In the case of *Sutton v. Weeley*, Lord Ellenborough observed, "The principle of the bankrupt laws, as it is to be found in the statute of Henry the 8th, is to prevent persons craftily obtaining into their hands great substance of other men's goods, and, at their own wills and pleasure, consuming the substance obtained by credit of other men. The statute of the 13th of Elizabeth differs but little in this respect from the subsequent statute of the 1st of James the First, which, after speaking of certain persons who shall be liable to be made bankrupts, goes on—"or seeking his trade of living by buying and selling." That expression, when taken with the context, must mean "goods;" and the buying and selling must mean a buying and selling of goods; and a series of cases ending with that of *Ex parte Gallimore*, establish the rule respecting a dealing in bricks. In that case, the then Lord Chancellor observed, "It is admitted, if a person make bricks on his own estate, and sell them, he is no trader; and I cannot think there is any difference, whether or not he is a termor or a freeholder. For it is the same species of interest, but in one case, is for a shorter duration; and therefore the same principle must apply." It is clear, that such a person does not seek his living by buying and selling. But where a man carries on the trade of making bricks, and makes the bricks themselves by means of a substantive buying of the materials,—if, for instance he bought the brick earth, wrought it into bricks, and then sold them,—the case might be different. We think, therefore, that, according to the principle, as well as the terms of the old acts, the plaintiff cannot be considered as a trader within the operation of those acts. Nor does it appear to us that the terms of the new act are such as to bring the plaintiff within their operation. The new act certainly has some additional words, after the words used in the old acts, "buying and selling." The new words are, "or by buying and

letting for hire, or by the workmanship of goods or commodities." But the case of *Ex parte Burgess*, in *2nd Glyn and Jameson*, has decided, and we think rightly, that those words do not apply to the making of bricks, under circumstances like the present; but were intended to provide for the cases of lace-manufacturers, stocking-knitters and others; and not for those persons who manufacture alum, burn lime, make bricks, or the like, upon their own estates. We concur in the opinion expressed by the Lord Chancellor in that case, upon the con-

struction to be given to those words. We are therefore of opinion,—first, that the plaintiff is not estopped from disputing the validity of the commission against him; and secondly, that that commission cannot be sustained. The consequence is, that the present rule must be made absolute for entering the verdict in his favour.

Rule absolute.

[See also the opinion of Lord Tenterden in the before-cited case of *Paul v. Dowling*, in 3 Carr. & Payne, N.P.C. 500.]

END OF EASTER TERM, 1829.

CASES ARGUED AND DETERMINED

IN THE

Court of King's Bench,

TRINITY TERM, 10 GEO. IV.

1829. } PALMER AND OTHERS, ASSIGNEES
June 6. } &c., v. MOSER.

A commission of bankrupt issued after the 1st of September 1825, cannot be supported by an act of bankruptcy committed before that day.

This was an action for work and labour performed by Moser, the bankrupt, for the defendant. The plaintiffs sued as the assignees under a commission of bankrupt issued against Moser, after 1st of September 1825, founded upon an act of bankruptcy committed before that day. The defendant disputed the commission. Ultimately, the plaintiffs, the defendant, and the trustees, under a deed hereafter mentioned, and the bankrupt, all agreed to refer the finding of the facts to an arbitrator: upon which facts the Court would have to determine whether the commission was sustainable or not. The arbitrator found the facts as follows:

Timothy Moser was a trader subject to the bankrupt laws; and, on August 15th, 1825, (16 days before the act 6 Geo. 4. c. 16. came into effect,) being insolvent, he assigned, by deed, all his real and personal property, including the debts then due and owing to him, to trustees, to be distributed in equal rateable proportions among all such creditors as should execute the said deed, and thereby release him from all further claim. The deed was executed by all the trustees, and by some, but not by all, the creditors; and, at the time of such assignment, the sum which is the subject of

this action was due from the defendant to Timothy Moser. Being of opinion, that, as a consequence of the enactments of 6 Geo. 4. c. 16, the said assignment was legal and valid, I award, that the sum of 796*l.* be paid by the defendant to the said trustees, Thomas Palmer, Edward Dubbins, and George Stephens; and that a verdict in this action be entered for the defendant. But, if the assignment above stated be void in law, I then award a verdict to be entered for the plaintiffs for the sum of 849*l.* 10*s.*

Mr. Clarkson, for the plaintiffs.—The question in the cause is, whether the commission of bankrupt is valid; because, if the commission is valid, the deed of assignment is invalid. That question depends upon another—whether a commission issued after the 1st of September 1825, founded upon an act of bankruptcy committed before that day, can be sustained. The case of *Maggs v. Hunt* (1) has undoubtedly decided the negative of this proposition; but it is now submitted, that that decision requires to be reviewed. If it be held, that such a commission is not good, no commission can be issued upon an act of bankruptcy committed between the 2d of May and the 1st of September 1825; for the 6 Geo. 4. c. 16. repeals all the previous acts of parliament relating to bankruptcy from the passing of that act, which was the 2d of May; but provides (by sect. 136,) that the act shall not take effect until the 1st of September, except as to the repeal of the

(1) 4 Bing. 212; 5 Law Journ. C.P. 130.

previous acts. It surely was not intended, that there should be no commission issued after the 1st of September upon any act of bankruptcy committed between May and September. The legislature intended no hiatus in this respect. The expression "not take effect," may be satisfied by holding, that no commission should issue until the 1st of September, which would be giving to the expression a meaning as if it had been "shall not take full effect," until the 1st of September. This interpretation of the act is undoubtedly at variance with that which was given to it in the case of *Maggs v. Hunt*. But the report of that case in *Bingham's Reports* is very short; and it does not there appear, very distinctly, what were the reasons for the Court arriving at such a conclusion (2). The decision itself, it is submitted, is against the meaning of the legislature, whose object was, for this purpose, merely to consolidate the existing laws. That it was not intended to fall into such an absurdity as that which must be contended for by the other side, may be seen by a reference to the section immediately preceding; for the 135th section expressly provides, that the act shall be construed "beneficially for creditors;" and how would the Court be giving effect to this provision, if they were to hold, that creditors of persons liable to the bankrupt laws should not have the remedy intended by this statute, in respect of any act of bankruptcy committed between May and September?

Mr. Chitty, contra, was stopped.

Mr. Justice Bayley.—This question does not come before us for the first time; and I know that my Brother Holroyd concurred in the opinion which I am about to give. Upon a consideration of the present Bankrupt Act, we are of opinion, that no commission, issued after the 1st of September 1825, can be supported upon an act of bankruptcy committed before that day. Before the passing of the 6 Geo. 4. c. 16, the 5 Geo. 4. c. 98. was in operation. That act is repealed by the 6 Geo. 4, which itself repealed the previous acts; so that the repealing of the 5 Geo. 4, without any expression of reservation, as to previous acts, would let those acts again into operation;

(2) The judgment is given at length in the Law Journal.

but the 6 Geo. 4. did, in point of fact, repeal all the previous statutes. It then provides, by the 136th section, that that act shall not take effect until the 1st of September, except as to the repealing of the statutes thereby repealed; and, as to that repeal, it provides, that it shall take effect from the passing of the act, which was the 2d of May. Unfortunately, no provision was made for what might take place between May and September; and, from first to last, there is nothing in the act to shew an intention in the legislature to continue the old acts in operation, so far as regards acts of bankruptcy committed in the intermediate time: and it is to be observed, that the 3d section of the 6 Geo. 4. c. 16, which describes the several acts of bankruptcy, was prospective language. It says, "that if any such creditor *shall* depart," &c., and so it goes on;—not saying, "shall *have* departed," &c.; and it also describes new acts of bankruptcy: all shewing, in my opinion, that the clause was intended to be prospective only. In the case of *Maggs v. Hunt*, I know the Court of Common Pleas felt no doubt upon the point; but they thought the promulgating the grounds of their opinion might be mischievous; and that it would be better for the legislature to have an opportunity of correcting this omission, if it really were an inadvertence. But no bill was introduced into parliament for this purpose; and it is therefore to be presumed, that the legislature intended the act to have the meaning given to it by the decision in *Maggs v. Hunt*. This probably accounts for the reason of the decision not having been given in the report in *Bingham* of that case. The result is, that no commission of bankrupt, issued after the 1st of September 1825, can be supported by an act of bankruptcy committed before that day.

Mr. Justice Littledale and *Mr. Justice Parke* concurred.

Postea to the defendant.

1829. }
June 23. } BOURNE v. FREETH.

Joint Stock Company—Partnership.

A prospectus for the formation of a joint stock company upon certain terms, was signed by the defendant. The terms were

never fulfilled. The defendant ceased to take any part in the concern. Subsequently, the plaintiff was shewn the prospectus signed by the defendant, and supplied goods for the use of the company:—Held, that the defendant had not made himself liable as a partner in the company.

Assumpsit for goods sold and delivered.

Plea—The general issue.

This cause was tried, at the Spring Assizes for the county of Lancaster, 1828, before Mr. Baron Hullock, when the following appeared to be the principal facts:

The action was brought to recover the price of three hundred and forty-five quarters of malt, sold and delivered, in August 1826, by the plaintiff to one Langley, who conducted a concern called "The Hunter-street Distillery," at Liverpool. The question was, whether the defendant had rendered himself liable as a partner in that concern. In the Spring of the year 1825, Sir W. Fairlie was the occupier of an estate at Maghull, seven miles from Liverpool, called Broadwood, and, it being believed that parliament was about to pass an act to allow the distillation of whiskey in England, Sir W. Fairlie proposed to form a company for that purpose, and to carry on the business at Broadwood; and in March 1825, the following prospectus was issued:—

"As the legislature has now authorized the distilling of whiskey in England, a company is proposed to be formed near Liverpool for that purpose, and to get a man from Inverness-shire to distil, in the small still, the spirit in the way practised at Ferintosh and Glenlivet, so that the quality, not the quantity, will be the basis on which the company pledge themselves to make their whiskey. The concern to be divided into forty shares of 100*l.* each, one half of which the gentlemen who conduct the work will take. The other twenty shares will be filled up by subscribers; subscribers to pay in their money to Messrs. Moss & Co. bankers, Liverpool, on account of the Maghull Distillery Company, by the 1st May."

This prospectus was signed by Sir W. Fairlie, by the defendant and other persons. The act of parliament alluded to by the prospectus, passed on the 27th of June 1825, but was not to come into operation until January 1826, and it prohibited all

persons from carrying on any distillery at any greater distance than a quarter of a mile from a market town. On the 20th of May, the defendant, Sir W. Fairlie, and two other persons who had signed the first prospectus, met at Liverpool, and a second prospectus was drawn up and signed by the four persons then present, and afterwards by others; that prospectus ran as follows:—

"As the legislature has authorized the distilling of whiskey in England, to commence the 10th of October next, and having limited the situation of those distilleries to within a quarter of a mile of a market town, the distillery company forming at Maghull will necessarily have to occupy premises within that distance of Liverpool. The conditions upon which this establishment is formed are—First, they pledge themselves they will distil nothing but the purest malt spirit, in the smallest stills that government will license, and on the same plan practised in the highlands of Scotland, for which purpose an eminent distiller from Inverness-shire will be engaged. Secondly, the concern will be divided into twenty shares of 100*l.* each, which are transferable, five of which belong to Sir W. Fairlie, bart. the founder of the works, the other fifteen subscribers to pay in their subscription to Messrs. Moss & Co. bankers, Liverpool, in such proportions as may be called for. Thirdly, the concern to be under the management of a committee of three of the subscribers, to be chosen annually upon the 10th of October. Fourthly, regular books to be kept, which shall be open for inspection of any of the subscribers, and a division of the profits made twice a year, at Lady-day and Michaelmas. Fifthly, ten per cent. to be paid into the bank, on or before the 1st of June next."

At this meeting it was proposed that the premises in Hunter-street should be taken, and it did not appear that the defendant objected to the proposal; at this meeting it was agreed that the parties present should solicit persons of respectability at Liverpool to become shareholders. Subsequently, Sir W. Fairlie inclosed a copy of the prospectus in a letter to the defendant, of which the following is a copy:—

"I inclose the prospectus. If Lord Blayney and Sir John Tobin take shares, let them subscribe it; it is then full. I have directed a

copy of the new act (when filled up) to be sent to me to your care, which you will take care of. Mr. J. Drinkwater wished to see it.

On the 24th of May 1825, the defendant sent the following answer :—

"I should have written to you before, but Sir John Tobin having been absent for the last few days, prevented me. I was with him this morning, and shewed the prospectus, but he seemed not to think much of it, and declined becoming a shareholder; so I am afraid his reluctance will deter Lord Blayney, who will be here about the beginning of next week. I had some conversation with Mr. John Richardson upon it; however, he does not appear to think it will answer, on account chiefly of the trouble the Excise at Liverpool give to all concerns of this nature. Not being a judge and totally unacquainted, I cannot give an opinion. On your return, all parties must lay their heads together. J. Drinkwater I have not seen."

In June 1825, a person named Murray was engaged by Sir W. Fairlie to carry on the distillery, and the names of Murray & Co. were affixed on the premises; and in that month Sutherland & Co., who were brass-founders at Liverpool, were employed by Sir W. Fairlie to fit up the distillery, and he shewed them the two prospectuses, signed by the defendant. To the second prospectus there were subscribed the names of ten persons, including those of Sir W. Fairlie and the defendant. On the 30th of June 1825, Sir W. Fairlie wrote to the defendant a circular letter, of which the following is a copy :—

"As Mr. W. Murray, distiller, has taken the premises to fit up the same for commencing distilling whiskey, agreeable to the prospectus, of which you are a shareholder, Upon the 10th of October next, it will be necessary for you to pay in the amount of your subscription, 100*l.*, to Messrs. Moss & Co. on or before the 1st of August next, on his account, to enable him to complete the arrangements necessary; the receipts will be left at the bank."

With this circular, Sir W. Fairlie wrote to the defendant the following letter :—

"I annex a circular, and congratulate you that Mr. Murray has undertaken the management, as we could not have found a more fit person to conduct it with every

prospect of advantage. He has stipulated that all the subscriptions shall be paid in full by the 1st of August, and, failing that being done, he is to have the shares forfeited: no more than the 100*l.* will be required from any of the subscribers; and there is every reason to expect the profits will be handsome, of which you will be entitled to a twentieth share."

On the 25th of August 1825, a gentleman named Edmunds, by the direction of the defendant, wrote to Sir W. Fairlie a letter, of which the following is a sufficient extract :—

"With respect to the subscription for the distillery, General Freeth requested me to say, that the notice was so short from the time he received your letter, forwarded by me, to the period mentioned, by which the shares were to be forfeited, it was out of his power, from unforeseen causes, to be able to lodge the amount within the time prescribed."

No one of the persons who had signed the prospectus had paid their subscription. In December 1825, a person named Langley was employed to conduct the business, and then the names of Langley & Co. were fixed on the premises. Langley, wishing to purchase milk of the plaintiff, referred him to Sutherland & Co., and they informed the plaintiff, that the several persons whose names were subscribed to the second prospectus (including the defendant) were partners. These being the facts, the defendant's counsel contended that he was not liable as a partner. First, that he was not an actual partner, entitled to share the profit, because he had never paid the subscription, the payment of which was a condition to entitle him to share in such profits. Secondly, that the mere signing of the prospectus was not an act by which the defendant held out to the world that he was a partner; inasmuch as the prospectus merely proposed a partnership on certain terms and conditions. The opinion of the learned Judge was unfavourable to the defendant upon this point; but he reserved it for the consideration of the Court. The defendant then went into his case, and endeavoured to prove, that, even conceding that there had been a partnership, he had put an end to it before the goods were supplied by the plaintiff. To shew this, Edmunds, who had written the

letter of the 25th of August 1825, to Sir W. Fairlie by desire of the defendant was, called: he stated, that subsequently he had had a conversation with Sir W. Fairlie on the subject of that letter, and that Sir W. stated his regret that the defendant declined to have any concern in the distillery. The learned Judge then left it to the jury to say, whether (supposing the defendant to have been a partner,) he had done anything to put an end to the partnership. The jury found that he had not done anything to put an end to the partnership. A verdict was then taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit. A rule nisi having been obtained accordingly,—

Mr. F. Pollock, Mr. Starkie, and Mr. Alderson now shewed cause.—They contended that the defendant was a partner, entitled to a share of the profits; and that the prospectus which he had signed, spoke of a partnership which actually existed. They sought to distinguish the case from that of *Vice v. Lady Anson* (1), inasmuch as there the defendant was not an original subscriber, and the plaintiff, when he supplied the goods in question, did not know that the defendant had any interest in the concern. Here, the defendant was an original subscriber; and the plaintiff knew of the defendant having an interest when the goods were supplied.

They relied on the cases of *Perring v. Hone* (2), and *Lawler v. Kershaw* (3). In the former Sir John Perring's name was entered in a book, with other names as subscribers to a joint stock company. He received certain scrip receipts. A deed was drawn up for the formation of the company; but before it was executed, he sold his shares: he never executed the deed, yet he was held to be a partner.

[*Mr. Justice Bayley*.—The foundation of that decision was, that Sir John had not sold his shares in the way directed by the deed; and that he therefore was still a holder of them.]

But in *Lawler v. Kershaw*, Lord Tenterden held, that where a party paid a deposit on shares in a trading company, and after-

wards signed the deed of partnership, he was a partner from the time of his paying the deposit.

Mr. J. Williams, contra, was stopped.

Lord Tenterden.—I think that the defendant was not a partner, as between him and the other persons who proposed being members of the company, whoever they might be. That is shewn by the letter of the 25th of August 1825, which was written by the authority of the defendant. But, I agree, that although he might not actually be a partner, yet, if he had held himself out to the world as a partner, he would be liable. The question is, did he hold himself out to the world as a partner. That depends entirely on the effect of the prospectus which he signed. That instrument indicates, that a company was about to be formed, and not that one was actually formed. It shews only, that it was in the contemplation of the parties who had subscribed their names to it, to establish a company on certain conditions. The words relied upon, to shew that the company had been actually formed, are, "The conditions upon which this establishment is formed are," &c. Undoubtedly, the import of those words, taken by themselves, might be that a company was actually formed. But no person could misunderstand this; for if he read on, he would find that it was all in prospect only. It goes on, "The concern will be divided into twenty shares of 100*l.* each, which are transferable, five of which to belong to Sir W. Fairlie, the founder of the works, the other fifteen subscribers to pay in their subscription to Messrs. Moss & Co. bankers, Liverpool, in such proportions as may be called for. The concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October; ten per cent. to be paid into the bank, on or before the 1st of June next." The import of which was, that a company was to be formed thereafter, and this paper the defendant signed. His having signed that paper, does not indicate to any person who reads it, that he has become a member of a company already formed. He has not therefore held himself out to the world as a partner in a company already formed. I therefore think, that a nonsuit should be entered.

(1) 7 B. & C. 409; 1 M. & R. 113; 6 Law J. K.B. 24.

(2) 4 Bing. 28; 5 Law Journ. C.P. 33.

(3) Moo. & Malk. 93.

Mr. Justice Bayley and Mr. Justice Littledale concurred.

Mr. Justice Parke, having been engaged in the cause while at the bar, gave no opinion.

Rule absolute for a nonsuit.

1829. }
June 23. } SMITH v. SURMAN.

Statute of Frauds—Growing Timber—Acceptance.

1. *A contract for the sale of trees not actually felled is not a contract for the sale of any interest in lands, tenements, or hereditaments within the meaning of the fourth section of the Statute of Frauds.*

2. *A letter written on the part of the seller, touching a sale of goods, cannot be connected with an answer written by the buyer, so as to amount to a note in writing to satisfy the seventeenth section of the statute, if the letters differ as to the terms of the contract.*

3. *A mere offer by the buyer to sell the goods to a third person, is not such an acceptance of the goods as to satisfy the provision in the seventeenth section respecting acceptance of goods. The criterion to try whether there has been such an acceptance appears to lie in two questions—1st. Whether the purchaser has lost his right to object to the quality of the goods. 2dly. Whether the vendor has lost his right of lien for the price. The affirmation of either of these questions will shew that there has been such an acceptance.*

This was an action brought to recover 17l. 3s. 6d., the value of 229 feet of ash timber, at 1s. 6d. per foot.

The declaration stated that the plaintiff, on &c., at &c., at the request of the defendant, bargained with the defendant to sell to him, and the defendant agreed to buy of the plaintiff, a large quantity of timber, to wit, 230 feet of timber, lying and being in and upon certain lands of the plaintiff, at a certain rate or price, to wit, at the rate or price of 18d. for each and every foot thereof, to be fetched, taken, and carried away by the defendant from the said lands of the plaintiff, and to be paid for by the defendant at the rate or price aforesaid, within a reasonable time then next follow-

ing, and in consideration thereof, and also in consideration that the plaintiff, at the like request of the defendant, had undertaken and faithfully promised the defendant to permit and suffer the defendant to fetch, take, and carry away the said timber from the lands of the plaintiff, the defendant undertook and faithfully promised the plaintiff to fetch, take, and carry away the timber from the lands of the plaintiff, and to pay the plaintiff for the same at the rate aforesaid, within a reasonable time. The breach complained of was, that the defendant refused to fetch and carry away the timber, or to pay for the same.

There were counts for goods bargained and sold, and goods sold and delivered. The defendant pleaded Non assumpsit.

The cause was tried, before Mr. Baron Vaughan, at the Summer Assizes for Worcester, 1828, when the following appeared to be the material facts of the case:—The plaintiff had given orders to have some ash trees cut down in a coppice of which he was the proprietor; and the defendant, while the trees were being cut, and after two of them had been actually felled, came to the coppice, and the plaintiff pointed out to him the trees which were numbered. The defendant, after he had looked at them, said to one of the by-standers, that he had made a good bargain, and told one of the persons who was cutting them, to tell the other man to cross-cut them fair; and they were cut accordingly. The defendant afterwards stated, that he had bought ten trees only, and that the reason he did not take them was, that they were unsound. The trees, upon being cut, measured 229 feet 7 inches. The defendant afterwards saw the person who had measured them, and offered to sell him the butts (which, he said, he had bought of the plaintiff); but, this not being acceded to, the defendant asked him if he knew any person who wanted any butts, and then said he would go to the plaintiff, and convert the tops into building-stuff. The defendant not having taken the timber away, the plaintiff's attorney sent him the following letter:—

Sir,—I am directed by Mr. Smith, of Norton Hall, to request you will forthwith pay for the ash timber which you purchased of him. The trees are numbered from

one to fourteen, and contain, upon a very fair admeasurement, 229 feet 7 inches. The value, at 1s. 6d. per foot, amounts to 17l. 3s. 6d. I understand your objection to complete your contract is, on the ground that the timber is faulty and unsound; but there is sufficient evidence to shew that the same timber is very kind and superior, and a superior marketable article. I understand you object to the manner in which the trees were cross-cut, but there is also evidence to prove that they were so cut by your direction. Unless the debt is immediately discharged, I have instructions to commence an action against you."

The defendant answered as follows:—

"Sir,—I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1s. 6d. per foot, to be sound and good, which I have some doubts whether it is or not; but he promised to make it so, and now denies it. When I saw him, he told me I should not have any without all; so we agreed on those terms, and I expected him to sell it to somebody else."

Upon these facts, the defendant's counsel contended that the contract was one for the sale of growing trees, and therefore, for the sale of an interest in land, and consequently that the case fell within that of *Scorrell v. Boxall* (1): or, that if it was a contract for the sale of goods, wares, and merchandizes of the price of 10l. and upwards, there was no note or memorandum of the contract in writing, and, consequently, the action was not maintainable. Subject to this question, the plaintiff obtained a verdict for 17l. 3s. 6d.; but leave was given to the defendant to move to enter a nonsuit. A rule nisi was accordingly obtained, and now,

Mr. Serjeant Russell and Mr. Shutt shewed cause.—Upon the first point, they relied upon the principle to be collected from the case of *Evans v. Roberts* (2), where it was decided that a verbal agreement for the sale of a growing crop of potatoes was not a contract or sale of any interest in or concerning lands. Upon the question arising out

of the argument, that if this was a contract for the sale of goods, there should have been a note in writing to satisfy the Statute of Frauds, they denied that this was such a contract; but that it was a contract for work, labour, and materials only. In support of this, they relied upon the cases of *Buxton and another v. Bedall and another* (3), and *Groves v. Buck* (4); and sought to distinguish *Garbutt v. Watson* (5). See also *Fielder v. Ray* (6). But, supposing the Court should be of opinion that this was a contract for the sale of goods, they contended that the contract had been executed by an acceptance of the goods sold, so as to dispense with a written note: and, in support of this argument, they relied upon the cases of *Chaplin v. Rogers* (7), *Elmore v. Stone* (8), and *Blenkinsop v. Clayton* (9). But even if the Court should be against them on these points, they submitted that the letter of the plaintiff's attorney, coupled with the defendant's answer, amounted to a note in writing of the contract sufficient to satisfy the statute. To shew that the two might be connected, they cited *Saunderson v. Jackson* (10), and *Schneider v. Norris* (11). See also *Heming and Cox v. Perry* (12). They sought, upon this point, to distinguish the case from that of *Richards and another v. Porter* (13), as there the letter in answer shewed that the contract had not been performed by the vendor.

Mr. Jervis, contra, was stopped.

Mr. Justice Bayley.—I think there was no contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them within the meaning of the fourth section of the Statute of Frauds. The contract was not for the growing trees, but for the timber at so much per foot; that is to say, the produce of the trees when they should be cut down

(1) 1 Y. & J. 396.
(2) 5 B. & C. 829; 8 D. & R. 611; 4 Law Journ. K.B. 313.

Vol. VII. K.B.

(3) 3 East, 303.
(4) 3 Mau. & Selw. 178.
(5) 5 B. & A. 613; 1 D. & R. 219.
(6) 4 C. & P. 61.
(7) 1 East, 192.
(8) 1 Taunt. 456.
(9) 7 Id. 597.
(10) 2 Bos. & Pul. 238.
(11) 2 Mau. & Selw. 286.
(12) 2 Moore & P. 375.
(13) 6 B. & C. 437; a.c. 5 Law Journ. K.B. 175.

and severed from the freehold. This renders it necessary to consider the other questions. First, it was said that this was a mixed contract for goods and chattels, and for work and labour to be bestowed and performed by the plaintiff for the defendant. But, I think, the true construction of the bargain is, that it is a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, was doing work for himself and not for the defendant. The case of *Garbutt and another v. Watson*, is an express authority. There, the plaintiffs, who were millers, agreed to sell to the defendant, a corn-merchant, 100 sacks of flour at 50s. per sack, to be got ready by the plaintiffs to ship within three weeks. There was no memorandum in writing of the contract. The flour was not at that time prepared, and it was there held, that it was a contract for the sale of goods, wares, and merchandize within the meaning of the seventeenth section of the Statute of Frauds. I think, therefore, that the contract in this case was a contract for the sale of goods, wares, and merchandize, within the seventeenth section of the statute, and there ought to have been a note or memorandum of it in writing, or a part-acceptance, earnest, or part-payment. Then it is said that the defendant has recognized in writing the contract stated in the letter of the plaintiff's attorney. I agree, that, if there had been a letter written by the seller, specifying the terms of a contract, and the buyer, in his answer, had recognized that contract, there would have been a note in writing of the bargain sufficient to satisfy the statute. But here, the defendant does not recognize the contract stated in the letter of the plaintiff's attorney. The contract differs essentially in each letter as to the quality of the things to be sold. In the letter of the plaintiff's attorney, the contract is spoken of as one for the absolute purchase of trees at 1s. 6d. per foot, without mention of any quality; the defendant says, that it was part of the contract that the timber should be sound and good; that Mr. Smith denied it, and refused to let him have part without all; and that he had expected he would have sold it again. The letter shews, therefore, that the vendee did not consider it a bind-

ing bargain. What the terms of the contract really were, is left in doubt, and must be ascertained by verbal testimony. The object of the statute was, that the note in writing should exclude all doubt as to the terms of the contract; and that object is not satisfied by the defendant's letter. I am, therefore, of opinion, that there was no note in writing of the contract sufficient to satisfy the Statute of Frauds. This brings me to the next point relied upon by the plaintiff. It is contended that there was an acceptance, an actual receipt, of part of the property sold, so as to bring the case within the exception in the seventeenth section; but I think that there was no such acceptance, or actual receipt. In all the cases cited for the plaintiff, there has been something equivalent to an acceptance. In *Chaplin v. Rogers*, the vendee had sold the hay again, and the jury from thence drew the conclusion that there had been an actual acceptance. In *Elmore v. Stone*, the horses were purchased of a horse-dealer, who kept a livery stable. The buyer directed the seller to keep the horses at livery, and they were transferred from the sale to the livery-stable. The purchaser became liable to the livery-stable keeper for the keep, which could not have been the case unless the horses were supposed to have gone into his possession. The direction given by the vendee was considered equivalent to an acceptance or actual receipt of the horses. The vendor was converted into the agent of the vendee for the keep of the horses; and they might be considered as much in the possession of the vendee as if they had been in his stable. For these reasons, I am of opinion, that there was no contract for the sale of an interest in land within the meaning of the fourth section of the statute, but that the contract was for the sale of goods, wares, and merchandize; that the letters did not amount to a sufficient note in writing of the bargain; and that there has not been any part-acceptance of the goods sold, so as to dispense with such a note: consequently, the rule for entering a nonsuit should be made absolute.

Mr. Justice Littledale.—The object of the Statute of Frauds appears, by the preamble, to have been to prevent fraudulent practices, commonly endeavoured to, be

upheld by perjury and subornation of perjury; and with that view, in order to prevent them, it requires that the terms of contract shall be reduced into writing, or that some other requisite should be complied with, to shew manifestly that the contract was completed. I collect from this preamble, that the legislature intended to include within some of its sections the subject-matter of all contracts. The first provides that all leases shall have the effect of leases at will only; the second excepts out of the first, leases not exceeding three years, where the rent reserved during the term is two-thirds of the improved value. The third enacts that no leases, either of freehold or terms of years, shall be assigned, granted, or surrendered, except by deed or note in writing. Now, the first three sections apply to contracts which, before the statute, were usually, though not necessarily, under seal. The fourth section applies to those parol promises or agreements, which, before the statute, were probably, in most instances, reduced into writing, but which, until the statute, were not necessarily so. This section provides, that no action shall be brought in the cases specified unless the agreement, or some note or memorandum thereof, shall be reduced into writing. The agreements therein described are, a special promise by an executor to answer damages out of his own estate; a special promise to answer for the debt of another person; an agreement made in consideration of marriage; any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; and any agreement not to be performed within the space of one year from the making thereof. Such contracts, from their very special nature, would probably have been reduced into writing, but the statute expressly requires that they shall. The seventeenth section enacts, that no contract for the sale of goods, &c. for the price of 10*l.* or upwards shall be binding, unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum of the bargain in writing, be made and signed by the parties to be

charged by such contract, or their agent, thereunto properly authorized. Now, looking to the object of the statute as it appears by the preamble, I infer, that it was the intention of the legislature to embrace within the fourth and seventeenth sections the subject-matter of every parol contract, the uncertainty in the terms of which was likely to produce perjury or subornation of perjury. A contract for mere work and labour is not expressly mentioned in those clauses, and such a contract therefore may possibly not be within the statute: but when the contracting parties contemplate a sale of goods, although the subject-matter at the time of making the contract does not exist as goods, but is to be converted into that state by the seller's bestowing work and labour on his raw materials; that, I think, is a case within the statute. It appears to me to be sufficient, if, at the time of completion of the contract, the subject-matter be goods, wares, and merchandize. I cannot, therefore, subscribe to the doctrine of any case which has decided that such a contract is not within the statute. Applying these opinions upon the different sections to the present case, I think that this contract was not a contract for the sale of lands, or any interest in lands, within the meaning of the fourth section. The words in that section relate to contracts (whether for the sale of the fee-simple, or of some interest less than the fee,) which would give the vendee a right to the use of the land for a given time. Even had the contract been for the sale of the trees, with a specific liberty to the vendee to enter the land and cut them, I think it would not have given him an interest in the land within the meaning of the statute. The object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees, when they become goods and chattels. Here, the seller was to cut the trees; and the intention evidently was, not to give the vendee any property in the trees until they had been cut and had ceased to be part of the freehold. For these reasons, I am of opinion, that the present was not a contract for the sale of any interest in lands. But, supposing this to be so, the next question

arises, whether the case is not within the seventeenth section? It was formerly held, that where the goods, which were the subject-matter of the sale, were not to be delivered till a future day, as one of the three things required by that section of the statute, namely, a part-acceptance, could not be complied with at the time of the contract, it was not a case within that section of the statute; but later authorities have established, that such a contract, whether the goods are or are not to be delivered immediately, is within the meaning of the statute. Those cases, therefore, have established, that, if two of the things required by the seventeenth section can, at the time of the contract, be carried into effect, the case is within it, although one cannot be complied with. There is another class of cases, where the article contracted for has not existed at the time of the contract, but is to be produced by work and labour to be bestowed by the vendor; as, for instance, where the contract was for a quantity of oak pins, which had not been made, but were to be cut out of slabs; or for a chariot to be built. In those cases, the contract has been considered rather as a contract for work and labour, than for the sale of goods, wares, and merchandize, and not within the statute. The impression on my mind, however, is, that wherever the subject-matter, at the time of the completing of the contract, is goods, wares, and merchandize, this section of the statute attaches upon it, although it has become goods, wares, and merchandize, between the time of making and completing the contract, either by one of the parties having bestowed his work and labour upon his own materials, or by his having converted a portion of his freehold into goods and chattels. The provisions of the statute are more important in cases where the contract is to be executed at a future period, than where it is to be executed immediately. From the uncertainty in the terms of bargains to be completed at a future period, disputes, and the perjury too frequent as a consequence, are more likely to arise, which it was the object of the statute to prevent. In the case of the chariot, for instance, a dispute might, at any time before its com-

pletion, have arisen respecting the quality of the materials of which it was to be composed, or the colour which it was to be painted; and upon those facts it would have been necessary to have recourse to verbal testimony to prove the terms of the contract, which testimony it was the avowed object of the statute to exclude. It follows that I am of opinion that the contract in this case was a contract for the sale of goods, wares, and merchandize, within the seventeenth section. Assuming it to be such a contract, I think there was no sufficient note in writing in compliance with the statute. The correspondence between the plaintiff's attorney and the defendant cannot be considered as amounting to such a note in writing. Not only did it take place after the time for the performance of the contract had expired, but the two letters do not agree as to the terms of the contract. That of the plaintiff's attorney speaks of it as a contract for the sale of so much timber at so much per foot, without any mention of quality. That of the defendant states that it was a contract with a condition that the timber should be sound and good, though the plaintiff had subsequently denied that that was one of the terms of the contract. And, for the reasons stated by my Brother Bayley, which I need not repeat, I think that there was no acceptance of the goods, so as to dispense with a written note altogether, according to the exception in that part of the statute. I, therefore, think, that the present rule for a nonsuit should be made absolute.

Mr. Justice Parke.—I concur in opinion with the rest of the Court. I think that the defendant could take no interest in the land by this contract, inasmuch as he could not acquire any property in the trees till they were cut. I think, also, that this was a contract for the sale of goods, wares, and merchandize, within the seventeenth section of the statute. In *Groves v. Buck*, it certainly was said that that section did not apply to a sale of goods which, at the time of the contract, were not capable of delivery and part-acceptance; but that case was overruled by *Garbutt v. Watson*. There, it was held,

that a contract for the sale of a quantity of flour, which, at the time of the contract, was not prepared and in a state capable of immediate delivery, was substantially a contract for the sale of flour, and not a contract for work and labour, and materials found and provided. The true criterion in such cases is, whether the contract be substantially a contract for the sale of goods, or for mere work, labour, and materials. Here, the contract was substantially a sale of timber at so much per foot. Then, assuming that there was a contract for the sale of goods within the seventeenth section, the next question is, whether there was any note or memorandum in writing of that contract, or any part-acceptance of the goods. The two letters do not, in my opinion, amount to a note in writing of the contract, because the contract stated by the plaintiff's attorney is not adopted by the defendant. On the contrary, it is evident that the defendant has not assented to the contract stated by the plaintiff's attorney. The only remaining question is, whether there has been a part-acceptance of the goods sold, and actual receipt of the same. It is believed, that, in the older decisions, the Court did not advert to the words of the statute; for it is difficult to reconcile those decisions with those words. But, in the later cases of *Home v. Palmer* (14), and *Tempest v. Fitzgerald* (15), it was held, that, unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part-acceptance. Here, there was nothing to shew that the vendor had lost his lien for the price, or that the purchaser had lost his right to object to the quality. I therefore concur in opinion that there should be a nonsuit entered.

Rule absolute.

(14) 3 Barn. & Ald. 321.

(15) *Ibid.* 680.

1829. } DAWSON V. MORGAN, GENT. ONE
June 23. } &c.

Bill of Exchange—Costs against Indorser.

Where the drawer or indorser of a bill is sued by the holder and pays the costs of the action, he has no legal remedy over, against the acceptor, for the amount of those costs, unless there be an express promise to pay them.

This was an action of assumpsit. The declaration set out a bill of exchange, dated the 3rd Nov. 1824, for 40*l.* 3*s.* 6*d.*, drawn by W. J. Bantoch, upon the defendant, payable three months after date to the order of the drawer; accepted by the defendant, indorsed by the latter to the plaintiff, and by him to one J. Florance. It then stated the presentment of the bill for payment and refusal, and notice thereof to the plaintiff; that an action was commenced by Florance against the plaintiff in the King's Bench, and judgment given for 54*l.* 10*s.* damages and costs; that, for the recovery of those damages and costs, Florance sued out a writ of *fi. fa.* against the plaintiff's goods; that the plaintiff, in order to obtain the release of his goods, was forced to pay the sum of 54*l.* 10*s.*, 1*l.* 5*s.* for the writ, and 4*l.* 9*s.* for sheriff's poundage and expenses, amounting in the whole to 60*l.* 4*s.*, of all which premises the defendant had notice; that, according to the usage of merchants, the defendant became liable to pay to the plaintiff the said sum of 60*l.* 4*s.*, and that, being so liable, he promised payment.

Plea, the general issue.

On the trial, before Lord Tenterden, at the London Sittings after Easter term, 1829, the facts stated in the declaration were proved. It appeared also that Florance, the holder of the bill, who had sued the plaintiff, had also sued the defendant, the acceptor, and had received from him the amount of the bill and the costs of the action against the acceptor. Florance had repaid to the plaintiff the amount of the bill, so that the present action was brought to recover 20*l.* 0*s.* 6*d.*, the amount of the costs paid by the plaintiff in the action against himself. There was no promise to pay. Upon these facts, Lord Tenterden was of opinion, that, although it was

the practice of the Court not to allow the acceptor of a bill to stay proceedings in the action against himself, unless he paid the costs of the actions against the other parties; yet, that this was a matter of discretion in the Court, which discretion was exercised upon the ground that the acceptor was asking a favour, which the Court would not grant unless he would do justice by consenting to pay the costs of all parties, occasioned by his own default. The plaintiff was therefore nonsuited, liberty being reserved to him to move to enter a verdict for 20*l.* 9*s.* 6*d.*

Mr. Patteson moved accordingly.—He relied upon the practice of the court, and upon *dicta* in the cases of *Smith v. Dudley* (1), and *Jones v. Brooke* (2), where the liability of the acceptor to pay these costs was taken for granted. He also relied upon *Pownall v. Ferrand* (3), where the indorser was allowed to recover against the acceptor a sum which he (the indorser) had paid the holder on account of the bills, the holder having subsequently recovered the balance from the acceptor. He admitted that in that action the indorser had not received costs; but his declaration contained no special count like the present to include them.

Lord Tenterden.—There is no privity of contract between the indorser and the acceptor for costs. Such a case as this must have occurred over and over again; but it has never been considered that the acceptor is, in point of law, bound to pay those costs. In strict law, the indorser is bound to pay the holder upon receiving notice of the dishonour of the bill; and then no costs are incurred. The other Judges concurring,—

Rule refused.

1829. }
June 25. } HARRIS v. WILSON.

Libel—Intention.

Where the necessary effect of a publication complained of as a libel is to injure the plain-

(1) 4 Term Rep. 691.

(2) 4 Taunt. 464.

(3) 6 B. & C. 439; 5 Law Journ., K.B. 176.

tiff, the action is maintainable in point of law, although the defendant did not intend by the publication to injure the plaintiff.

Case for an alleged libel, published in a newspaper called "The Hull Advertiser and Exchange Gazette." The passage charged as libellous purported to be the report of certain proceedings in the Insolvent Debtors Court, London, and was as follows:—

"In the Insolvent Debtors Court, London, yesterday week, Francis Harrison, late of Humbleton, was opposed by Mr. Beckwith, executor of the late W. Dobson, of Brandaburton. The grounds of opposition were, first, that the insolvent had made away with his property, by giving several valuable horses to his sons, mere boys, and, in collusion with his landlord W. Haire, setting up a fictitious distress; and secondly, that he had raised a vexatious defence to an action at law, in which W. Beckwith was plaintiff. After a long examination, in the course of which the insolvent swore that the distress was a *bond fide* one for rent actually owing, and that there was no agreement between himself and his landlord, the case was adjourned, with an order for the insolvent to produce all papers and documents relative to the distress and the value of his property, and also to produce his landlord."

The cause was tried, before Mr. Baron Hullock, at the Spring Assizes for Yorkshire, 1828, when the learned Judge left as a question to the jury, whether the writer of the paragraph intended to injure the plaintiff; and if they believed he did (but not otherwise), they were to find a verdict for the plaintiff. They found for the defendant. The learned Judge, upon consideration, was of opinion that the paragraph, in point of law, and independent of the question of intention, was libellous; and according to this opinion, a verdict was taken for the plaintiff, with 1*s.* damages, leave being reserved to the defendant to move to enter the verdict in his favour. A rule for that purpose having been obtained accordingly,—

Mr. Brougham and *Mr. Starkie* now shewed cause, and relied on *Bromage and*

another v. Prosser (1), as laying down that where the necessary effect of the publication is to injure the plaintiff, the question of intention is immaterial.

Mr. Pollock and Mr. Alderson, contra, contended that the paragraph did not contain any libel on the plaintiff, though it might be libellous upon Harrison, the insolvent. At all events, where the question is doubtful, the intention becomes material. It is part of the *res gesta*.

Lord Tenterden.—I think this paper contained matter which was libellous, in point of law, so as to entitle the plaintiff to maintain the action. It states that the plaintiff was charged with colluding with the insolvent in setting up a fraudulent distress. I think, therefore, the question of intention is immaterial. At least, if the question of intention be left to the jury at all, it should be accompanied with a recommendation to them to consider, that every man intends that to be produced by his test, which is a material consequence resulting from the test. If it were to be held otherwise, I see no reason why, in the case of one man knocking down another with a staff, the defendant should not be allowed to go into the question whether he intended to injure the plaintiff by so knocking him down. This rule should be discharged.

Mr. Justice Bayley and Mr. Justice Littledale concurred.

Mr. Justice Parke, being engaged in the cause while at the bar, gave no opinion.

Rule discharged.

1829. } *HALL v. CURZON, LETT, AND*
July 2. } *OTHERS.*

Evidence—Partners.

In an action brought against one of several partners, either of the partners is a competent witness to prove the liability of the defendant as a partner, although the liability

of the witness himself appears by evidence other than his own.

This was an action of assumpsit for work and labour. It was brought against the defendants, as members of the "City of London Central Street and Northern Improvement Company." The cause was tried, before Lord Tenterden, at Guildhall, Sittings after Easter term, 1828. To prove that the defendant Lett was a member of the company, the plaintiff called a shareholder and director of the company; and he was proved to be a shareholder, not only by his own admission of the fact, but by other evidence in the cause. The defendant's counsel contended that he was incompetent, on the ground that he had an interest in fixing the defendant as a co-partner, inasmuch as he would be liable to contribute in a certain proportion, and the witness's contribution would *pro tanto* be diminished. Lord Tenterden overruled the objection, subject to which a verdict was found for the plaintiff.

Mr. Campbell, in the course of this term, moved to enter a nonsuit, and sought to distinguish the case from *Blackett v. Weir* (1). In that case the liability of the witness appeared only by his own admission; but here it was proved by other evidence. If an action was brought by A. B. upon a written contract signed by J. S., J. S. would evidently have an interest in shewing that others were jointly liable with him. He would thereby reduce the amount of his own contribution.

Mr. Justice Parke.—In *Lockart v. Graham* (2), which was an action against one of three obligors, a co-obligor was allowed to be a witness to prove the execution of the bond by the defendant. The bond itself would shew that there were three joint contractors; but here the witness is called to prove the existence of the joint contract, where his own liability already appears by evidence, which does not affect the present defendant.

The Court took time to consider; and this day,

(1) 4 B. & C. 247; 6 D. & R. 298; 3 Law J. K.B. 803.

(1) 5 B. & C. 385; 8 D. & R. 142; 4 Law J. K.B. 205.

(2) 1 Str. 35.

Lord Tenterden delivered their opinion.—We think there ought not to be any new trial in this case. It was attempted to distinguish *Blackett v. Weir*,—on the ground that there the fact of the witness being a shareholder was proved by his own admission, whereas in this case it was proved by other evidence; and *Lockart v. Graham* (which was mentioned by my Brother Parke),—on the ground that the bond itself shewed that there were three joint contractors. We have considered the point, and think there is not sufficient ground to distinguish this in principle from the former cases. The case is similar in principle to that of co-trespassers. The recovery against one of several co-trespassers is a bar to an action against the others. In practice, the co-trespasser is constantly called to prove that he did the act by the command of the defendant (3).

Rule refused.

1829. } STEVENSON v. ROCHE AND ANO-
July 4. } THER, BAIL OF HORNBOR.

Practice.—Bail.

Bail are liable on their recognizance for the residue left unsatisfied after the plaintiff has proceeded against the goods of the principal by fieri facias.

The defendants (the bail) were served with process on their recognizance. They sought to set aside the proceedings. The following were the facts:—

The original defendant Hornor gave the plaintiff a cognovit, payable by instalments, the last of which fell due upon a day earlier than that upon which the plaintiff could have obtained judgment in case the cognovit had not been given.

Default being made in payment, the plaintiff entered up judgment and sued out a *fi. fa.* against the goods of Hornor. Under this writ, a part of the amount of the judgment was levied. The plaintiff then proceeded by *ca. sa.* for the residue. The sheriff to that writ returned *non est inventus*; and the plaintiff then proceeded against the bail.

(3) See *Morris v. Daubigny*, 5 Moore, 319.

Mr. Archbold, on a former day, obtained a rule *nisi* to set aside the proceedings on two grounds: first, that the plaintiff, by taking a cognovit from the principal without the consent of the bail, had discharged them. [But, upon the hearing of the rule, the Court were clearly of opinion, according to the authorities collected in *Tidd's Practice*, 295, that the bail were not discharged, inasmuch as the plaintiffs had not given to the principal time beyond that at which he could have obtained judgment.] Secondly, that the plaintiffs, in having proceeded against the principal by *feri facias*, had made his election, and could not afterwards proceed against the bail. Upon this point,

Mr. Talfourd now shewed cause.—Upon principle there can be no objection to this proceeding, for it is in relief of the bail. They have the less to pay; and their remedy over, is *pro tanto* expedited; but there is also authority for the proceeding. In *Manning's Exchequer Practice*, p. 472, it is stated, that a case occurred in the Common Pleas in which Lord Chief Justice Gibbs held that the plaintiff might thus proceed; although a part of the debt had been levied by *feri facias* (1). In p. 475, *Mr. Manning* also mentioned a case of *Waring v. Jones*, in Easter term 1807, where the same proceedings were taken and no objection made.

Mr. Archbold, *contra*.—By proceeding against the goods of the principal, the plaintiff indicates his intention to resort to that remedy. The authority, according to the ancient practice in 2 *Crompton*, 72, and 2 *Sellon*, 112, is against the proceeding, and lays down, that, by taking it, the plaintiff discharges the bail.

The Court took time to consider; and this day judgment was delivered by—

Lord Tenterden.—The bail cannot be prejudiced by this proceeding. It is to

(1) We have been favoured by a gentleman who conducted the proceedings in the cause with further particulars. The case occurred about the year 1816. The name of the cause was *Chown v. Deacon* and Another, bail of Tod. The rule on behalf of the bail was supported by Mr. Serjeant Copley, now Lord Lyndhurst, and opposed for the plaintiff by Mr. Serjeant Best, now Lord Wynford. Plaintiff's attorneys, Tahourdin and Buchanan; Defendants' attorney, (and attorney for the bail,) R. Harvey.

their advantage; for, by so much as the plaintiff obtains through the *feri facias*, by so much are they relieved. The proceeding is, in our opinion, regular against the bail, as well as against the principal.

Rule discharged.

1829. } GLASSPOOLE v. YOUNG AND
July 4. } OTHERS.

Husband and Wife—Sheriff.

1. *Semble, that if a man and woman live together as husband and wife, the goods of the woman, in the house in which they live, are liable to seizure under an execution against the goods of the man.*

2. *But, where a man and woman had been married, and goods, which had been the property of the woman before marriage, were seized and sold under an execution against the goods of the man; and the woman, two years afterwards, discovered that the man had a wife living at the time he professed to marry her:—Held, that she was entitled to maintain trover against the sheriff for the value of those goods, though no blame was attributable to the sheriff or his officers.*

This was an action of trover against the late sheriff of Surrey and his officers, for certain goods and chattels, charged to be the property of the plaintiff.

Plea—Not guilty.

The cause was tried, before Lord Tenterden, at the Sittings after Trinity term, 1828, when the following appeared to be the material facts:—In 1823, the plaintiff, then a widow, intermarried with one Mearing. The goods in question, at the time of the marriage, were her property. In 1824, a judgment on a warrant of attorney was entered up against Mearing, and a writ of *fi. fa.* issued, under which the defendant, the sheriff, seized the goods in question, in the house where Mearing and the plaintiff were living together as husband and wife. Mearing moved the Court for a rule to set aside the judgment; and the present plaintiff joined him in the affidavit upon which he moved, and in that affidavit she described herself as his wife. The rule was referred to the Master, who directed that the judgment should stand. The sheriff

VOL. VII. K.B.

sold the goods. The plaintiff, two years afterwards, stated, that she had just discovered, that when she intermarried with Mearing he had another wife living,—of which she gave notice to the defendants, and demanded the goods; and, they not being returned, she brought the present action. The defendants' counsel contended, that the sheriff was justified in seizing the goods as Mearing's, inasmuch as the plaintiff afterwards passed as his wife, and represented herself in her affidavit to be his wife.

Lord Tenterden stated to the jury, that the plaintiff was entitled to recover, unless something had occurred to deprive her of her right. If she had lived with Mearing, and passed as his wife, knowing at the time that she was not so, she would not, in the present case, be allowed now to say she was not his wife. And he left it to them to say, whether, at the time of the execution being levied, or at the time of her subsequently making the affidavit, the plaintiff knew that Mearing had another wife living; if not, he thought she was entitled to a verdict. The jury found a verdict for the plaintiff for the value of the goods, which, it was stated, exceeded the sum for which they were sold under the execution; leave was reserved to the defendants to move to enter a nonsuit, or reduce the damages. A rule *nisi* having been accordingly obtained,—

Mr. Gurney and Mr. Comyn now shewed cause.—The jury having negatived the fact which alone could raise a doubt as to the legal right of plaintiff to recover, the case stands, therefore, upon the mere fact, that the sheriff, being directed to take the goods of Mearing, took those of the plaintiff. She did not resist the seizure, because she was not aware of the fact upon which depended her legal right to resist it; she, therefore, cannot be considered as having consented to the act of which she now complains. The case of *Edwards v. Bridges* (1) is a much stronger case than the present. There, the plaintiff cohabited with one Salmon, and passed as his wife. A writ of *feri facias* issued against his goods, and when the officer went to execute it, she

(1) Stark. N.P.C. 396. See also *Edwards v. Farebrother*, 2 M. & P. 293; 7 Law J. C.P. 72.

represented herself to be his wife, but before the seizure and sale, claimed the goods; and although the plaintiff had passed as the wife of Salmon, knowing herself not to be so, she was held, by the present Lord Tenterden, entitled to a verdict, upon proving that the goods were hers. Thus much for the verdict. There is no ground for reducing the damages, as, supposing the plaintiff to be entitled at all, she is entitled to the value of the property, which has been improperly converted.

Mr. Attorney General and Mr. Coltman, contra.—The plaintiffs made no complaint until after the sale. The case of *Edwards v. Bridges* is distinguishable from the present. There, the sheriff had full notice before the goods were sold, that they were not the property of the party against whom the execution had issued. Notwithstanding that notice, he took upon himself the risk of making out that the goods belonged to the debtor. There was nothing in this case to put the sheriff on his guard; the plaintiff had held herself out as the wife of Mearing, and continued to do so for two years after the execution was executed. Where the sheriff is deceived by a false representation of a party respecting any fact, a knowledge of which may influence the sheriff's conduct, it is not competent for that party to turn round upon him and sue him, for an error, which he has been the cause of. In *Morgan v. Brydges* (2), Lord Ellenborough says, "Where a party has misrepresented himself, and taken a name which does not belong to him, it is not permitted to him to take advantage of his own wrongful act, so as to enable him to avoid the consequences of it; for a mistake induced by his own affirmation, cannot give him a right of action. I remember a case to this effect before Lord Loughborough, where a person had obtruded himself instead of another on the sheriff's officers, and afterwards, having been arrested, brought an action against them, and Lord Loughborough held, that it would not lie. I dissented at that time from the decision, but, on fuller consideration, I have been satisfied that the case was rightly determined." The case of *Mace v. Cadell* (3) is to the same effect, and that case was approved of in

Edwards v. Farebrother. It is immaterial to the sheriff, whether the representation made by the plaintiff was fraudulent or not, he was deceived by her silent acquiescence. The sheriff is entitled to protection in cases like the present, where he has no means of knowing what are the rights of the different parties, and wherever the parties themselves did not know their own rights at the time. In the case of an execution improperly issued, and afterwards set aside by the Court, the sheriff would be justified in having acted under it: *Coles v. Wright* (4). There is the greater reason for protecting the sheriff in this case, inasmuch as that, without any fault on his part, he would be rendered liable to a loss, in respect of which he would have no remedy over against any person. But, independent of the question of property, the plaintiff is not entitled in this action to recover. The form being trover, the plaintiff is bound to shew, not only her right of property, but the wrongful conversion by the defendants. The facts which appeared in evidence amounted to a licence by her; and although she might retract the licence at any time, as regards a wrong-doer, she cannot be allowed to do so, to throw liability upon parties who are not wrong-doers. Here was a marriage in fact. The plaintiff by that marriage gave up all her goods to her husband *de facto*; and when they were seized as his goods she made no objection, nor did she object even to their being sold. How then can she complain of the sheriff, as one who has wrongfully converted her goods? Still less can she seek to charge him with a value greater than that which they bore at a sale, which took place with her knowledge, and to which she made no objection.

Lord Tenterden.—I am of opinion, that this rule must be discharged. It certainly may be hard on the sheriff, that he should be held liable in such a case as the present, where no misconduct can be imputed to him or his officers; but I fear we should be laying down a bad precedent, if we were to break in upon the general rule of law, merely on account of the hardship which attends its application in this particular case. The general rule is, that if by process the

(2) 3 Barn. & Ald. 650.

(3) Cowp. 239.

(4) 4 Taunt. 198.

sheriff is desired to seize the goods of A., and he takes those of B., he is liable to be sued in trover for them. We must not enter into a discussion of the circumstances of each case; we must adhere to the general rule. But it was said that the plaintiff, having looked on and submitted—having seen the goods removed, without expressing any dissent, could not recover. But at that time she did not know the fact which gave her the right to oppose the sale. There is therefore nothing to take the case out of the general rule.

Mr. Justice Parke.—I concur in opinion with the rest of the Court. The rule of law is, that the sheriff must at his peril seize the goods of the party against whom the writ issues. There was nothing amounting to leave and licence in this case. The whole proceedings as between the sheriff and the present plaintiff was *in invitum*; and she cannot be considered as estopped by what took place while she was ignorant of the fact upon which her right depended. The case might have been different if she had fraudulently represented herself to be the wife of the person against whom the writ issued.

Rule discharged.

1829. }
June 20. } LORD V. HILLIER.

Practice.—Term's Notice.

Where a cause has been at issue for more than four terms and no proceedings taken, the defendant must give the plaintiff a term's notice of his intention to proceed before he rule the plaintiff to enter the issue.

The parties in this case were at issue as of Michaelmas term 1826. Nothing further was done until Hilary 1829, when the defendant ruled the plaintiff to enter the issue; and that rule not being complied with, judgment of *non pros.* was issued. Upon a rule to set aside the judgment, the question was, whether the defendant was bound to give a term's notice of his intention to proceed, more than four terms having elapsed since the last proceeding.

Mr. Kelly, for the defendant.—A term's notice was not necessary. In *Theobald v. Crickmore*(1), by analogy to the case of judgment, as in the case of a nonsuit, it was held not to be necessary for the defendant to give a term's notice previous to his trying by proviso. And in *May v. Wooding*(2) it was held, that, on the part of the plaintiff, it was not necessary to give a term's notice where four terms were allowed to elapse between verdict and the rule for judgment. The pleadings are no longer in controversy; and this, according to the opinion of Lord Ellenborough in the last case, furnishes the test. Here, the pleadings were complete.

Mr. Helps, *contra.*—The test is, whether the proceeding to be taken, is an interlocutory stage in the cause; and there can be no doubt that a rule to enter the issue is an interlocutory stage. The matter is yet in controversy; for the parties are at issue. The practice as to rules for judgment, as in the case of a nonsuit, was settled in *Manby v. Wortley*(3), on account of the rule of court in the Common Pleas having been made before the 14 Geo. 2. c. 17, which gave the judgment as in case of a nonsuit.

Lord Tenterden observed, that, without saying whether the reason given in the Common Pleas for the distinction was a good one or not, it would be the safer course to hold, that, in a case like the present, a term's notice was necessary. Accordingly—

Rule absolute, without costs.

1829. }
July 4. } FLINN V. HEADLAM.

Insurance—Misrepresentation.

A misrepresentation used by the assured to the assurer as to a cargo, will not avoid the policy, unless the misrepresentation be of a material fact, likely to affect the risk.

This was an action on a policy of insurance; and the question argued in the

(1) 2 Barn. & Ald. 594.

(2) 3 Mau. & Selw. 500.

(3) Sir W. Bl. 1223.

cause was, whether the policy was void by reason of a misrepresentation made by the agent of the ship-owner to the underwriter. The latter made some demur in consequence of understanding that the ship was to carry rock salt. The agent said she would carry only so much as would put her in ballast trim. That, in point of fact, was not true, as she carried a very large quantity. But the fact upon which the underwriter placed the greatest reliance when treating for the insurance was, the obtaining a certificate that the ship was in good repair and seaworthy. The defence now made to the action was the falsehood as to the rock salt. Lord Tenterden left it to the jury, whether there had been any material misrepresentation. They were of opinion there had not; and found for the plaintiffs.

The defendant afterwards, upon argument, contended that the misrepresentation was material; and relied upon the case of *Pamson v. Watson* (1), where it was held, that a representation under such circumstances when made to the underwriter, amounted to a warranty; and that a warranty must be strictly complied with. But, by

Lord Tenterden.—If underwriters mean to consider such circumstances as material, they must introduce a provision in their policies to this effect; and then the assured will know what is the basis of the contract. Here, I have no doubt the underwriter took the risk, not upon the representation as to the rock salt, but on the certificate of the seaworthiness. The jury thought so too; and thought there had been no material misrepresentation.

The other Judges concurred.

Rule discharged.

Sir James Scarlett and *Mr. Alderson* for the plaintiff:

Mr. Brougham for the defendant.

(1) *Cowp.* 785.

1829. }
July 4. } THE KING v. DAY.

Corporation—Incompatible Offices.

Where it is sought to deprive a corporator of one office, on the ground that he has vacated it by the subsequent acceptance of an office incompatible with the former one, it must be shewn not only that he has acted in the subsequent office, but that his appointment to it was legal. Until such appointment, the holding of the former office is legal.

In this case it was proposed to raise, as a question, whether the office of alderman of the city of Norwich was incompatible with that of an inspector of corn returns for that city (which is a county of itself). It appeared, that the defendant, being an alderman, had acted as inspector of corn returns for that city and county; and that his appointment as inspector appeared, in the books kept by the clerk of the peace, to have been made at a meeting of the justices. The rule sought for a *quo warranto* against the office of alderman; but the affidavit which spoke to this fact did not go on to state that the appointment of corn-inspector appeared to have been made by the justices assembled at Quarter Sessions.

Mr. Attorney General and *Mr. Campbell* contended, that this was sufficient, according to the case of *Rex v. Slythe* (1).

Mr. Alderson and *Mr. Patteson*, contra, relied on the words of the 9th Geo. 4. c. 60. s. 21, as shewing that the appointment must be by the justices assembled in Quarter Sessions; and they contended that *Rex v. Slythe* was inapplicable, as the affidavit applied there to the office from which it was proposed to remove the defendant; while here it applied to an office which, it was contended, was incompatible with the former. It was, therefore, incumbent on the other side, to shew clearly an acceptance of the office which was said to be incompatible, but which there was no objection to the defendant retaining.

Lord Tenterden.—We may discharge this rule without breaking in upon our

(1) 6 B. & C. 245; 5 Law Journ. Mag. Cases, 41, 44.

practice. Those who seek to remove a man from one office, by shewing that he fills another which is incompatible with that one, must shew clearly that the man properly fills the office which is said to be incompatible, and the acceptance of which vacates the former. Here the affidavit states, that the defendant was appointed to the office of inspector of corn returns at a meeting of justices; and that he has acted as such inspector. That may be, and yet he may not be well appointed, as the appointment can only be made by the justices assembled at Quarter Sessions. There is consequently not enough to shew that the defendant has vacated his office of alderman.

The other judges concurring,—

Rule discharged, without costs.

1829. } HARRATT AND ANOTHER v.
July 6. } WISE.

Insurance — Blockade — Total Loss — Abandonment.

1. *An insurance effected upon a ship for a voyage to a port which is in a state of blockade at the time of effecting the insurance, is not illegal, unless it appear that there is an intention to violate the blockade. The voyage may be legally made, in expectation that the blockade may have been taken off by the time of the ship's arrival; and inquiry for this purpose may be lawfully made at some port of the blockading country.*

2. *When a ship sails on a voyage from this country, and after she has sailed notice is given by the Gazette, that the port for which she is destined, is in a state of blockade, the question, whether the captain received intimation of the blockade is (for the purposes of insurance) a question of fact for the jury, taking into consideration all the circumstances of time, place, and opportunity.*

3. *Where an offer of abandonment is made upon a supposition of certain facts existing at that time; but, before action brought, it be known that those facts did not exist at that time, the assured cannot rely upon those supposed facts to justify his offer of abandonment.*

Accordingly, a ship had been captured,

and upon the intelligence arriving the assured offered to abandon; but in the interim the ship had been rescued by the crew, and, at the time when the offer of abandonment was made, was upon her voyage back, and she actually arrived back with the cargo. After her arrival back, the assured brought an action as for a total loss:—Held, that they were not entitled to recover.

Declaration on a policy of insurance on goods by the ship *Ann*, at and from London to Buenos Ayres. The loss was alleged to be by capture.

Plea—The general issue.

The cause was tried, before Lord Tenterden, at the London Sittings after Trinity term, 1828, when the following appeared to be the principal facts.—The ship sailed from Liverpool on the 4th February 1826, and having met with bad weather, and received much damage, put into Lochendale, one of the western isles of Scotland, on the 19th of February, to repair; she sailed thence on the 12th of March; arrived off Monte Video in May, and was there captured by the squadron then blockading Buenos Ayres, carried into Monte Video, and thence sent to Rio Janeiro, where the cargo was taken out and put into the government stores. Notice of abandonment was given on the 6th of May, and refused by the underwriters. While she was at Lochendale, a part of the crew deserted, and the master went to Greenock to procure some other men, and was absent about five days. The blockade of Buenos Ayres was notified in the London Gazette on the 18th of February. The insurance was made on the 22d of that month. The witness examined on the part of the plaintiff, who was the mate, denied any knowledge by himself, and, as far as he knew, by the captain, (but who was not examined,) of the existing blockade, till the ship came up to the blockading squadron by night. A number of ships being observed there together, the captain dropped anchor, and remained till daylight in order to obtain some information, but in the morning the ship was seized. Upon this evidence Lord Tenterden left it to the jury as a question of fact, whether the master knew of the blockade before he sailed from Lochendale. If they found that he did not,

they were to return a verdict for the plaintiffs. The jury found for the plaintiffs.

Subsequently *Mr. Brougham* obtained a rule nisi for a new trial, on the ground that the voyage, being to a blockaded port, was illegal, and that the notice of the blockade in the Gazette was notice to all the king's subjects; and, therefore, that the captain, at the time when he sailed from Lochendale, must be presumed to have known of the blockade.

In the course of this term *Mr. Attorney General* and *Mr. Tomlinson* shewed cause.—It is not unlawful to effect a policy after it is known that the ship is sailing for a blockaded port. She may commence her voyage for the port; and, on her arrival, she may find that the blockade is at an end. No doubt that, if she tried to force her way in, notwithstanding the continuance of the blockade, this would be illegal. The assurer has a right to say, "I will sail in the belief, that, before the arrival of the ship, the blockade will be at an end." This doctrine is recognized in the case of the *Shepherdess* (1). Besides, in this case, the ship was on her voyage before the notification of the blockade. What passed afterwards at Lochendale was not sufficient to shew that the captain had notice of the blockade at that time; and the jury have, by their verdict, expressly negatived such notice. The cases of the *Neptunus* (2), may be cited on the other side, to shew that notice of a blockade to a government is notice to all the subjects of that government; but those are cases where the question was as to notice between nation and nation. If those cases could apply to the present, it might be contended, that notice to the English government was notice to all its subjects, even before that notice was announced in the Gazette. For the purpose of municipal regulation, and the adjusting of questions of contract between the subjects of a state to the government of which notice is given, the question of actual notice becomes material; and, even admitting that notice in the Gazette is *prima facie* evidence, sufficient to raise a presumption of notice until the contrary be shewn, here the contrary has been

shewn, and the jury have found that there was no notice.

Mr. Brougham, *contra*.—First, I contend that the policy was illegal. It is a violation of the blockade to sail for the blockaded port, even to make inquiries, and it was so considered by Lord Stowell in the case of the *Shepherdess*. Secondly, the notice to the English government, or at least the notice by the English government in their Gazette, is notice in point of law to all the subjects of the government. It was so held in the *Neptunus* and the *Adelaide*. But if it is not considered notice in point of law, it is such strong *prima facie* evidence, that it must be met by positive evidence to shew the fact of ignorance of notice. And for this purpose the captain should have been called by the other side, if the fact really was, that he did not receive notice of the blockade when he went on shore at Lochendale.

The Court took time to consider; and this day the judgment was delivered by—

Lord Tenterden.—After stating the facts and the questions raised, his Lordship observed—We are of opinion that it cannot be said that this voyage was illegal in its commencement, because the voyage began by the ship's departure from Liverpool, which was before the publication of the Gazette: yet it may be admitted, that the blockading nation may, by the law of nations, be allowed to consider its notification of a blockade as notice thereof to all the subjects of the nation to whom the notification is given; for it cannot be expected that the blockading nation should be required, or would be able if required, to prove actual knowledge in the master of every vessel of the other country. But this rule, allowing it to prevail to the supposed extent, (though it may be open to some qualification and relaxation for the furtherance of justice, and the benefit of commerce,) cannot, in our opinion, be applied to the case of insurance. And if the possibility, or even probability, of actual knowledge, should be considered as legal proof of the fact of actual knowledge, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice. We, therefore, think that such a rule cannot be established as a rule

(1) 5 Rob. 262.

(2) 2 Rob. 112, 113, v.

of insurance law ; but that knowledge, like other matters, must become a question of fact for the decision of juries. The probability of actual knowledge, upon a consideration of time, place, the opportunities of testimony, and other circumstances, may in some instances be so strong and cogent, as, in the opinion of the jury, fairly to cast the proof of ignorance on the other side, and, in the absence of such proof, to lead them to infer knowledge ; but still we think the inference, whichever way it be drawn, is to be drawn by the jury. In the case now before us, if the jury had drawn the other inference, we are not prepared to say they would have done wrong. But we cannot say that their verdict is altogether against the evidence ; and therefore we cannot set aside their verdict. The rule for a new trial must be discharged.

Rule discharged.

1829. } NAYLOR AND OTHERS v.
July 6. } TAYLOR.

Declaration on a policy of insurance, dated the 6th of March 1826, on goods by the ship *Monarch*, at and from Liverpool, at or to any port or place in the river Plate, with liberty, *in the event of a blockade, or being ordered off the river Plate*, to proceed to any other port, and there wait or discharge. The loss was alleged to have been by capture.

On the trial, before Lord Tenterden, at the London Sittings after Trinity term, 1828, the following appeared to be the principal facts:—The ship sailed on the voyage insured from Liverpool on the 11th of March 1826 ; arrived in the river Plate on the 22d of May, and was captured by a Brazilian frigate on the 23d of May. She was detained and sent to Monte Video ; and after remaining there a short time was sent to Rio Janeiro for adjudication, with the master and some of the crew, a prize-master and some soldiers and sailors of the Brazilian government. On her passage towards Rio Janeiro, the master and crew rose upon the Brazilian people, overpowered them, and brought

the ship and cargo back to Liverpool in September. The master then landed and warehoused the goods ; but the plaintiffs had not taken possession of them. On the arrival of the news of the capture, the plaintiff caused verbal notice of abandonment to be given to the defendant, which he refused to accept ; but, in point of fact, the rescue had taken place before that notice was given, although intelligence of the rescue had not arrived.

The notification of the blockade of the ports in the river Plate belonging to the government of Buenos Ayres, by the emperor of Brazil, was published in the London Gazette on the 18th of February 1826.

The present action was brought after the arrival of the ship back at Liverpool.

The defendant contended, first, that the voyage was illegal, it being to a blockaded port after notification of the blockade. Upon this point Lord Tenterden left it to the jury to say, whether the master intended to violate the blockade. They found that he did not.

Secondly, the defendant contended, that there was not a total loss of the goods ; they never having been taken from the ship, but brought back in her to Liverpool.

Upon the last point the defendant had leave to move to enter a nonsuit ; and subject to this, the plaintiffs had a verdict.

A rule *nisi* to set aside the verdict was obtained by *Mr. Attorney General*, and the case was argued this term, by him for the defendant, and by *Mr. Campbell* and *Mr. R. Scarlett* for the plaintiffs.

Upon the first point, the arguments appear in the preceding case of *Harratt v. Wise*.

It was contended also, by the defendant's counsel, that the rescue of the ship was illegal according to the law of nations ; and that the master, being with the ship in custody, and in a course of legal investigation, had no right to rescue the possession of the ship by force. This was denied by the plaintiffs' counsel, who insisted that the rescue was legal. Upon this point it became unnecessary for the Court to give any opinion.

Upon the question of a total loss, the plaintiffs' counsel relied upon the cases of

Holdsworth v. Wise (1), and *Parry v. Aberdeen* (2).

The defendant's counsel relied upon *Hamilton v. Mendes* (3), in which Lord Mansfield laid down, that the assured might demand as for a total loss, and abandon, provided the capture or the total loss occasioned thereby continued up to the time of abandoning and bringing the action. Here the action was commenced after the return of the ship with the goods to Liverpool. And the opinion of Lord Ellenborough in *Bainbridge v. Neilson* (4), was also cited; from which it appeared that the effect of an offer to abandon is, that if the facts, upon the supposed existence of which the offer is made, turn out to have then existed, the abandonment is a good one, otherwise it is not. Here, the abandonment was made upon a supposition that the ship was in the hands of the captors, while, in fact, at that time, she had been rescued, and was on her voyage back to Liverpool.

The Court took time to consider; and this day the judgment was delivered by—

Lord Tenterden.—After stating the facts and the questions they raised, his Lordship observed—We think this voyage was not illegal in its commencement: indeed, according to the opinion of Lord Stowell, in the case of the *Shepherdess*, the vessel might have sailed for Buenos Ayres without contravening the law of nations, provided it was a part of the original intention to inquire as to the continuance of the blockade at some port of the blockading country; and in this case inquiry might have been made at Monte Video, or of any of the Brazilian ships met in the river Plate; and the policy is framed upon a doubt whether the blockade would continue at the time of the ship's arrival in the Plate, and does not indicate any intention to violate the blockade. Upon the question, whether the rescue of the ship was legal, we give no opinion. It is unnecessary to deliver an opinion upon the effect

of the rescue, or of the return to Liverpool. The cases of *Anderson v. Wallis* (5), and *Holdsworth v. Wise*, which were both cited in argument, shew that a mere loss of the *Adventure* by retardation of the voyage, without loss of the thing insured, either by its being actually taken from the ship or spoiled, does not constitute a total loss under a policy of insurance, unless by the aid and effect of an abandonment. In this case the goods have been brought back to Liverpool. It does not appear on what ground the master has detained them; if it be on the ground of a claim of the nature of salvage, the plaintiffs may have them on satisfying that claim, but there is no proof that the goods are deteriorated. The particular adventure on which they were sent has indeed been defeated; but this fact will not, in itself, make the underwriters liable for a total loss. It therefore becomes necessary for the plaintiffs to shew, that the abandonment has the effect of enabling them to recover as for a total loss. If the abandonment is to be viewed with regard to the ultimate state of facts, as appearing before the action was brought, then, according to the opinion of the Court in *Bainbridge v. Neilson*, there has not, for the reasons already given, been a total loss. We understand that doubts were expressed by a very high authority, in the case of *Smith and others v. Robertson* (6), as to the propriety of the decision in *Bainbridge v. Neilson*. But notwithstanding those doubts, the rule, as laid down in *Bainbridge v. Neilson*, was adopted and acted upon by the Court in the two subsequent cases of *Patterson v. Ritchie* (7), and *Brotherston and another v. Barber* (8). We consider the question to have been well settled, and the rule properly established by these authorities. The verdict is therefore to be set aside, and a nonsuit entered.

Rule absolute for entering a nonsuit.

(5) 2 Maul. & Selw. 240.

(6) 2 Dow, 474.

(7) 4 Maul. & Selw. 393.

(8) 5 Id. 418.

(1) 7 Barn. & Cress. 794; s.c. 1 M. & R. 673; 6 Law Journ. K.B. 134.

(2) 9 B. & C. 411; s.c. 7 Law Journ. K.B. 269.

(3) 2 Burr. 1198.

(4) 10 East, 329.

1829. }
 July 7. } LEIGH V. HIND.

Vendor and Purchaser—Covenant against opposition in trade.

The vendor of a public house covenanted with the purchaser not to carry on the business of a publican within the distance of half a mile. Upon a question, whether this covenant had been broken, it appeared that if the distance were measured along the footpath, with an occasional crossing of the carriage way, so as to arrive at the point by the shortest possible mode, the distance was within half a mile :—Held, that for this purpose, the mode of admeasurement which had been taken was correct, and that the covenant was broken. If the distance were to be measured by drawing a straight line; or, as it is popularly termed, as the crow flies, whether this would be a correct mode of admeasurement for such a purpose—quære.

This case came before the court upon the award of an arbitrator. The question referred to him was, whether the plaintiff was entitled to recover, by reason of the alleged breach of covenant of the defendant.

The defendant, upon assigning to the plaintiff the lease of the public-house, called the Black Lion in Bishopsgate-street, covenanted with the plaintiff not to carry on the business of a victualler within half a mile from that house. He had subsequently carried on such business at the Southwark Bridge Tavern, in Queen-street, in the city of London; and whether that house was within the limited distance, was the question. The arbitrator, to whom the question of distance was referred, stated as follows :—

He had caused to be taken three different admeasurements, one pursuing the course of a person going out of the doorway of the Black Lion, and continuing for the most part along the foot-pavement, but occasionally deviating therefrom into the carriage-way, and entering the doorway of the Southwark-bridge Tavern; another being the course of a person going out of the doorway of the Black Lion, at right angles to the same, to a spot in the carriage-way, distant two feet and nine inches from the curb-stone, and proceeding along the carriage-way, in the nearest direction a carriage could take to a spot, also distant two

feet, nine inches from the curb-stone, opposite to one of the door-posts of the Southwark-bridge Tavern, and passing from such last-mentioned spot to the curb-stone, and thence to the doorway of the said tavern, by walking across the foot-pavement, in a direction slightly inclining to the left hand; and a third measured from the centre of the doorway of the said Black Lion, to the centre of the doorway of the Southwark-bridge Tavern, along the foot-pavement and crossings for foot-passengers. The distance between the Black Lion and the Southwark-bridge Tavern, according to the measurement first mentioned, was two thousand six hundred and twenty-seven feet and one inch; and according to the measurement secondly mentioned, two thousand six hundred and thirty-eight feet, and according to the measurement thirdly mentioned, two thousand six hundred and ninety-five feet; and the arbitrator therefore determined the Southwark-bridge Tavern to be within half a mile from the Black Lion, and the distance by the nearest mode of access between the said premises to be less than half a mile. The arbitrator ordered the verdict which had been taken for the plaintiff to stand.—A rule nisi having been obtained for setting aside the award,

Mr. Gurney and Mr. Patteson shewed cause, contending, that according to the intention of the parties, the defendant was not to set up business within half a mile in point of space, calculated by the shortest possible mode of arriving at the point; and that the defendant was liable, even had the distance been measured in a straight line; or, as it is popularly expressed, as the crow would fly.

The Attorney General and Mr. Chitty, contra.—The last argument of the other side is most unreasonable; if it were to be taken literally, a defendant might be liable, although according to the intention of the parties he had performed his covenant. Suppose the case of a walled town; one house within, and the other without the wall, exactly on the other side. As the crow would fly, the distance would be but a few feet, and, according to the argument of the other side, the defendant would be liable; yet, by the nearest mode of approach in the usual course, the house might be considerably beyond the limited distance.

Therefore, the usual mode of access is to be considered as that which will best fulfil the intention of the parties. And here the usual frequenters of the public-house would go by the footpath, which is out of the limited distance. That was the mode adopted in *Woods v. Dennett* (1). Covenants like this are not to be favoured: *Crutwell v. Lye* (2).

Lord Tenterden.—The arbitrator has declared the distance by the nearest mode of access between the premises to be less than half a mile. Now, unless the nearest mode of access be taken, it is difficult to say what other mode should be taken. If we depart from it a little in this case, we may be called upon to depart from it still more in another, and the consequence will be, that there will be no certain rule applicable to the subject. I think the distance must be measured by the nearest mode of access, and that this was the intention of the parties when they agreed.

Mr. Justice Littledale concurred.

Mr. Justice Parke.—I think the proper mode of measuring the distance would be, to take a straight line from house to house; in common parlance, as the crow flies. So that, at all events, the award, in my opinion, is correct.

Rule discharged.

1829.
July 3.

B. BUCHANNAN, JACKSON AND
HARRIS, ASSIGNEES OF THE
ESTATE AND EFFECTS OF WIL-
LIAM DUFF AND THOMAS
BROWN, BANKRUPTS, v. FIND-
LAY, BANNATYNE, AND RO-
BERT BUCHANNAN.

Set-off.

1. *Where a debtor sends bills to his creditor to be discounted and applied to a particular purpose, the creditor cannot apply the proceeds of the bills to his own debt, and against the particular purpose for which they were remitted.*

2. *If in such a case the debtor become*

bankrupt, his assignees may maintain either trover for the bills, or money had and received for their produce; and, in the latter case, the creditor will not be entitled to set off his old debt.

Assumpsit for money had and received by the defendants to the use of the bankrupts before their bankruptcy, and to that of the assignees after the bankruptcy.

Plea—The general issue.

The cause was tried, before Lord Tenterden, in Easter term, 1827, when a verdict was found for the plaintiffs, subject to the opinion of the Court, on a case of which the following is the substance:—

CASE.

The bankrupts carried on business in Liverpool, in partnership, under the firm of Duff & Brown, until their bankruptcy. A commission of bankruptcy was issued against them on the 1st of February 1826, under which they were declared bankrupts, and the plaintiffs duly appointed assignees of their estate, and the usual assignment executed to them. The defendants carried on business, as merchants, in London, under the firm of Findlay, Bannatyne & Co., for several years prior and up to the 23d of June 1826, on which day they suspended their payments. The two bankrupts, Duff and Brown, and the defendant Findlay, with several other persons, carried on business, in partnership, in Liverpool, for many years up to the 31st of December 1821, under the firm of Duff, Findlay & Co., which firm was dissolved on that day. At that period the said Duff and Brown began to conduct business under the firm of Duff & Brown. At the time of the dissolution of the firm of Duff, Findlay & Co., the defendants were under acceptances for the firm of Duff, Findlay & Co., and for their accommodation, to the amount of 50,000*l.* and upwards. On the dissolution of the firm of Duff, Findlay & Co., it was agreed among the partners in that firm and the defendants, that the firm of Duff & Brown should continue to draw bills on the defendants until the assets of the dissolved firm could be collected and realized, to retire such acceptances and discharge the debts of that firm. Duff & Brown did accordingly continue to draw

(1) 3 Stark. N.P.C. 89.

(2) 17 Vesey, 335.

bills on the defendants, which they accepted; and, on the 23rd day of January 1826, the defendants were under acceptances to the firm of Duff & Brown, but drawn for the account of the dissolved firm of Duff, Findlay & Co., to the amount of 50,000*l.* and upwards. On the same 23rd day of January, the defendant, John Bannatyne, at London, wrote a letter to the bankrupt, William Duff, in Liverpool, of which the following is a copy:—

"I have no letters from you this morning, nor the promised remittances. We have been so completely drained between the two accounts, that we have found it totally impossible to get on, and have been driven to the necessity of stopping payment this morning."

On the same 23rd of January 1826, the bankrupts at Liverpool wrote a letter to the defendants in London, of which the following is an extract:—

"Inclosed please to receive two bills, value 1,740*l.*, which place to our credit; and we have to request that you will pay in cash and in course 900*l.* on our account to Messrs. Ransom & Co., bankers, and that you will place the balance, when discounted, to the credit of Duff, Findlay & Co., with you."

On the 25th of January 1826, the defendant, John Bannatyne, in London, wrote a letter to Mr. Duff, one of the bankrupts at Liverpool, of which the following is an extract:—

"I have received your letter of the twenty-third. It is a thousand pities that the application you now think of making for a loan had not been made two months ago, when we might have been aided. In our present situation, we can do nothing with the bills you have sent us till maturity, and of course can pay nothing to Ransom's."

On the 30th of January 1826, the bankrupts in Liverpool wrote a letter to the defendants in London, of which the following is a copy:—

"The notice of the suspension of your payments produced a paralyzation of our efforts, and has driven us to the painful necessity of a stoppage. You will please to return to us the specialities we sent you, and received by you since the 23rd instant."

On the 1st of February 1826, the bankrupts at Liverpool wrote another letter to the defendants in London, of which the following is an extract:—

"We are surprised that we have not yet received the bills and orders sent to you on our account on the 22d ultimo. It was surely your duty to have appropriated them, barring your suspension, or to have returned them to us."

On the 2nd of February 1826, the bankrupts at Liverpool wrote another letter to the defendants in London, of which the following is an extract:—

"We have your favour of the 1st, and are anything but satisfied with your reply. We remitted you two bills for a specific purpose, which you received after you had given us notice of a suspension of your payments; and yet to this hour we have neither any acknowledgment of their receipt, nor have they been returned as requested, and as they ought. The same has taken place with the post-office order; neither of which you have attended to in your reply, which we again repeat is anything but satisfactory."

On the 4th of February 1826, the bankrupts at Liverpool wrote another letter to the defendants in London, of which the following is an extract:—

"We are at a loss to conceive why you should continue to give us no satisfactory reply to our several queries regarding two bills sent you for a specific purpose, and which, as you have not, nor could have in your circumstances, applied them, you ought to have returned, as well as the post-office order we sent."

On the 6th of February 1826, the defendants in London wrote a letter to the bankrupts in Liverpool, of which the following is an extract:—

"With respect to the post-office order, we have mislaid it somewhere or other, unless we may have given it to Mr. Tate to return to you; because, from the moment we received it, we never had the slightest intention of using it. The bills remitted stand differently: if you have them back you cannot use them, and they are just as safe with us until the question of right is ascertained; we neither desire, nor will we do, anything respecting them that is not proper."

The bills of exchange, mentioned to be inclosed in the letter of the 23rd of June 1826, were inclosed therein and came to the hands of the defendants on the 25th of January 1826. The bills were, one for 240*l.*, due 7th of March 1826; and one for 150*l.* due 9th of March 1826.

The bankrupts, at the time the letter of the 23rd of January was written, were indebted to the defendants in the sum of 2,000*l.* and upwards, of which 817*l.* 2*s.* 6*d.* have been since received; and the bankrupts ever since have been, and still are, indebted to the defendants in the sum of 1,200*l.*, without taking into account the monies which are the subject of the present action. The firm of Duff, Findlay & Co. was, on the 23rd of February 1826, and ever since has been, and still is, indebted to the defendants in a cash balance to an amount greatly exceeding the said sum of 1,740*l.*, besides the acceptances before mentioned.

The defendants, on the 25th of January 1826, the day on which the remittance for 1,740*l.* reached their hands, made entries in their bill book and their account current book in the respective accounts of Duff & Brown, and Duff, Findlay & Co., of which the following are copies:—

In the account current of Messrs. Duff & Brown.

Messrs. Duff & Brown—Cr.

1826, January 25.	
Ryle on Whitmore, due 7th of	
March	£ 240 0 0
Credsdon on Esdaile	1500 0 0
	<hr/>
	1740 0 0
Discount 10 3 9	
Duff, Findlay & Co.	
per desire	829 16 3
	<hr/>
	840 0 0
	<hr/>
	900 0 0
	<hr/>

In the account current of Messrs. Duff, Findlay & Co.

Messrs. Duff, Findlay & Co.—Cr.

1826, January 25.	
By Duff & Brown, per desire	£ 829 16 3
	<hr/>

The defendants, in the month of April following, made entries in their journal and ledger in the same manner as the above, to the respective accounts of Duff & Brown, and of Duff, Findlay & Co., and such entries still remain. It has always been the practice of the defendants to enter, in the first instance, all remittances in their bill book and account current book as the transactions take place, and afterwards to make entries in their other books. The defendants did not, in fact, discount the bills for 1,740*l.*, but retained them in their hands until they became due, when they received the amount thereof. This receipt was previous to the commencement of the present action.

The question for the opinion of the Court was, whether, on the facts stated, the plaintiffs were entitled to recover; and, if they were, to what amount. If the Court should be of opinion that they were not entitled, a nonsuit should be entered: if they should be of opinion that the plaintiffs were entitled to recover, they were to order the sum for which the verdict should stand.

The case was argued on the 3rd of July by *Mr. Patteson* for the plaintiffs, and *Mr. Campbell* for the defendants.

For the plaintiffs it was contended,—first, that this being a transfer of bills for a specific purpose, and the purpose contemplated not being answered, the parties (the bankrupts) who made the transfer, had a right to countermand, and had countermanded the transfer. Secondly, that this was not a case of mutual credit within the meaning of the 6 Geo. 4. c. 16.

For the plaintiff the cases of *Humphries v. Wilson* (1), *Toovey v. Milne* (2), *Thompson v. Giles* (3), *Rose v. Hart* (4), *Easum and others v. Cato* (5), and *Sampson v. Burton* (6), were relied on as analogous; and those of *Key v. Flint* (7), and *Ex parte Flint* (8), as expressly in point. It was admitted that

(1) 2 Stark. N.P.C. 566.

(2) 2 Barn. & Ald. 683.

(3) 2 Barn. & Cress. 492.

(4) 8 Taunt. 499.

(5) 5 B. & A. 861.; 1 D. & R. 530.

(6) 2 B. & B. 89; 4 B. Moore, 515.

(7) 8 Taunt. 21; 1 B. Moore, 451.

(8) 1 Swanst. 30.

there might be a difficulty as to the 840*l.* if the bills had ever been discounted, and the money, the produce, had been paid to the defendants; but the bills never having been turned into money, there was no appropriation of that sum.

The case of *Clive v. Smith* (9), it was observed, had been qualified by the subsequent case of *Rose v. Hart*.

For the defendants, it was insisted, that, at all events, as to the 840*l.* there had been an appropriation to which the bankrupts had assented; and it was urged, that the defendants had been compelled to stop payment by the breach of faith of the bankrupts.

[*Lord Tenterden*.—But they wrote a letter, stating, that they had not appropriated the bills.]

The expression in the letter of the 25th of January, is in mercantile language.

[*Lord Tenterden*.—But the letter of the 6th of February is false, if the other is true.]

[It was then insisted that the defendants were entitled to the right of set-off; and the cases of *Cornforth v. Rivett* (10), *Lechmere v. Hawkins* (11), *Eland v. Karr* (12), *Atkinson v. Elliott* (13), *Chalmers v. Page* (14), and *M'Gillivray v. Simpson* (which is to be found in the 5 Law Journ. K.B. 53, but in no other report), were relied on, in support of the argument.]

The Court took time to consider; and on the 7th of July the judgment was delivered by—

Lord Tenterden.—After stating the questions, his Lordship observed—The cases that bore upon the subject were quoted in the argument. The case nearest to the present in its circumstances, is that of *Key and others v. Flint*, which was also before the late Lord Chancellor by the name of *Ex parte Flint*. Indeed, there is no substantial difference between that case and the present, except in the form of action, which in that case was trover for the bill of exchange, which then remained in the hands

of Flint overdue and unpaid; whereas, the present action is for money had and received to the use of the plaintiffs, the bills of exchange having been paid to the defendants after the commission. But if the bankrupts could have maintained trover for these bills, or if the plaintiffs could have maintained an action in that form, they may waive the tort, and maintain the action in its present form. A lien before payment, and a set-off after payment of the bills, must be governed by the same rules.

We think the cases cited on behalf of the defendants are all distinguishable from the present. In some of them a set-off was allowed against the price of the goods sold; notwithstanding a promise at the time of the sale to pay ready money to the bankrupt for them. In those cases the bankrupt should have insisted upon receiving the money before he parted with the goods: by parting with them he immediately raised a case of mutual credit and cross demands. In *Chalmers v. Page* the policies of insurance were delivered to the defendant, that he might receive the money upon them; and he was not a wrong-doer by retaining the policies. The case of *M'Gillivray v. Simpson*, was of the same kind. Goods were placed in the defendant's hands for sale, and his sale of the goods was not a wrongful act. In *Atkinson v. Elliott* the bill of exchange was placed in the defendant's hands, that he might receive the money upon it when due; no offer was made, before it fell due, to pay him the sum which it was intended he should retain out of it: he was not a wrong-doer by keeping it, and receiving the money upon it. In each of these cases the claim was for money; the breach of the contract consisted only in the non-payment of money. But in the present case, as in the case of *Flint*, the bills were sent to the defendant for a specific purpose; and, as soon as the defendant declined to perform that purpose, the right to retain the bills ceased, and the party was legally bound to restore them on demand. The lien arising out of the deposit in the case of *Flint*, was satisfied before the action was brought: in the present case no lien was created by the original transaction, in which it was never

(9) 5 Taunt. 36.

(10) 2 Maul. & Selw. 510.

(11) 2 Esp. N.P. 625.

(12) 1 East, 375.

(13) 7 Term Rep. 328.

(14) 3 Barn. & Ald. 697.

intended that the defendants should hold the bills. The bills were sent to the defendants, that they might procure them to be discounted without delay, and make an immediate application of the proceeds according to the directions contained in the letter in which the bills were sent to them. They did not procure them to be discounted, and as soon as the bankrupts knew that this was not done, they required the defendants to return the bills. The bankrupts had a right to make this demand. If goods or bills are deposited for a specific object, and the bailee will not perform the object, he must return them: the property of the bailor is not divested or transferred until the object is performed. If, in the present case, the defendants had procured the bills to be discounted as directed, and paid over the 900*l.* to Ransom & Co., they would have been entitled to the benefit of the difference, and to apply it to the account of Duff, Findlay & Co.; but, as they did not procure the bills to be discounted, nor pay the 900*l.*, the bankrupts had a right to a return of the bills; and the defendants cannot have the benefit of that partial application of their value, to which they would have been entitled if they had followed the directions of the bankrupts in other respects. If they could be permitted to do this, they would receive the benefit without performing the consideration, which would be unreasonable. For these reasons we think the verdict is to stand for the whole sum.

Reston to the plaintiff.

1829. } DOWBESON, ADMINISTRATRIX,
July 2. } ETC. v. HARRISON.

Executors—Costs:

Where the plaintiff, executor, joins a count laying the cause of action to himself, as executor, with counts laying the cause of action to his testator, and upon the trial the plaintiff is nonsuited,—he is liable to costs under the 23rd Hen. 8. c. 15.

This was an action of assumpsit.—The first five counts of the declaration were on promises made to the intestate in his lifetime. The sixth count charged, that the

defendant accounted with the plaintiff, as administratrix, of and concerning divers sums of money from the defendant to the plaintiff as administratrix as aforesaid, before that time due and owing, and then in arrear and unpaid; and upon that accounting the defendant was found to be in arrear and indebted to the plaintiff, as administratrix, in the sum of 500*l.*, and being so indebted, he, in consideration thereof, promised the plaintiff, as administratrix, to pay.

The defendant pleaded the general issue. On the trial, the plaintiff was nonsuited.

The defendant applied to the Master to tax his costs, but the Master was of opinion that he was not entitled to costs.

On a former day a rule nisi had been obtained by *Mr. Campbell*, for the Master to tax the defendant his costs. This had been obtained on the authority of *Jones v. Jones* (1).

Against the rule *Mr. Attorney General*, *Mr. Brougham*, and *Mr. Godson*, now shewed cause—denying the authority of the case of *Jones v. Jones*. Their arguments were chiefly those of the unsuccessful party in that case.

Mr. Campbell, contra.—The plaintiff have gone to trial upon a count which describes a cause of action in themselves; and the statute of 23 Hen. 8. c. 15, independent of the case of *Jones v. Jones*, entitles the defendant to costs. (He was here stopped.)

Lord Tenterden.—The 23 Hen. 8. c. 15 declares, "that if any person commence or sue any action, bill, or plaint of debt or covenant upon any specialty made to the plaintiff, or upon any contract supposed to be made between the plaintiff and any other person; and the plaintiff, after appearance of the defendant, be nonsuited, or a verdict pass against him, the defendant shall have judgment to recover his costs against the plaintiff." The sixth count of this declaration alleges, that the defendant accounted with the said plaintiff as administratrix of and concerning divers sums of money from the defendant to the plaintiff, as administratrix, before that time due and owing, and then in arrear and unpaid,

(1) 1 Bing. 249; 8 B. Moore, 146.

and upon that accounting the defendant was found to be indebted to the plaintiff, as administratrix, in so much, and, being so indebted, in consideration thereof, promised to plaintiff, as administratrix, to pay to her that sum upon request. If we are to consider the promise as the contract made between the plaintiff and defendant, then it is a case within the very words of the act. If, on the other hand, we are to look to the consideration as part of the contract, I cannot say that the consideration may not have moved from the plaintiff to the defendant. It may be, that goods belonging to the intestate had been sold by the plaintiff to the defendant after the death of the intestate, and she might sue, as administratrix, for the price of the goods—for the amount would be assets in her hands. So, if the defendant, after the death of the intestate, had received money belonging to his estate, she might sue for that money as administratrix, and she, as administratrix, might account with the defendant respecting such monies; and the consideration for the promise implied by law from such accounting would move from the plaintiff to the defendant. If that be so, then, with reference either to the promise or the consideration, the sixth count states a contract (within the very words of the statute) made between the plaintiff and the defendant.

Mr. Justice Bayley.—I think also, that the plaintiff is liable to costs. The true distinction was given as early in point of time as the case of *Marsh v. Yelloly* (2), upon the words of the statute of Henry the Eighth. Where the plaintiff might have declared in his own right, he is within the words of the statute. His adding his representative character is not to excuse him. In the taxation, the Master will, of course, distinguish the costs applicable to the count in question, from the counts in which the cause of action is declared to have accrued to the testator.

Mr. Justice Parke.—I think the case is perfectly clear upon the words of the statute. I prefer abiding by them than

endeavouring to reconcile all the cases which have been decided upon this subject.

Rule absolute.

[It is understood that this case is going up to the Exchequer Chamber upon a writ of error.]

1829. } CARTWRIGHT, ADMINISTRATRIX,
July 8. } v. COOKE.

This was an action by an administratrix, in which the declaration contained, among others, a count for money paid by the plaintiff, as administratrix, for the use of the defendant.

Mr. Knowles, on the part of the plaintiff, moved for leave to discontinue without payment of costs. He had intended to argue the main question as to the liability of the plaintiff to pay costs, even had she gone to trial and been nonsuited; but after the decision of the case of *Dowbiggin v. Harrison* yesterday, he admitted he could not do so. He sought, however, to distinguish the present case, as it was a motion to discontinue; and as, in point of fact, the cause of action was that put, by way of example, by Lord Ellenborough in the case of *Ord v. Fenwick* (1).

Mr. Campbell, contra, was to have shewn cause in the first instance, but was stopped by the Court, who did not think the case distinguishable from *Dowbiggin v. Harrison*.

Mr. Knowles therefore prayed for the common rule to discontinue on payment of costs.

Rule accordingly.

[But see *Blakemay v. Edwards* (2), where the Court of Exchequer, on such a motion, made a special rule, distinguishing the costs applicable to the different counts.]

(1) 3 East, 109.

(2) 2 Y. & Jer. 559.

1829. }
 July 7. } DUNN v. MURRAY.

Arbitration—Plea—Judgment recovered.

1. *Where all matters in difference in a cause are referred, and the arbitrator awards a sum to the plaintiff in satisfaction of his damages in the cause, semble that the plaintiff cannot maintain another action for a demand not made before the arbitrator, but within the scope of the reference to him.*

2. *The proceedings to bar the plaintiff in such a case may be given in evidence under the general issue in the second action.*

Assumpsit.—The declaration stated, that, in consideration that the plaintiff, at &c., would enter into the employ of the defendant in the capacity of a reporter of the proceedings in the Court of King's Bench, and also of the proceedings in the House of Commons, and would furnish reports of such proceedings to the defendant, his servants or agents, for the purpose of publication in a public newspaper of the defendant for one whole year, to wit, from &c. at and for a certain salary or wages, at the rate of five guineas per week throughout the year, the defendant undertook and faithfully promised the plaintiff, to retain and employ him, the plaintiff, in the capacity aforesaid, and continue him in such employ for one whole year, to wit, from the day and year aforesaid; and, although the plaintiff, confiding in the promise and undertaking of the defendant, did afterwards, to wit, on &c., at &c., enter into the employ of the defendant in the capacity aforesaid, and on the terms aforesaid, and continued in such employ of the defendants, in the capacity aforesaid, and on the terms aforesaid, and did furnish reports of such proceedings as aforesaid to the defendant, his servants and agents, for the purpose of publication in the said public newspaper of the defendant, for a long space of time, to wit, until the 4th of August 1827, at &c.; and although the plaintiff was, on &c., at &c., and had always been ready and willing, and then and there offered to remain and continue in the employ of the defendant in the capacity aforesaid, and on the terms aforesaid, and to furnish such reports as aforesaid, for the purpose aforesaid, for the remainder of the

said year; yet the defendant did not, nor would continue the plaintiff in his the defendant's employ until the expiration of the said year, to wit, from the day and year aforesaid; but, on the contrary thereof, then and there refused to suffer the plaintiff to continue in his the defendant's said employ, and discharged him, the plaintiff, therefrom, without any reasonable or probable cause whatsoever, and had thence hitherto wholly neglected and refused to retain or continue the plaintiff in his the defendant's employ for the remainder of the said year. By means whereof he, the plaintiff, had lost and been deprived of all his wages, profits, and advantages which he otherwise might and would have derived and acquired from being continued in the employ of the defendant as aforesaid, and which the defendant had, from that time, wholly refused to pay or allow to the plaintiff; and the plaintiff had been, by means of the premises, wholly unemployed for the remainder of the said year. Counts were added for wages and salary, money had and received, and on an account stated.—The defendant pleaded the general issue.

This case was referred to Benjamin Heath Malkin, Esq., barrister-at-law, who, by his award, found the following facts:—
 "The said defendant, J. Murray, one W. J. Stewart, and one W. Mudford, together with certain other persons, on and before the 2nd day of February 1827, were the proprietors of a certain public newspaper, and so continued until and after the 2nd day of February 1828, and the said James Dunn was engaged by the said proprietors as a reporter of the proceedings in the Court of King's Bench, and also of the proceedings in the House of Commons, for the said newspaper, for the space of one year, beginning on the said 2nd day of February 1827, at the salary of five guineas a week during the whole of the said year; and the said James Dunn entered upon his duties as such reporter, and continued to perform the same until the 4th day of August 1827, when he was discharged from his said employment by the said proprietors, without any just cause for his said discharge; and the said James Dunn after that time continued ready and willing, and tendered and offered to perform the duties of his said

employment; and the said James Dunn, in Michaelmas term 1827, filed his bill in a certain action of assumpsit against the said W. J. Stewart, J. Murray, and W. Mudford, which said bill contained, among other counts, a count for the wages or salary of the said James Dunn, by him before then done and performed as a reporter of law proceedings in the Court of King's Bench and of debates and other proceedings in the House of Commons, and for publishing reports of such law proceedings, debates, and other proceedings, for the said W. J. Stewart, J. Murray, and W. Mudford, their servants and agents, for the purpose of publication in a certain public newspaper of them the said W. J. Stewart, J. Murray, and W. Mudford; and also a count for work and labour, care and diligence, before that time done, performed, and bestowed by Dunn for the said W. J. Stewart, J. Murray, and W. Mudford, at their instance and request, and for divers material and necessary things before that time found and provided by Dunn for the said W. J. Stewart, J. Murray, and W. Mudford, at their like instance and request, and used and applied in and about the said work and labour; and also a special count, similar to the first count of the declaration in this cause. The plaintiff laid his damages at 300*l.*, and the defendants pleaded the general issue only.

" On the 9th of July 1828, all matters in difference in the said cause between the plaintiff and the said W. J. Stewart, J. Murray, and W. Mudford, were referred by order of Nisi Prius to the arbitrament of T. N. Talfourd, Esq., barrister-at-law; and it was ordered, that the costs of the said suit should abide the event of the award, and that the costs of the reference should be in the discretion of the arbitrator. That order was, on Thursday next after the Morrow of All Souls, in the year 1828, made a rule of this court. Mr. Talfourd, on the 16th of September 1828, made his award concerning the matters so referred to him, and thereby awarded that the plaintiff in the said cause had good cause of action in the said cause against the defendants in the same, to the amount of 63*l.*, which he was entitled to recover as and for his damages in the said cause; and he also awarded and

adjudged, that the defendants in that cause should pay to the plaintiff in the same the said sum of 63*l.* in satisfaction of the damages sustained in the said cause, and that the cause should be prosecuted no further; and that the defendants in that cause should pay their own costs of the reference and of that award, and also should pay the plaintiff his costs in that cause, and of the said reference and award, the same being taxed by the proper officer of the court.

The said W. J. Stewart, J. Murray, and W. Mudford, the defendants in the said cause, afterwards, on the 13th of November 1828, paid to the plaintiff in the same cause the damages and costs as by the said award was directed. The said dismissal of the plaintiff from the service of the said proprietors was proved in evidence before Mr. Talfourd upon the said reference; but no claim was made before him for any compensation in damages for such dismissal, except or beyond a claim for the amount of wages or salary accruing up to the 27th day of October 1827 (being the day on which the said writ in the said action was served), except so far as the counts in the declaration above set forth, and the evidence of the said employment and the said dismissal, might amount to such a claim; and Mr. Talfourd, in assessing the said damages, made no allowance for any such compensation in damages aforesaid, but assessed the same as the amount of wages or salary accruing up to the said 27th day of October, and on no other account whatsoever."

It was further found, by Mr. Malkin, that the declaration in the present action was filed after the payment of the said damages and costs in the former action, that is to say, on the 18th of November 1828; and that the plaintiff had no cause of action in this cause against the said defendant in the same, except upon account of his said dismissal by the said proprietors, and of their failure to employ him as aforesaid until the end of the said year.

Upon these facts, Mr. Malkin left it to the Court to decide whether the plaintiff was entitled to recover; or whether he was barred by the previous action and the facts which followed. The amount of the plaintiff's damages was assessed at 52*l.* 10*s.*, if the Court should be of opinion that he was entitled to recover.

The plaintiff having obtained a rule to enter a verdict for that sum, cause was now shewn by—

Mr. F. Pollock and *Mr. R. V. Richards*; and the rule was supported by *Mr. Campbell* and *Mr. Tomlinson*.

For the defendants, the cases of *Smith v. Johnson* (1), and *Lord Bagot v. Williams* (2), were relied on, as shewing that the plaintiff, having recovered upon a count adapted to let in the whole amount of the claim, was concluded, and could not set up a fresh demand arising out of the same subject matter. And, in anticipation of the case of *Hambleton v. Veere* (3) being cited for the plaintiff—[but it was not]—it was observed, that that case was distinguishable, as there, the action was in tort; and there, too, the relation of master and apprentice had never been extinguished. Here, the contract was dissolved; for the defendant could not afterwards have called upon the plaintiff to resume his labours for the remainder of the year.

For the plaintiff, the case of *Vooght v. Winch* (4) was relied on, as shewing that the proceedings in the former action did not operate conclusively in bar unless specially pleaded, and that the effect of giving them in evidence under the general issue was to let in the question whether the plaintiff had or had not been satisfied in respect of his present demand;—that this got rid of the case of *Lord Bagot v. Williams*; for there the former judgment was specially pleaded;—that in the former action the plaintiff had recovered only for the by-gone time, and, according to the cases of *Gandell v. Pontigny* (5), and *Eardly v. Price* (6), could only recover for that time (7). But whatever the plaintiff might have recovered under the reference of the former case, it was insisted, on the authority of *Ravee v. Farmer* (8), and *Golightly v. Jellicoe* (9), that, as the matter now in question had not, in fact, been brought before the arbitrator, the

plaintiff was not precluded from now entering into it.

The Court took time to consider; and on the following day the judgment was delivered by—

Lord Tenterden.—After stating the facts, his Lordship observed—It is clear that the present claim might have been brought before the arbitrator on that occasion; and in the case of *Smith v. Johnson* (10), Lord Ellenborough lays it down, that, where all matters in difference are referred, the party, as to every matter included within the scope of such reference, ought to come forward with the whole of his case. So here, the present claim was within the scope of the former reference, for it arose out of the dismissal. It was the duty of the plaintiff to bring it before the arbitrator, if he meant to insist upon it as a matter in difference; and we are of opinion that he cannot now make it the subject-matter of a fresh action.

Rule discharged.

1829. { PEYTON AND OTHERS v. THE
June 25. { GOVERNORS OF ST. THOMAS'S
HOSPITAL.

Action on the Case—Party Walls.

1. Semble—That a man may lawfully pull down his house adjoining to that of his neighbour, without taking means to continue to that of his neighbour, a support for his neighbour's house, equal to that which was given by his own.

2. But, whether it is not incumbent on him to give reasonable notice to his neighbour of his intention, in order that his neighbour may himself take means to provide adequate support for his own house—quære.

This was a special action on the case. The declaration in the first count stated, that a certain messuage or dwelling-house was in the possession of one D. as tenant to the plaintiffs, for a term, which dwelling-house was in part adjoining to a house of the defendants; yet the defendants, contriving, &c. to aggrieve the plaintiffs in

(10) 15 East, 213.

(1) 15 East, 213.

(2) 3 B. & C. 235; a.c. 5 D. & R. 87; 2 Law Journ. K.B. 152.

(3) 2 Saund. 169.

(4) 2 Barn. & Ald. 662.

(5) 4 Campb. 375.

(6) 2 New Rep. 333.

(7) 2 M. & P. 233; a.c. 6 Law Journ. C. P. 244.

(8) 4 Term Rep. 146.

(9) Ibid. 147, in note.

their reversionary interest in the first-mentioned house, whilst the same was in the possession of D, as such tenant, negligently, unskilfully, wrongfully, and improperly, by certain servants of the said defendants, altered, pulled down, and removed the said messuage of the defendants, so in part adjoining to the plaintiffs' house, without shoring up, propping up, or duly securing the adjoining house of the plaintiffs, in order to prevent the same from being damaged by the said altering, pulling down, and removal of the defendants' messuage, so that, for want of such shoring up, &c., the plaintiffs' house became and was, by and through the altering, pulling down, and removal of the messuage of the defendants, greatly weakened, damaged, and injured, and in part fell down. The second count, after stating as before, that a certain dwelling-house was in the possession and occupation of one D. as tenant to the plaintiffs, in part adjoining to a certain other messuage of the defendants, and connected therewith by a certain party-wall, the defendants so negligently, unskilfully, wrongfully, and improperly conducted themselves, by certain servants employed by them in that behalf in and about the altering, taking away, pulling down, and removing the defendants' house; that the plaintiffs' house, by such negligent, unskilful, and improper conduct, became greatly weakened and damaged, &c. To these were added other counts, which charged the defendants with negligence in the pulling down of the party-wall between the two houses.

The defendants pleaded not guilty.

The cause was tried, before Lord Tenterden, at the London Sittings after Trinity term 1828, when the following appeared to be the principal facts:—The houses in question were in Cheapside; the plaintiffs' was in the occupation of D. their tenant, and the defendants' house adjoined to the westward, at the corner of Honey-lane. The latter had been for some years in bad repair, and supported by struts or shores placed against the house at the opposite side of the lane. Ultimately the defendants resolved to take down the house and rebuild it, and they agreed with one Lees to demise the premises to him on a building lease;—after this agreement Lees sold the materials of the old house by auction,

and the purchasers pulled it down, and in so doing they removed the struts by which it had been supported. The plaintiffs' house, in consequence of the removal of the defendants' house, and the struts, separated from the house next adjoining to the eastward, and was materially injured. No person shored up the plaintiffs' house either externally or internally; the plaintiffs themselves had put up some internal supports, but not sufficient for the purpose; and it seemed to be agreed, that, if the plaintiffs' house had been properly shored inside, the injury would not have happened. There were some minor facts, which appear afterwards in the judgment. These being the main facts, Lord Tenterden was of opinion, that the injury had not arisen from any misconduct on the part of the defendants; and that the plaintiffs, and not the defendants, were bound to prop up the plaintiffs' house. The plaintiffs were therefore nonsuited.

A rule had been obtained on the motion of the late Solicitor General (Sir N. C. Tindal) for setting aside the nonsuit: it was granted on two grounds—first, that the defendants were answerable for the injury arising from the removal of their house; the Solicitor General stating, as a legal proposition, that if a man pulled down his own house next door to that of his neighbour, he was bound, at his peril, to do it in such a manner as not to injure his neighbour's house; and the Solicitor General contended, that the present case fell within that proposition.

The second point made on the motion was, that, even supposing the defendants were not bound to shore up the plaintiffs' house, they were bound to give him reasonable notice of their intention to pull down their own, that he might take the necessary precaution. The case of *Jones v. Bird* (1), was relied upon as expressly in point. In the present case there had been a question as to notice, and the Solicitor General contended, that the evidence of notice was insufficient; but as the case went off upon another point, it is not necessary to state the evidence in this respect.

Cause was now shewn against the rule

(1) 5 B. & A. 837; 1 D. & R. 497.

on behalf of the defendants by *Sir James Scarlett* and *Mr. C. Cresswell*; and the rule was supported, on behalf of the plaintiffs, by *Mr. Brodrick* and *Mr. Dodd*.

For the defendants, it was contended, that, unless their act of pulling down their own house was wrongful, no action could be maintained by the plaintiffs for the damage they had sustained; and that no point could be raised in this action as to want of notice, there being no count charging the pulling down without reasonable notice to the plaintiffs.

In support of this argument the cases of *The King v. the Commissioners of Sewers for the Levels of Pagham* (2), and *Virtue v. Birde* (3); also *Com. Dig.* Action upon the case, A; and *Domat's Civil Law*, book ii. title 8. art. 9. "Damage occasioned by Fault," were relied on. The case of *Jones v. Bird*, it was contended, was distinguishable; for the defendants were public commissioners, and had a power to enter premises to shore them up, and to raise money to defray the expense. *Bullard v. Harrison* (4) was also cited, as shewing that the defendants would not have been liable to repair their house; and that, if instead of pulling it down they had allowed it to decay and to fall, they would not have been liable for the injury which such fall might produce to the plaintiffs' house.

For the plaintiffs, it was contended, that the proposition laid down by the late Solicitor General, on moving for the rule, could not be controverted; that the cases cited were cases of acts of nonfeazance, while this was of misfeazance; and that the case of *Edwards v. Halinder* (5) shewed the soundness of the distinction between the two. There, the tenant of a cellar recovered against the tenant of the warehouse above for placing so great a weight on the floor, that it gave way and crushed the plaintiff's goods in the cellar. It was there admitted that the defendant would not have been liable if the floor had given way merely from want of repair. It was also contended, that it was not necessary to charge in the declaration, in express terms, that a proper notice

had not been given; that the charge of negligence was sufficient, and that if a proper notice had been given, that fact would be an answer to the charge of negligence. The cases of *Robinson v. Lewis* (6), *Roberts v. Read* (7), and *Rooth v. Wilson* (8), were also cited as favourable to the plaintiffs' case; but the case of *Jones v. Bird* was relied on, as expressly in point.

The Court took time to consider, and on the 7th of July the judgment was delivered by—

Lord Tenterden.—After stating the first and second counts of the declaration, his Lordship proceeded:—This declaration does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants' house; nor does it, in our opinion, contain any allegation from which a title to such support can be inferred as a matter of law. The complaint also in both counts relates to the fact of taking down the defendants' house, and the manner in which that was done. The first count is evidently framed upon an assumption, that it was the duty of the defendants to use the necessary means to sustain the plaintiff's house when they took down their own; the second count is more general, but it does not charge the want of notice of taking down the defendants' house, in order that the plaintiffs might themselves use the necessary means to sustain their own property, as the injury complained of: and consequently, in our opinion, the action cannot be maintained upon the want of such notice:—even conceding for the present, that, as a matter of law, the defendants were bound to give notice beforehand; upon which point of law we are not, in this case, called upon to give any opinion. I have been thus particular in noticing the declaration, because it furnishes an answer to most of the arguments that were advanced on the behalf of the plaintiffs. On the trial, it appeared, upon the plaintiffs' evidence, that the two houses were very old and decayed, the party-wall between them weak and defective; that for some time pieces of timber, called struts, had been carried across Honey-lane, on the east side whereof the

(2) 8 B. & C. 355; s. c. 2 M. & R. 469; 6 Law Journ. K.B. 338.

(3) 2 Lev. 196.

(4) 4 Maul. & Selw. 387.

(5) 1 Poph. 46; 2 Leon. 93.

(6) 10 East, 227.

(7) 16 Id. 215.

(8) 1 Barn. & Ald. 59.

defendants' house was situate, to the opposite house on the west side of that lane; that the plaintiffs' house adjoined the defendants' eastward; that these strutts, by preventing the defendants' house from falling westward, had the effect also of preventing the plaintiffs' house from falling that way; that when the defendants' house was taken down, these strutts were necessarily removed, and no other or longer strutts substituted, extending from the plaintiffs' house to the house on the opposite side of Honey-lane, nor any upright shores placed within the plaintiffs' house to sustain the floors and roof without the aid of the party-wall; it appeared, also, that if either of these measures had been adopted, the plaintiffs' house might have stood; but that, neither of them being adopted, it soon became separated from the house adjoining to it on the east, and either partly fell or was necessarily taken down, and rebuilt, being injured, dangerous, and uninhabitable. There was no evidence to shew whether the two houses had been erected at the same time, or at different times; from their construction, it seems likely, that they were built at or about the same time. The freehold was then in different hands; and as the governors of the hospital are not likely to have bought or sold in modern times, it is probable, that the freehold was also in different hands when the houses were built. These, however, are but conjectures; if the facts either way would have aided the plaintiffs' case, it was their duty to have proved those facts. It did not appear that the defendants gave any previous notice of their intention of pulling down their house, or of the time of doing so, but the defective state of both houses was of course known to the parties. There had been previous discussions and treaty between them, especially with regard to the party-wall; and a notice of rebuilding the party-wall under the act of parliament had been given, but the defendants' house was pulled down before the expiration of the time mentioned in that notice. The operation of taking down the defendants' house was carried on by day; and the operation must have been seen and known by the occupier of the plaintiffs' house. These being the facts in evidence, on the trial, I was of opinion, at the close of the plaintiffs' case, that it was their duty

to support their own house by shores within, and upon that ground I directed a nonsuit.

A rule for setting aside a nonsuit was granted in the ensuing term; cause was shewn, and the matter very well argued on both sides during the present term. We have considered it; and adverting to the facts proved, and to the want of evidence from which a grant to the plaintiffs of a right to the support of the adjoining house might be inferred, and to the form of the declaration, we think the nonsuit was right, and therefore the rule for setting it aside must be discharged.

Rule discharged.

1829. } MARSHALL AND ANOTHER, EXEC-
July 3. } CUTORS, v. WILDER.*

Costs—Executors.

1. *Where an executor pleads non assumpsit by his testator, and also plene administravit, and the plaintiff takes issue upon both pleas, and the issue upon non assumpsit is found for the plaintiff, and that upon plene administravit for the executor, the latter is entitled to his general costs in the cause, upon the rule that there is one plea which answers the action.*

2. *But where to such pleas the plaintiff takes issue upon the plea non assumpsit, and admits the truth of the plea of plene administravit, taking judgment of assets quando acciderint, and the issue upon the plea of non assumpsit is found for the plaintiff, he is entitled to the general costs against the executor, upon the principle, that he forced the plaintiff on to trial, by a plea which he could not support.*

This was a writ of error from the Common Pleas. The action was in assumpsit by *Wilder v. Marshall and Hobson*, executor and executrix of Hobson, for goods sold and delivered to the testator on promises by him; and on an account stated with the defendants as executor and executrix of monies due from the testator. The executors pleaded, first, *non assumpsit* as to all the promises; secondly, *plene administravit*. The plaintiff joined issue, and

* In the note at p. 157 of the Common Pleas Reports in this volume, the reference should have been to *Marsh v. Wood*, K.B. 327.

went to trial on the first plea, and took judgment of assets *quando*, &c. upon the second. The jury found for the plaintiff as to the promises alleged to have been made by the testator, with 27*l.* damages, and 40*s.* costs, and for the defendants as to the promise alleged to have been made by them; and the plaintiff's costs of increase were taxed at 91*l.* 6*s.* 2*d.*, and judgment was entered up for the whole of these damages and costs "to be levied of the goods and chattels, which were of the said J. Hobson at the time of his death in the hands of the defendants as executor and executrix as aforesaid, to be administered, if they have so much thereof in their hands to be administered; and if they have not so much thereof in their hands to be administered, then the sum of 93*l.* 6*s.* 2*d.* of the damages aforesaid, being for the costs and charges aforesaid, to be levied of the proper goods and chattels of the defendants." Errors were assigned, and the plaintiff joined in error.

Mr. Wightman, for the executors, contended, that, as, according to the case of *Edwards v. Bethell* (1), where all the earlier cases were considered, the executors would have been entitled to costs in case the plaintiff, instead of taking judgment of *quando acciderint*, had taken issue on the plea of *plene administravit*, the plaintiff could not, by admitting the truth of the defendants' plea, place them in a worse situation, than if an issue on that plea had been found for them; and that an executor was not liable to costs unless he pleaded a plea false to his own knowledge.

Mr. Follett, contra, was stopped.

Lord Tenterden.—I am of opinion that the judgment of the Court below ought to be affirmed. If the defendant had pleaded a plea of *plene administravit* only, the plaintiff might have taken judgment of assets *quando acciderint* without incurring the costs of a trial. But the executors, by pleading that the testator never promised, compelled the plaintiff to incur those costs. It is true, that if issue had been taken on both the pleas, and the second (a bar to the action) had been found for the defendants, the rule established in ordinary cases

where any plea answering the action is found for the defendants, would have been applicable. But the plaintiff did not do that; he admitted the truth of the second plea, without putting the defendants to the expense of proving it, but was compelled to go down to trial on the other issue, in order to avail himself of the judgment of assets *quando acciderint*. The costs of going to trial have therefore been entirely caused by the act of the executors.

Mr. Justice Bayley.—The case of *Edwards v. Bethell* only decided that where a plea of the general issue is found against an executor and *plene administravit* for him, he is entitled to a general judgment in his favour, and to the general costs of the action. It has been contended, that an executor is never liable to costs *de bonis propriis*, unless he pleads a plea false to his own knowledge. But that, I apprehend, is not the rule. Where he pleads a plea false to his own knowledge, as a false plea of *plene administravit*, he is liable not only to pay the costs, but the damages also *de bonis propriis*. But, if he pleads a plea which he cannot support, although it be not false to his knowledge, and the plaintiff is by that plea driven to trial, and obtains a verdict, he is entitled to judgment for the whole, in the first instance, *de bonis testatoris*, and, if there are not assets, then to the costs *de bonis propriis* of the executor.

Mr. Justice Littledale.—I am of the same opinion. I have always understood the course, in such pleadings as these, to be, that the plaintiff is entitled to costs. He should not recover the debt out of the executor's property; but as the costs are incurred in consequence of the defendants having pleaded a plea which they could not support, and having by that plea alone forced the plaintiff to trial, it is right that they should pay them if they have not assets of the testator's sufficient for that purpose. 1 Roll. Abr. 933, is to this effect. The case of *Dearne v. Grimp and others* (2) has been in some measure overruled.

Judgment affirmed.

[As to the right of the executor to charge such costs against the estate, see *Fielden v. Fielden*, 1 Sim. & Stu. 255.]

(1) 1 Barn. & Ald. 254.

(2) 2 Sir W. Bl. 1275.

1829. { MARSH AND OTHERS, ASSIGNEES,
July 3. { ETC. OF ROWE, A BANKRUPT,
v. WOOD AND ANOTHER.

Arbitration—Submission revoked.

1. *When two parties have submitted to refer to arbitration, and then one of them becomes bankrupt, whether the bankruptcy is of itself a revocation of the submission, quære.*

2. *Though it be not of itself such a revocation, if the interest in the subject-matter of the party who becomes bankrupt passes to his assignees, the other party is justified in revoking the submission; because, as the assignees would not be bound by the submission, it is no longer mutual.*

This was an action of covenant.—The declaration averred, that before Rowe became bankrupt, by an indenture made between the defendants of the one part, and Rowe of the other part (after reciting, amongst other things, that Rowe alleged that he was entitled to charge the defendants, or one of them, the loss, or some part or share of the loss, which had arisen to him by or in consequence of the purchase of three ships of war, in or about which the said defendants wholly disputed, and that there were other differences and disputes between the defendants and Rowe respecting the said ships, all which differences and disputes they had agreed to refer to an arbitrator in the said indenture mentioned,) in consideration of the premises, the said parties thereto did mutually agree to stand to and abide by the award of W. S. of, upon, and concerning the said disputes and differences, &c., and that the parties should not, nor would, in any manner obstruct, hinder, or impede the said arbitrator in making an award. The breach assigned was, that the defendants revoked their said submission. The defendants pleaded the bankruptcy of Rowe generally before the revocation, and also a special plea of Rowe's bankruptcy, and adding, that before any award was made the commissioners assigned to A. B. (the provisional assignee) all claim, right, interest, or demand whatsoever, of or belonging to the said Rowe, in or concerning all and every the matters or things in dispute, or

difference between him and the defendants. Demurrer to the plea of bankruptcy generally. Replication to the other plea, that, after the assignment to A. B. the plaintiffs were duly chosen assignees of the estate and effects of Rowe, and A. B. assigned to them all and singular the goods, wares, and chattels, debts, sum and sums of money, and all other the personal estate of which Rowe, or any person in trust for him, was possessed, or entitled to, at the time of his bankruptcy. To this replication there was a demurrer.

Mr. Follett (in support of the demurrer,) for the defendants.—First, the bankruptcy of Rowe was of itself a revocation of the authority of the arbitrators; so that the revocation by the defendants was an act of surplusage—a mere nullity. But, secondly, if the bankruptcy was not of itself a revocation, the defendants had a right to revoke the submission; because, as the present plaintiffs, the assignees, were not bound by that submission, it is but reasonable that the defendants should be allowed to relieve themselves from it: as the agreement between the parties was no longer mutual. The first proposition is shewn by the obvious fact, that Rowe, the bankrupt, had lost all power over the subject-matter of the arbitration. Marriage of a feme sole after submission is a revocation of the authority: *Sir W. Jones*, 388; *Charnley v. Winstanley* (1); *Saccum v. Norton* (2). By analogy it may be inferred, that bankruptcy revokes the authority. In *Hovill v. Lethwaite* (3), and *Hudson v. Granger* (4), it was held, that a power of attorney to receive money was revoked by bankruptcy.

But, at all events, the bankruptcy of Rowe justified the defendants in revoking the authority. If the parties, by that circumstance, were no longer upon equal terms, it can scarcely be denied that the party who was at a disadvantage by a circumstance over which he had no control, had a right to relieve himself from that disadvantage. Cases are not necessary to shew that a submission to arbitration must

(1) 5 East, 266.

(2) 2 Keb. 865.

(3) 5 Esp. N.P. 158.

(4) 5 Barn. & Ald. 27.

be mutual, and must bind all the parties to it. The cases however of *Dilly v. Polhill* (5), *Biddell v. Dowse* (6), and *Ferrer v. Owen* (7), illustrate that rule. And the case of *Ex parte Kemshead, in re Cotterell* (8) is an express authority, shewing that the submission made before the bankruptcy was not binding on the assignees. The only case which at first sight may appear to bear against the present argument, is that of *Andrews v. Palmer* (9).

[*Lord Tenterden*.—That case is not against you. There, a verdict was taken subject to the award: and the Court held, that the award, when made, referred to the time at which the verdict was taken.]

Then, there is no other point against which the defendant has to contend. But, even if there was no right to revoke the submission, the plaintiffs, as assignees, have no right to maintain this action. The breach of the contract was committed after the bankruptcy. The right of action was not a debt due to the bankrupt, nor does it come within the description of property which passes to assignees of a bankrupt. In this respect, the case is different from that of *Smith v. Coffin* (10), where it was held, that a right to maintain a real action passed to the assignees. Here, the whole was matter of personal contract.

Mr. R. V. Richards, contra.—Much of the argument of the other side may be admitted; but none of the authorities cited go to shew that bankruptcy is a revocation of the submission; and the opinion of the Court in *Andrews v. Palmer* seemed to be that it was not. The case of *Haswell v. Thorogood* (11) is also an authority to the same effect. There, an award was made after the bankruptcy; and the award being against the plaintiff, the Court granted an attachment against him for non-payment of the costs. This they would not have done if the bankruptcy had revoked the submission.

Mr. Follett, in reply, cited *Aston v. George* (12), as shewing that there were cases wherein a party might reasonably revoke the submission.

Lord Tenterden (after stating the pleadings).—All that was the subject-matter of this reference (the interest of Rowe in the ships) passed to the assignees; and, upon this taking place, the defendant revoked the submission. Now, it is not necessary for us to lay down any general rule upon the question, whether the bankruptcy of either party to a submission is, of itself, a revocation of the submission. It is admitted that the assignees would not have been bound by the submission. Then, can we say that the defendant had not a right to revoke the authority of the arbitrator? All the authorities cited shew, that, in the case of a submission to arbitration, for one party to be bound, all ought to be bound.

Mr. Justice Bayley.—The object of a reference is to bring about a final determination of the matter in dispute. Here, the matter could not be finally determined; for the assignees would not be bound by the result. The defendant was therefore justified in preventing the further proceeding of a reference, the main object of which had been defeated by an act to which he was no party.

Mr. Justice Littledale.—It is an admitted principle, that the very essence of an arbitration is, that the submission should be mutual, and that the award should be mutual and final. Here, although the submission was at first mutual, it did not continue so, but an assignment was made of Rowe's claims, which destroyed the mutuality. Neither would the award have been mutual if made, it would, as to one side, have been quite ineffectual; and this change was the effect of Rowe's bankruptcy. I think, therefore, that the defendants were justified in putting an end to the arbitration.

“ *Judgment for the defendants.* ”

(12) 2 B. & A. 395; 1 Cbit. 200.

(5) 2 Stra. 923.

(6) 6 B. & C. 255; s.c. 5 Law Journ. K.B. 128.

(7) 7 B. & C. 427; s.c. 1 M. & R. 222; 6 Law Journ. K.B. 28.

(8) 1 Rose, 149.

(9) 4 Barn. & Ald. 250.

(10) 2 H. Bl. 444.

(11) 7 Barn. & Cress. 705.

1829. } *In the matter of arbitration be-*
 June 22. } *tween CASSELL AND ANOTHER.*

Award—Choice of Umpire.

Where there is a reference to two persons who have power to nominate a third, their nomination must be the result of their judgment, and not that of chance; and if such nomination be the result of chance, the Court will set aside the award, unless the parties have consented to the arrangement, or afterwards acquiesced in it.

The submission in this case was to two persons, Adams and Chapple, and such third person as they should appoint. They could not agree upon a third person, and they therefore agreed that each should name two; that the names of the four should be written on pieces of paper and put into a hat; that one should thence be drawn out; and that the name so drawn out should be the third person. That third person and the two arbitrators afterwards proceeded in hearing the matter; but the award was made by the third person and one of the arbitrators. This third person was one of the two, whose names were put in the hat by the arbitrator who joined with him in making the award.

It was moved to set this award aside. The party applying did not know of the manner in which the third person was appointed until after the award was made.

The case was argued last term by *Mr. F. Pollock* and *Mr. R. Bayley*, in support of the award, and by *Mr. Godson* against it.

In support of the award, the case of *Neale v. Ledger* (1) was relied on as expressly in point. There, two arbitrators, having each proposed a third, and neither liking to abandon his own choice, (though not exactly disapproving of the choice of the other,) agreed to toss up which of the two proposed should be nominated. The Court held the award to be good, and Lord Ellenborough distinguished the case from that of a tossing up which of the two should nominate a third.

Against the award, the cases of *Harris v. Mitchell* (2), and *Wells v. Cooke* (3) were cited. In the former, the arbitrators could

not agree who should be umpire, and they threw cross and pile who should have the nomination; and the Court set aside the umpirage. In the latter, the arbitrators drew lots who should have the nomination of the umpire; and the Court set aside the umpirage.

[The case of *Young v. Miller* (4), was to the same effect, though it was not cited in the argument, nor noticed in the judgment. There, the nomination of umpire was decided by lot; and the Court set aside the award.]

The Court took time to consider; and this day their opinion was delivered by—

Lord Tenterden.—(After stating the facts, and the cases cited,)—The facts differ very slightly indeed from those in the case of *Neale v. Ledger*. Upon the authority of that case I was at first disposed to support the award; but my learned Brothers differed in opinion from me, and we thought it right to consider the subject together. We have done so, and we are now all of opinion, that this mode of appointment is bad. When parties refer in this manner they expect the concurring judgment of the two in the appointment of a third. And, without entering into any nice distinction between the facts of this and of other cases, we think it is better to lay down as a general rule that the appointment of the third person must be the act of the judgment and will of the other two. It must be matter of choice, and not of chance, unless the parties consent to some other mode, or by their subsequent conduct acquiesce in it. This award is therefore bad.

Rule absolute.

1829. } *BOTTINGS v. FIRBY AND ANOTHER.*
 June 23. }

Evidence—Judgment in inferior Court.

Where an action had been brought in an inferior court, and was thence removed into the King's Bench, where the defendants pleaded, and the cause was brought on for trial:—Held, that evidence of a record of the

(1) 16 East, 51.

(2) 2 Vern. 485.

(3) 2 Barn. & Ald. 218.

(4) 3 B. & C. 406; s. c. 5 D. & R. 263; 3 Law Journ. K.B. 54.

action, while it was in the inferior Court, (by which it appeared that a judgment by default in the action had been suffered by the defendants,) was inadmissible on the trial of the action in the King's Bench.

Case for an excessive distress.

Plea—The general issue.

On the trial, before Lord Tenterden, at the Sittings at Westminster, the sittings after last term, a verdict was found for the defendants. The case afterwards came before the Court, upon the single point, whether a judgment between the parties was evidence. The following were the facts relating to that point.

The action had been originally brought in the Palace Court, and was thence removed (after declaration,) by the defendants by writ of habeas corpus.

Upon the removal of the cause, the defendants pleaded in this Court the general issue. But the plaintiff, on the trial, proved a record of a judgment in this action in the Palace Court, by which, judgment by default was entered against the defendants. The witness who produced it stated that he had drawn it up, in consequence of the defendants not having pleaded in time, according to the practice of the Palace Court.

Lord Tenterden thought the evidence of this judgment was inadmissible; the defendants had pleaded to the action in this Court;—and the judgment below was part of the present record.

Mr. Erle now moved for a new trial.

The judgment should at least have been received in evidence, and left to the jury as an apparent admission by the defendants of their liability; subject to be explained if the defendants could shew that it arose from some mistake or omission on their part. A judgment between the same parties is generally conclusive: *Astlin v. Parkin* (1).

[*Mr. Justice Bayley*.—There, a new action was founded upon a judgment given in a former one. Here, the object of the removal of the cause was to have tried the question, whether the defendants were liable or not. If, as you contend, they were bound by the

judgment, and the plaintiff was entitled to recover something, you should have applied to the Court to quash the writ—at least, you should not have joined issue upon their plea.]

[*Mr. Justice Parke*.—If the judgment by default had been set aside, it could not have been evidence. The removal of the cause from the Palace Court was the legal effect of setting aside the judgment.]

[*Mr. Justice Littledale*.—It is the same as if no judgment had been given. The parties appeared at issue upon the present record.]

It was not proposed in the present case to carry it farther than as, *prima facie*, an admission.

Lord Tenterden.—I think it was altogether inadmissible. The admission of it would cause great injustice. The action was brought in the Palace Court; and removed thence for the purpose of trying the cause here. It does not appear that the defendants did any act whatever in that court.

Rule refused.

1829. { THE KING, ON THE PROSECUTION
June 30. { OF ROLFE AND ANOTHER, v.
JOHN FRENCH BURKE.

Costs—Attorney's Lien.

1. *Costs payable to the parties in the course of interlocutory proceedings in a cause may be set off against each other, notwithstanding the attorney's lien. Thus, where, in an indictment, both defendant and prosecutor gave notice of trial, both made default, and there were rules upon each to pay the costs of the day to the other,—it was held, that the costs upon one of those rules might be set off against the costs of the other, notwithstanding the lien of the attorney.*

2. *But where the payment of such interlocutory costs is made a condition precedent to the party having the benefit of any proceeding, such costs cannot be set off against interlocutory costs which may become due to the party in a subsequent stage of the cause.*

3. *They may, however, be set off against interlocutory costs due to the party before*

(1) 2 Burr. 668.

the costs which are to be paid as a condition precedent became payable.

In this case, both the defendant and the prosecutors gave notice of trial of the indictment, for the sittings after last term, and both made default. Each party then obtained a rule to be allowed the costs of the day occasioned by the default of the other. The costs of the defendant were taxed at 21*l.* 2*s.* 4*d.*; those of the prosecutors at 13*l.* 12*s.* 10*d.*

The defendant being a prisoner in the rules of the King's Bench, the prosecutors were desirous to set off their costs against those of the defendant, and to pay the balance only; but the attorney for the defendant insisted upon full payment, contending that he had a lien upon the costs.

The prosecutors having obtained a rule, calling on the defendant to shew cause why their costs should not be deducted from those of the defendant, and why, upon payment of the balance, all proceedings should not be stayed,—

Mr. Curwood now shewed cause, relying upon the lien of the attorney for the defendant, and upon the practice of this court, which in this respect differed from that of the Common Pleas.

Mr. Archbold, *contra*, admitted the general practice; but contended, that it did not apply to interlocutory costs in the cause; and he referred to *Howell and others v. Harding* (1): there the Court said, that "the attorney's lien attached only upon the balance of the costs accruing in the same cause, which are ultimately to be paid over to the one or other party in that cause; and that the cause is not to be split, so as to give the attorney of either party a lien upon interlocutory costs, although, ultimately, his client should be bound to pay costs to a greater amount to the adverse party."

Lord Tenterden.—That case seems to be in point.

Rule absolute.

(1) 8 East, 362.

1829. } *DOE d. DANGERFIELD AND UX.*
July 6. } *v. ALLSOP AND ANOTHER.*

This was also a question as to the right of a party to set off interlocutory costs, independent of the lien of the attorney. The following were the facts:

The lessors of the plaintiff gave notice of trial, entered the cause, and then withdrew the record. The defendants moved for and obtained the usual rule for the costs of the day, which were taxed at 12*5l.*; but those costs were not paid, nor were any proceedings taken to enforce them. The plaintiffs afterwards tried the cause, and obtained a verdict. The Court afterwards set aside that verdict and ordered a new trial *upon payment of costs*. Those costs were taxed at 78*l.* The defendant having obtained a rule to shew cause why he should not be at liberty to set off his costs of the day against the 78*l.*,—

Mr. Taunton shewed cause.—I am aware of the distinction as to interlocutory costs, in the case of *Howell v. Harding*, and the case of *The King v. Burke*, which occurred a few days since. But the present case is different; as here, the payment of the costs of the trial is a condition precedent to the granting of a new trial; and the case of *Aspinall v. Stamp and another* (1) is expressly in point. There, the defendants were allowed by a Judge's order to go to trial with certain advantages, upon payment of the costs up to the time of that order; those costs were not paid, but the cause was tried and the defendants obtained a verdict; and upon a question, whether the defendants should be allowed to defeat the attorney's lien, by setting off the taxed costs in the cause against the costs provided for by the order, the Court held that they should not, and that, the payments of the latter being a condition precedent, the defendants should not be allowed to set them off, they having had the advantage, as if they had performed the condition precedent. So here, the payment of the costs of the trial is a condition precedent to the defendant having the new trial.

Mr. Campbell, *contra*.—I admit that the payments of the costs is a condition precedent; but they are paid by being allowed

(1) 3 B. & C. 108; a.c. 4 D. & R. 716.

against the costs previously incurred. This circumstance distinguishes the case from *Aspinall v. Stamp*; for there, the costs which the defendant sought to set off, had not been incurred when the order was made which created the condition precedent. Here, they were due at the time the rule was made for the new trial.

Lord Tenterden.—If the fact of these costs being due to the defendant had been brought under our notice at the time we made the rule, we should, no doubt, have allowed the costs of the trial to be set off against those costs. And we now think that payment of the costs in account against the costs which the defendant ought to receive, will be payment according to the rule for a new trial. The distinction mentioned by Mr. Campbell between this case and that of *Aspinall v. Stamp* is a material one. The right of the party here to these costs existed at the time when the rule was made, which ordered him to pay the costs of the trial, as a condition precedent to there being a new trial.

Rule absolute.

1829. }
July 1. } LONG v. SPERRIN.

Cognovit—Irregularity.

Although a cognovit be produced to the clerk of the dockets on signing judgment, if it be not filed with him after the taxation of the costs (pursuant to the rule of court, Hilary 1822,) the judgment will be irregular.

Judgment upon a cognovit.—The cognovit was produced to the clerk of the dockets on signing the judgment; but, on the costs being taxed, the plaintiff's attorney took it away by mistake from the Master's office, instead of leaving it there to be filed with the clerk of the dockets, in pursuance of the rule of court, Hilary 2 & 3 Geo. 4, 1822, (5 B. & A. 560). A rule having been obtained to set aside the judgment for this omission,—

Mr. Jeremy shewed cause upon an affidavit, stating the mistake; and that the

cognovit was now properly filed; and that filing after judgment was sufficient.

Mr. Blackburn, contrà, contended that the judgment was a nullity, by reason of the disobedience of the rule of court.

Lord Tenterden.—The signing of the judgment, as it is called, with the clerk of the dockets, is merely the duty of an *incipitur*; and that with the taxing of the costs, make up but one act of signing judgment. There is, in fact, no judgment until the costs are taxed. The rule of court has not, therefore, been complied with; and the judgment is irregular.

Rule absolute.

[Another question was raised by the rule, whether the cognovit, which required a stamp, could be stamped after judgment, so as to warrant the judgment; but the Court gave no opinion on this point. See *Burton v. Kirby*, 7 Taunt. 174.]

1829. } THE KING v. WHITAKER AND
July 2. } OTHERS.

Public Commissioners—Majority.

Where a number of persons have powers given to meet and do certain acts, which are of a public nature, the general rule is, that a majority of those who are appointed must meet; and that, of those who do meet, the majority then present may exercise the powers.

This case came before the Court in the form of a rule for a mandamus commanding the defendants to apportion amongst the parishes, townships, and places within a certain district in Lincolnshire, called the Level of the Ancholme, a sum of 30,000*l.*, which had been assessed and taxed upon that district by certain commissioners appointed under the authority of a local act (6 Geo. 4. c. 145.) for the purpose of completing the drainage of the Level of the Ancholme, and also of making that river navigable from the river Humber to a place called Bishop's Brigg. By this act, the commissioners acting under it were empowered to appoint one or more person or persons to be assessor or assessors. They had appointed three. The three

assessors had met; two had agreed to making an apportionment; the third had refused.

The main question was, whether, after the three had met, an apportionment made by two was good.

There was another question, as to one of the assessors being interested; but nothing turned upon this; and the Court were not unanimous on the point.

Mr. Denman and Mr. Clinton contended that the concurrence of all three was necessary.

Mr. Attorney General, Mr. Coleridge, and Mr. N. R. Clarke, contended that an apportionment by a majority was sufficient; chiefly on the ground that this was a public body; and consequently, on the authority of *Grindley v. Barker* (1), and *Carter v. the Kent Water-works Company* (2), that the act of the majority was, in point of law, the act of the whole.

The Court took time to consider; and, this day, their opinion was delivered in the following terms by—

Lord Tenterden.—(After stating the facts, his Lordship proceeded)—If by law an apportionment made by two, according to their opinion, after a meeting of all three, is good, we ought not to grant a mandamus to the three; and we are of opinion, that by law an apportionment made by the two (the three having met) is a good apportionment. The case of *Grindley v. Barker*, which was decided in the Court of Common Pleas, was to that effect. On the authority of that case, as well as on the general principle, that this being a matter of public and not of private trust, we think an apportionment made by the two was good. But a majority must meet; and a majority of those who do meet must concur in the act done.

[The remainder of the judgment was upon the question whether the particular individual was interested or not; and would, of course, be of no general importance.]

Rule discharged.

(1) 1 Bos. & Pul. 229.

(2) 7 B. & C. 650; 5 Law J. Mag. Cases, 106.

1829. } BEESTON v. BECKETT AND
July 2. } OTHERS.

Practice—Amendment—Demand of Plea—Essoign Day.

1. Where a plaintiff obtains leave to amend his declaration in a term subsequent to that in which the declaration was delivered, a new rule to plead is necessary of such subsequent term; but such rule may be given before the amendment is made.

2. In such a case no demand of plea is necessary of the subsequent term, if there had been one of the previous term.

3. Where a plaintiff is entitled to sign a judgment by default before the essoign day of the term, a judgment signed between the essoign day and full term is regular, and is a judgment of the preceding term.

In this case the plaintiff had declared in Hilary term—given a rule to plead, and demanded a plea; but, the defendants being entitled to an imparlance, they claimed, and had it. In Easter term the plaintiff obtained leave by rule to amend his declaration on payment of costs. On the 1st of June, being the last day of that term, a fresh rule to plead was given. The declaration was amended on the 5th of June. There was no subsequent demand of plea; and, the defendants not having pleaded, the plaintiff, after the essoign day of Trinity term, but before the first day of full term, signed judgment for want of a plea. A rule was obtained to set aside this judgment for irregularity; and cause was now shewn—

Mr. Wyborn for the defendants; Mr. Barstow for the plaintiff.

The following were the objections taken to the judgment; and the answers which were given to those objections.

First—The rule to plead was given before the declaration was amended. In general, a rule to plead cannot be given before declaration, and the amended declaration is the declaration in the cause, as it is that upon which the judgment was signed.

Answer.—If the rule be of the same term as the amendment, it is sufficient, though it be before the amendment: *Yates v. Edmonds* (1).

(1) 1 Tidd, 475.

Secondly.—There was no demand of plea. A new rule to plead was admitted necessary; and it follows that there should be a demand of plea.

Answer.—The case of *Huckvale v. Kendall* (2) decided that, although a new rule to plead is necessary where the amendment is of a term subsequent to that in which the declaration is delivered, a fresh demand of plea is unnecessary.

Thirdly.—The judgment was signed after the essoign day of Trinity term, and therefore had relation to that term; and there was no rule to plead of that term.

Answer.—Judgments signed between the essoign day and full term relate to the previous term. If it were held otherwise, a plaintiff could never sign judgment by default between the essoign day and the fifth day in full term; for rules to plead are not entered until full term. This shews that the rule to plead covers the time until the first day of the next term.

The Court inquired of the Master as to the practice on the last point; and the Master stated it to be, as contended for by the plaintiff's counsel. They, therefore, held the judgment to be regular.

Judgment regular; but defendant let in to try upon payment of costs.

1829. }
July 4. } TOMKINS v. SAVORY.

Stamp—Broker's Note.

A note given by a broker to his principal, containing an account of a purchase made by the former for the latter, of shares in a public company, is not subject to a stamp (as an "agreement" under the 55 Geo. 3. c. 184,) in an action by the principal against the broker, in respect of the subject-matter.

This was an action of assumpsit for money received. Plea—Non-assumpsit.

The cause was tried, before Lord Tenterden, at the London Sittings after Trinity term 1828, when the following appeared to be the principal facts:—The defendant, a

broker, had purchased, on account of the plaintiff, fifty shares in the Continental Gas Company, and then held out to him that 8*l.* had been already paid on each of those shares. This was false, as 5*l.* only had been paid on each share; and this action was brought to recover a sum equal to 3*l.* per share, which had been paid by the plaintiff to the defendant, in consequence of such falsehood. In support of this case, the plaintiff offered in evidence the following unstamped note signed by the defendant: "Bought for Mr. Tomkins fifty Continental Gas shares, at 2*l.* premium, (8*l.* already paid) 500*l.*, commission 6*l.* 5*s.*—506*l.* 5*s.*" The defendant's counsel objected, that this paper could not be received in evidence for want of a stamp, inasmuch as it was a memorandum of a contract, and not being for the sale of goods, wares, and merchandize, required a stamp, according to 55 Geo. 3. c. 184. The plaintiff's counsel submitted, that it was merely an account furnished by the broker to his principal, and was analogous to broker's notes on the sale of stock.

His Lordship admitted the evidence, but reserved liberty to the defendant to move to enter a nonsuit. The jury having found for the plaintiff, a rule *nisi* had been obtained for entering a nonsuit, on the ground that the bought note had been improperly received in evidence, or for a new trial, on the ground that the verdict was against the weight of evidence.

Mr. Gurney and Mr. Comyns now shewed cause.—The plaintiff's cause of action was not founded upon the note, but upon the fact, that the defendant by a false representation, had obtained from the plaintiff 8*l.* per share, when, in fact, only 5*l.* per share had been paid to the company. That fact alone supplied a cause of action, and that fact was proved by evidence, other than this paper. The case of *Mullett v. Hutchinson* (1) shews, that a mere acknowledgment of having so much money in hand belonging to another does not require a stamp. The paper was used in this case merely as a declaration by the defendant of what he had done with the plaintiff's money.

(1) 7 B. & C. 639; s. c. 1 M. & R. 522; 6 Law Journ. K.B. 176.

Mr. Attorney General and *Mr. Richards*, contra, contended, that, if a stamp were not held to be necessary in this case, all broker's notes would escape the operation of the stamp laws: that this was not the case of principal and agent; but that of a contract for the sale of the shares of which this note was the evidence; and therefore that it required a stamp.

(The rest of the argument on each side was upon the question, whether the verdict was against evidence.)

Lord Tenterden.—We are of opinion that the paper in question did not require to be stamped, because we think it was a note sent by a broker to his principal, containing an account of a purchase he had made of shares. These broker's notes are not contracts, nor evidence of contracts, though they may be evidence that the broker has performed the transaction mentioned in the note. The rule for entering a non-suit, therefore, cannot be made absolute, but we think there should be a new trial on payment of costs, on the ground of the verdict being against the evidence.

Rule accordingly.

1829. { *SURTEES v. ELLISON.*
July 6. { *HEWSON v. HEARD.*

Bankruptcy.

A commission of bankrupt under 6 Geo. 4. c. 16. cannot be supported by evidence of a trading, or of an act of bankruptcy, before that act came into operation.

These cases came on in the order in which they are placed as above; but the judgment was given entire, to include them both.

In *Surtees v. Ellison*, the question was, whether a commission of bankrupt could be supported by evidence of a trading which ceased before 6 Geo. 4. c. 16. came into operation.

The affirmative was contended for by *Mr. Attorney General*, *Mr. Alderson*, and *Mr. Cresswell*; and the negative would have been contended for by *Mr. Brougham* and *Mr. Chitty*, but the Court did not think it

necessary to hear them. It is not thought necessary to give the arguments at length, as the question applied merely to cases which were of necessity of a temporary character.

In *Hewson v. Heard* the question was, whether a commission of bankrupt could be supported by evidence of an act of bankruptcy committed before 6 Geo. 4. c. 16. came into operation.

Mr. Campbell contended for the negative. He said, his argument lay in one sentence. It was, that it was to be considered by the Court for this purpose, that there were no bankrupt laws in existence until September 1825.

Mr. Attorney General and *Mr. Chitty* were to contend for the affirmative; but they admitted, that after the case of *Maggs v. Hunt*(1), in the Common Pleas, confirmed by *Palmer v. Moore*(2), in this court, they could not expect to offer sufficient reasons to support the commission.

Lord Tenterden.—In *Surtees v. Ellison* the rule must be made absolute. In *Hewson v. Heard* the rule must be discharged, we being of opinion that neither of the commissions can be supported. It has been long established, that, when an act of parliament is repealed, it must be considered as if it had never been made, except as to transactions which are closed. That is the general rule, and we must not break in upon that, by indulging in conjectures as to the intention of the legislature. We are, therefore, to look at the statute 6 Geo. 4. c. 16. as if it were the first that had ever been passed on the subject of bankruptcy; and, so considering it, we cannot possibly say, that, in *Surtees v. Ellison*, there was any sufficient trading, or in *Hewson v. Heard*, any sufficient act of bankruptcy, to support the commission. It is certainly very unfortunate that a statute of so much importance should have been framed with so little attention to the consequences of some of its provisions. It is said, that the last will of a party is to be favourably

(1) 4 Bing. 212; 5 Law Journ. C.P. 130.

(2) 8 Law Journ. K.B. 290.

(3) 7 B. & C. 639; a.c. 1 M. & R. 472; 6 Law J. K.B. 176.

construed, because the testator is *inops consilii*. That we cannot say of the legislature; but we may say, that it is "*magnus inter opes inops*."

The other Judges concurred.

Rule accordingly.

1829. } HAREYN, GENT., ONE ETC. V.
July 6. } MILES.

Attorney's Bill—Taxation.

1. If an attorney, after the expiration of the month, commence an action against his client for the amount of his bill, and the client afterwards apply to have it taxed, though, on taxation, more than a sixth be taken off, the attorney will not be liable to the costs of the taxation.

2. But, if the client obtain an order for taxation, before the commencement of the action by the attorney, the latter will be liable to the costs of taxation, if the bill be reduced by a sixth.

Upon a reference to the cases of *Benton v. Bulland* (1), in the Common Pleas, and *Jay v. Coaks* (2), in this court, it will be seen that they decided the two points above mentioned.

In this case the defendant, under precisely the same facts as there were in those cases, applied to the Court to charge the plaintiff, who had been his attorney, with the costs of the taxation; and *Mr. Attorney General* and *Mr. Campbell* contended, that those cases could not be supported upon a due consideration of the statute 2 Geo. 2. c. 23. s. 23. But,

The Court having taken time to consider,

Lord Tenterden said, We have again considered the case; and are of opinion, that if the client waits and lets the opportunity pass which the statute gives him, he cannot afterwards call upon the attorney to pay the costs of the taxation, though more than a sixth of the bill be taken off.

Rule discharged.

(1) 4 Bing. 561; 6 Law Journ. C.P. 115.

(2) 8 B. & C. 635; s. c. 3 M. & R. 35; 7 Law Journ. K.B. 32.

1829. }
July 6. } CARR V. STEPHENS.

Circuity of Action.

Where the plaintiff, though he may have a primâ facie case against the defendant, in one form of action, would be liable over to him in another form in respect of the same subject-matter, the plaintiff, in order that circuity of action may be avoided, will not be able to recover.

This was an action by the drawer against the acceptor of a bill of exchange.

The defendant was the receiver appointed by the Court of Chancery in a suit, out of which one H. and his wife, in right of the latter, were entitled to certain funds. The plaintiff, having a claim upon the husband, induced the defendant, with the assent of the husband, to accept the bill in question,—it being understood, that before the bill became due, the defendant would be in funds, as receiver, to meet it. The wife gave no authority for the acceptance. Before the bill became due, the husband and wife demanded their money from the defendant; and he paid it over to them before the commencement of this action. After the bill became due, and before the money was paid over, there was a treaty between the plaintiff and defendant on the subject, and the plaintiff gave the defendant an indemnity against any proceedings which might be taken against him for the money by the husband and wife. The defendant received the indemnity; but afterwards refused to pay.

On the trial, before *Lord Tenterden*, he was of opinion that the defendant was liable on the bill, and must be left to his remedy over upon the indemnity; but now, after argument by *Mr. Attorney General* and *Mr. Patteson* for the plaintiff, and *Mr. Gurney* and *Mr. D. Pollock* for the defendant,—

Lord Tenterden.—I think the opinion I formed on the trial was an erroneous one. It would be mere circuity of action for the plaintiff to recover upon the bill, and then for the defendant to recover back upon the indemnity—which he certainly could do; for he was bound to pay the money upon the order of the husband and wife. If the

bill had passed into the hands of an indorsee, the defendant would be bound by his acceptance, and must then have resorted to his indemnity. It is unnecessary to drive him to that, when both parties are before the Court.

Rule absolute for entering a nonsuit.

1829. }
July 7. } **SAMMON v. MILLER.**

Insolvent Debtors Act—Debts payable at a future day.

A discharge under the 53 Geo. 3. c. 102, as well as under the 7th Geo. 4. c. 57, relieves the insolvent from a judgment on a warrant of attorney to replace stock at a future day.

This case was brought before the Court in the form of a rule calling upon the plaintiff to shew cause, why the defendant should not be discharged out of custody on filing common bail. The following were the principal facts:—

The defendant in 1819 had been discharged under the Insolvent Debtors Act then in operation (53 Geo. 3. c. 102, commonly called Lord Redesdale's Act), as to all the creditors named and specified in the schedule, of whom the plaintiff was one. Her claim was in respect of 2,000*l.* navy five per cent. bank annuities, sold out, and the produce lent by her to the defendant several years before. The agreement was, that this stock should be replaced on the 9th October 1820; and that a sum equal to the dividends should be paid to the plaintiff half-yearly in the meantime. To secure the performance of this agreement, the defendant executed to the plaintiff a bond and a warrant of attorney. Judgment on the latter was entered up in Michaelmas term 1818, and the arrears of the dividends then due were levied. The action now brought was an action of debt upon that judgment so entered up in 1818, and the defendant had been arrested under the writ in this action.

Mr. Steer, for the plaintiff, now shewed cause against the defendant's discharge.

Vol. VII. K.B.

He admitted, that, if the defendant had been discharged under the Insolvent Debtors Act now in force, 7 Geo. 4. c. 57, the general words of the fifty-first section might relieve him; but there was no such section in Lord Redesdale's Act. The plaintiff could not come in among the other creditors under the provisions of that act, as the debt was not due at the time; consequently, the defendant's discharge is no bar to the present action. In *Davies v. Arnott* (1) the obligors in a bastardy bond, discharged under the then Insolvent Debtors Act, (1 Geo. 4. c. 119. s. 10,) subsequently to a judgment on the bond, were held to be liable for expenses incurred in respect of the bastard subsequently to their discharge; and in *Lloyd v. Peell* (2) a plea of discharge under the Insolvent Debtors Act was held to be no bar to an action of trespass for mesne profits, for which the defendant was liable before the discharge.

Mr. Comyn, contrà, relied upon the words in the 29th section of the present act, which exempted the defendant from imprisonment by reason of any judgment existing at the time of the discharge.

The Court thought the defendant entitled to his discharge, the judgment having been entered up and in force before the time of his imprisonment, from which he was discharged under the act in question.

Mr. Justice Parke thought the case analogous to the case of bankruptcy in *Parker v. Ramsbottom* (3).

Rule absolute.

1829. }
July 8. } **STEWART v. BEATTIE AND ANOTHER, BAIL OF HUNT.**

Bail—Ca. sa.—Dies non.

A ca. sa. lodged with the sheriff for a return of non est inventus with a view to proceedings against the bail, must remain in the sheriff's office four clear days before the

(1) 3 Bing. 154; 10 Moore, 539; 3 Law Journ. C.P. 312.

(2) 3 Barn. & Ald. 407.

(3) 3 B. & C. 257; s. c. 5 D. & R. 138; 3 Law Journ. K.B. 16.

return, exclusive of any dies non (such as Ascension Day), as well as of any intervening Sunday.

The question in this case was, whether Ascension Day (28th May) should count as one of the four days during which it was necessary for a *ca. sa.* to lie in the office of the sheriff, for the purpose of warranting proceedings against bail on their recognizance. If the day should be allowed to count as one of the four, the proceedings were regular; if not, they were irregular.

Mr. Dundas, for the plaintiff, contended that it should count, as it was a day upon which the bail might search at the sheriff's office, although the Court was not sitting. Therefore, the reason given in *Howard v. Smith* (1), and *Dicas v. Perry* (2), which decided that an intervening Sunday would not count, was inapplicable.

Lord Tenterden.—The bail should have four clear rendering days. If they took their principal on Ascension Day, they could not have brought him to court and rendered him; for no Court was sitting. A *dies non* cannot count as one of the four days.

Rule absolute to set aside the proceedings.

(*Mr. Chitty* for the bail.)

1829. } PHILLIPS, ASSIGNEE &c. v.
July 8. } DANCE.

Nonsuit—Trial by proviso.

Where a cause goes off at Nisi Prius, because neither party will pray a tales, the defendant cannot afterwards obtain judgment, as in the case of a nonsuit; nor can he try the cause by proviso.

In this case the plaintiff carried the record down to trial. It had been made a special jury; but a special jury not ap-

pearing, neither party prayed a tales. The plaintiff did not afterwards take any other proceeding. The defendant afterwards obtained a rule for judgment, as in case of a nonsuit, which rule was discharged upon an affidavit disclosing the preceding facts. The defendant then obtained the Master's rule for a trial by proviso. A rule having been obtained to set aside the latter rule,

Mr. Chitty now shewed cause.—No reason can be suggested why the defendant should not be allowed to try by proviso. The cause must not be allowed to hang over his head *ad infinitum*, which will be the case if this rule be made absolute. If the plaintiff does not mean to try the cause, the defendant should be allowed to do so.

Mr. Barstow, contra.—The reason why the defendant should not be allowed to try by proviso is, that he has already had an opportunity to try the cause, and he did not choose to do so, because he would not pray a tales. A defendant has no right to call upon the plaintiff to give him more than one opportunity to try the cause. The defendant must always be ready; the plaintiff may try when he pleases, subject always to the being forced on by certain rules to give the defendant one opportunity to try. This is one of the advantages which a plaintiff has over a defendant; and of which the Court can no more deprive a plaintiff than they can deprive him of his right to be nonsuited, and begin a fresh action, if just before the verdict be given, he suspect that the jury then empanelled are unfavourable to him. If these are improper advantages, the legislature may take them away; but they cannot be altered by the Court. The very rule for a trial by proviso assumes that the defendant has never had an opportunity to try. It runs in these words: "Let there be a record of Nisi Prius by proviso, if the plaintiff shall have made default." The plaintiff has made no default: he carried the record down to trial; and it was not more incumbent on him to pray a tales than it was upon the defendant. If it can be successfully contended that it was incumbent on the plaintiff, in order to avoid the being charged with default, to carry the record down

(1) 1 Barn. & Ald. 529.

(2) 2 D. & R. 869; 2 Chit. 192.

again, it must be contended that it may be incumbent on him to do so a third time; for, upon the second calling over of the jury, there might not be a full special jury, and, as before, neither party might choose to pray a *tales*. There has, therefore, been no default in the plaintiff; and, the fact which is the foundation of the defendant's rule for a trial by proviso is wanting. This view of the subject appears to have obtained in *Jenkins v. Purcel* (1). It is stated, that, "whilst the jury were swearing, the defendant's counsel called for the record, and finding a mistake in it, said they would make no defence. The plaintiff's counsel upon this, in order to avoid a nonsuit, and to save the costs, refused to pray a *tales*; and, though twelve had been sworn, yet, there having been no actual prayer of a *tales*, the cause was suffered to remain for want of jurors." Whether either party on that occasion took the best course, may be questionable; but the report shews that the general opinion was, that the plaintiff saved the costs by refusing to pray a *tales*. That case occurred two years before the statute, 14 Geo. 2. c. 17, which gives the defendant no advantage in this respect; but merely provides that, where the plaintiff has made default, the Court may give the like judgment, as in the case of a nonsuit.

Lord Tenterden.—We think that, where neither party prays a *tales*, it cannot be said that the plaintiff has made default. It follows, with reference to the language of the rule, that the defendant in such a case as the present, is not entitled to try the cause by proviso.

Rule absolute.

1829. }
July 8. } DOE d. HUDSON v. JAMESON.

Costs, Security for—Ejectment.

Security for costs to the satisfaction of the Master, ordered to be given by a person residing abroad who sought to defend in an action of ejectment as landlord, upon the usual landlord's rule.

(1) 2 Stra. 707.

Upon the tenant in possession being served with this ejectment, and the usual rule for judgment being obtained, the present defendant, Jameson, caused himself to be made defendant upon the usual landlord's rule; whereupon the lessor of the plaintiff, on an affidavit that Jameson resided in Scotland, obtained a rule, calling upon him to shew cause why the landlord's rule and consent rule should not be discharged, unless the defendant should consent to give security for costs to the satisfaction of the Master. Against the rule, so obtained,

Mr. Patteson now shewed cause.—The present application is without precedent. There is no instance to be found of a defendant being called upon to give security for costs in ejectment.

[*Mr. Justice Bayley.*—But ejectment has been said to be the creature of the Court, and may be moulded so as to administer justice.]

The statute 11 Geo. 2. c. 19, which gives the landlord the right to defend, is silent on the subject.

Mr. T. Clarkson, contra, was stopped by the Court.

Lord Tenterden.—The defendant is obliged to ask us to assist him, by letting him in to defend. We may refuse that assistance, unless he consents to reasonable terms; and it is but reasonable that the lessor of the plaintiff should have security for costs, seeing that in the tenant in possession he has a person within reach of process, and that by the substitution of the landlord as defendant, a person is given him, who is out of reach.

Rule absolute.

1829. }
July 17. } SWEETING v. HALSE.

Costs—Discontinuance—New Trial.

On the trial of an action a verdict was found for the defendant. The Court set aside that verdict upon an objection by the plaintiff, that an unstamped paper had been laid before the jury. The plaintiff did not

then carry the cause to a second trial; but took out a rule to discontinue on payment of costs. The Master, on taxation, allowed the defendant the costs of the trial; and the Court held that the defendant was entitled to them.

In this case a verdict was found for the defendant; and the Court afterwards set aside the verdict, and ordered a new trial, on the ground that the jury had been allowed to look at an unstamped agreement, which agreement, if properly stamped, would have warranted the verdict for the defendant.—(See the case reported in 9 B. & C. 365; Danson & Lloyd, 287; 7 Law Journ. K.B. 156.)

The plaintiff, however, did not avail himself of this rule for a new trial; but applied to Mr. Justice Littledale, and afterwards to Mr. Justice Parke, at chambers, for leave to amend his declaration, by adding fresh counts adapted to the unstamped memorandum which he proposed to cause to be stamped. Those learned Judges refused to make any order. The plaintiff then applied to the Court, and obtained a rule to shew cause why he should not be allowed to make this amendment. That rule was afterwards discharged.—(See the case in this stage reported in 7 Law Journ. K.B. 258.)

The plaintiff then took out a rule to discontinue on payment of costs. Upon the taxation, the defendant's attorney objected, that the common side-bar rule to discontinue ought not to have been taken out at so advanced a stage of the cause, (see *Tidd's Practice*, 679. Edition 1828,) and he therefore reserved his right to take this objection, if it should be necessary, in any future proceeding. The Master then taxed the costs; and allowed the defendant the costs of the trial.

The plaintiff objected to such allowance, and obtained a rule to shew cause why the Master should not be directed to review his taxation.

Mr. Barstow now shewed cause.—The plaintiff ought not to have taken out the common rule to discontinue, which can only be taken out, at the latest, before trial. He should have made a special ap-

plication to the Court for leave to discontinue; and the Court could then have laid him under reasonable terms. In that case the plaintiff would, no doubt, have been made to pay the costs of the trial. He, therefore, upon the discussion of this rule, cannot be allowed to stand in a better situation than he would be in, if he had applied to the Court for leave to discontinue. But, independent of this, the Master has properly allowed to the defendant the costs of the trial. No reason can be suggested why a plaintiff, who seeks to discontinue, should not pay the whole costs of an action which he, by his rule, admits he cannot sustain. The case of *Gray v. Cox* (1) will be cited by the other side; but there the verdict had been in favour of the plaintiff; and the Court, in holding that the defendant was not entitled, upon a rule for discontinuance, to the costs of the trial, proceeded upon the established principle, that a party can never be allowed the costs of a trial in which he has been defeated. Here, the verdict having been in favour of the defendant, if the cause had gone on to a new trial, and the verdict was again for the defendant, he would have been entitled to the costs of both trials; which, for the reason already given, could not have been the case in *Gray v. Cox*. The case of *Jackson v. Hallam* (2), is expressly in favour of the defendant on this principle. There, the plaintiff obtained a verdict; the Court set aside that verdict, on the ground that the Judge had misdirected the jury in a point of law; but the defendant, without going to trial, gave the plaintiff a cognovit; and the Court held, that he was liable to pay the costs of the action. The Lord Chief Justice there said, "If the plaintiff had obtained a verdict on the second trial, he would only have been entitled to the costs of that trial. Instead, however, of taking the benefit of a second trial, the defendant has acknowledged, by giving a cognovit, that he had no ground of defence to the action; and that the first verdict was right upon the merits. It seems to me, therefore, that, in point of justice, he ought to pay the costs of the

(1) 5 B. & C. 458; a.c. 8 D. & R. 220.

(2) 2 Barn. & Ald. 318.

trial; and *Booth v. Atherton* (3) is an authority to shew that such is the rule of law." Here the plaintiff did not choose to take the benefit of a second trial; and, by abandoning his action, he admits that the first verdict was right upon the merits.

Mr. Chitty, contra.—The case of *Jackson v. Hallam* is not applicable to the present; for the defendant there clearly shewed, by his conduct, in giving the cognovit, that the plaintiff had a good cause of action on the merits. Here, the plaintiff, by continuing, admits only that he cannot succeed upon the present record; and the opposition which was made to his application to amend, shews that the defendant is aware that he is liable to an action; and that the verdict which he obtained on the trial was not upon the merits. If the plaintiff had caused the agreement to be stamped before the trial he would have obtained the verdict; and it is not denied that the plaintiff, if he commence another action, will be entitled to a verdict.

Lord Tenterden.—I think this rule should be discharged. When a party applies for leave to discontinue his action, the terms upon which he shall be allowed to do so are discretionary with the Court. The new trial in this case was granted in consequence of the objection taken by the plaintiff himself, that an unstamped agreement had been laid before the jury. The plaintiff had a right to take this objection; but he does not appear to be entitled, when he takes such an objection, to assume that the merits are with him. He had the liberty of taking the case down to a second trial; and he knew that, on the second trial, the unstamped paper would not be laid before the jury. Yet, for some reason, he does not choose to try the cause again. He may probably bring a fresh action, perhaps successfully; but with these facts at present before us, I think he ought not to be allowed to discontinue the present action without paying the costs of the trial at which he was unsuccessful. Thus much appears to me upon the principle; but I think also, that the case which

has been cited of *Jackson v. Hallam* is expressly an authority in point, to shew that the plaintiff must be considered as having admitted the verdict to be right.

Rule discharged.

[See *Elvin v. Drummond*, 1 M. & P. 88. 6 Law Journ. C.P. 32.]

1829. }
July 28. } REX v. EDWARDS.

Attorney—Bankrupt—Contempt.

An attorney in custody for contempt for non-payment of money is discharged by bankruptcy and certificate, if the money be proveable as a debt under the commission.

The defendant, an attorney, being in contempt for not paying a sum of money which he was ordered to pay by rule of court, became bankrupt; a commission was taken out against him, and he afterwards obtained his certificate. Between the time of his last examination, and his obtaining his certificate, he was arrested under the present attachment. Having afterwards obtained his certificate, he obtained a rule calling upon the plaintiff to shew cause why he should not be discharged out of custody. Against which,

Mr. Kelly now shewed cause, relying upon the circumstance of the defendant being an attorney of the court, and the attachment being, not so much a remedy for the debt, as a punishment for the misconduct in receiving a client's money and not paying it over.

Sir James Scarlett, contra.—The debt for his contempt, in the not paying of which, the defendant is now in custody, was proveable under the commission; and the very process treats it as a debt. (He was then stopped.)

Lord Tenterden.—This was a debt proveable under the bankruptcy, and the usual consequence must follow; that the certificate discharges the debtor. The fact of the defendant being an attorney gave the client the advantage of the proceeding by

attachment; but it cannot alter the legal effect of the bankruptcy and certificate.

Mr. Justice Parke.—The question seems to have been decided by Lord Eldon in *Ex parte Eicke* (1), where a party, in custody for contempt in not paying money pursuant

to an order, was discharged out of custody upon becoming bankrupt and obtaining his certificate. I believe the party in that case was an attorney.

Rule absolute.

[See also *Ex parte Culliford*, 8 B. & C. 220, 6 Law Journ. K.B. 329.]

(1) 1 Glyn & J. 261.

END OF TRINITY TERM, 1829.

REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
Court of Common Pleas,

MICHAELMAS TERM	1
HILARY TERM	91
EASTER TERM	161
TRINITY TERM	233

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas.

IN

MICHAELMAS TERM, 9 GEO. IV.

1828. } J. H. LANGSTON V. SIR C. M.
Nov. 28. } POLE, BART., AND OTHERS.

Devise—Construction of.

A testator devised lands to trustees, in trust for his son J. H. L., for life, remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the said J. H. L., severally, successively, and in remainder, one after another, as they, and every of them, should be in seniority of age or priority of birth, &c., with divers remainders over:—Held, that, notwithstanding his being omitted in the enumeration, the first son of the testator's son J. H. L., took under this devise an estate in tail male expectant on the death of his father.

The following case was sent for the opinion of this Court, in pursuance of an order of His Honour the Master of the Rolls:—

“ John Langston, Esq. was, at the time of making his will hereinafter mentioned, and at his death, seised in fee simple of divers manors, messuages, lands, tenements, and hereditaments, situate in the counties of Oxford and Middlesex, and duly made and published his last will and testament in writing, bearing date the 28th of July, 1801,
Vol. VII. C. P.

which was executed and attested in the manner by law required to pass freehold estates by devise, and he thereby gave and devised all his manors, messuages, farms, lands, tenements, and hereditaments, situate and being in the several counties of Oxford and Middlesex, or elsewhere in England (except his shares in the New River Company), unto John Pollexfen Bastard, Esq., John Williams Hope, Esq., and Charles Morice Pole, Esq. (now Sir Charles Morice Pole, Bart.), their heirs and assigns, to the uses after-mentioned—(that is to say)—to the use of the said testator's son, the said plaintiff, James Haughton Langston, for and during the term of his natural life, without impeachment of waste, and, from and after the determination of that estate, by forfeiture, or otherwise, in his life-time, to the use of certain trustees therein named, and their heirs, during the life of the said plaintiff—in trust, by the usual ways and means, to preserve the contingent uses and estates thereafter limited, with remainder to the use of the *second, third, fourth, fifth, and all and every other the son and sons* of the body of the said plaintiff lawfully to be begotten, severally, successively, and in remainder, one after another, as they, and every of them, should be in seniority of age or priority of birth, &c., with divers remainders over:—

B

rity of age or priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body to be always preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing; with remainder to the use of the said testator's *second and other sons, successively*, and in tail male, with remainder to the use of certain other trustees therein named, their executors, administrators, and assigns, for the term of 500 years—upon the trusts and for the intents and purposes thereafter mentioned, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of the said plaintiff lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters, and the heirs of her body, to be always preferred and to take before the younger of such daughter and daughters, and the heirs of her and their body and bodies issuing; and, for default of such issue, to the use of other trustees therein named, their executors, administrators, and assigns, for and during the term of 99 years, upon the trusts and for the intents and purposes thereafter mentioned, with remainder to the use of the said testator's eldest daughter, Maria Sarah Langston, and her assigns, for and during the term of her natural life, without impeachment of waste; and, from and after the determination of that estate, by forfeiture in her lifetime, to the use of the trustees thereinbefore named for preserving contingent remainders, and their heirs, during the life of her, the said testator's said daughter, in trust by the usual ways and means to preserve the contingent uses and estates thereafter limited, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the son and sons of the said of her, the said testator's said daughter, lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of

age and priority of birth, and the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons and the heirs male of his body to be always preferred and to take before the younger of such son and sons and the heirs male of his and their body and bodies issuing; and, for default of such issue, to the use of other trustees therein named, their executors, administrators, and assigns, for the term of 600 years, upon the trusts and for the intents and purposes thereafter mentioned, with remainder to the use of the first, second, third, fourth, fifth, and all and every other the daughter and daughters of the body of her the said testator's said daughter, Maria Sarah Langston, lawfully to be begotten, severally, successively, and in remainder, one after another, as they and every of them should be in seniority of age and priority of birth, and the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing, the elder of such daughters and the heirs of her body to be always preferred, and to take before the younger of such daughter and daughters and the heirs of her and their body and bodies issuing; and, for default of such issue, to the use of the said testator's daughter Elizabeth Catherine Langston (now Elizabeth Catherine Barter) and her assigns, for her life; and, from and after the determination of that estate, by forfeiture or otherwise in her lifetime, to the use of the trustees thereinbefore named for preserving contingent remainders, and their heirs, during the life of his the said testator's said daughter, in trust to preserve the contingent uses and estates thereafter limited, with like remainders to the use of the sons of the said Elizabeth Catherine Langston (now Elizabeth Catherine Barter), and their heirs male; and, for default of such issue, to other trustees therein named, their executors, &c., for the term of 700 years, upon certain trusts thereafter mentioned, with like remainders to the use of the daughters of the said Elizabeth Catherine Langston (now E. C. Barter), and the heirs of their bodies; and, for default of such issue, to the use of the said testator's daughter, Caroline Langston, and her assigns, for her life; and, from and after the determination of that estate, by forfeiture or otherwise in her lifetime, to the use of the

trustees thereinbefore named for preserving contingent remainders, and their heirs, during the life of the said Caroline Langston, in trust to preserve the contingent uses and estates thereafter limited; and, from and after the decease of her, the said Caroline Langston, to the use of her sons, and their heirs male; and, for default of such issue, to the use of other trustees therein named, their executors, &c., for the term of 800 years, upon the trusts, and for the intents and purposes, thereafter mentioned, with like remainder to the use of the daughters of the said C. Langston, and the heirs of their bodies; and, for default of such issue, to the use of the said testator's daughter, Agatha Sophia Maria Langston, and her assigns, for her life; and, from and after the determination of that estate, by forfeiture or otherwise, to the use of the trustees thereinbefore named for preserving contingent remainders, and their heirs, during the life of her, the said testator's said daughter Agatha Maria Sophia Langston, in trust to preserve the contingent uses and estates thereafter limited, with like remainder to the use of the sons of her, the said testator's said daughter, Agatha Maria Sophia Langston, and their heirs male; and, for default of such issue, to the use of other trustees therein named, their executors, &c., for the term of 900 years, upon the trusts, and for the intents and purposes, thereafter mentioned, with like remainder to the use of the daughters of her, the said testator's said daughter, Agatha M. S. Langston, and the heirs of their bodies: And, for default of such issue, to the use of the said testator's daughter, Henrietta Maria Langston, and her assigns, for her life; and, from and immediately after the determination of that estate, by forfeiture or otherwise in her life-time, to the use of the trustees thereinbefore named for preserving contingent remainders, and their heirs, during the life of her, the said testator's said daughter, Henrietta Maria Langston, in trust to preserve the contingent uses and estates thereafter limited, with like remainder to the use of the sons of her, the said testator's said daughter, Henrietta Maria Langston, and their heirs male; with remainder to the use of other trustees therein named, their executors, &c., for the term of 1000 years, upon the trusts and for the intents and purposes thereafter mentioned; with like remainder

to the use of the daughters of her, the said testator's said daughter, H. M. Langston, and the heirs of their bodies: with remainder to the use of the said testator's sixth, and other daughters thereafter to be born, successively, in tail general, with remainder to the use of other trustees therein named, their executors, administrators, and assigns, for the term of 1500 years, upon the trusts, and to and for the intents and purposes, thereafter mentioned, with remainder to the use of the said testator's sister, Sarah, the wife of Peter Cazalet, Esq., her heirs and assigns, for ever: And the said testator did by his said will declare, that, as for and concerning the said term of 500 years by his said will limited as aforesaid, the same term was limited unto the said trustees thereof, their executors, administrators, and assigns, upon trust, that, in case there should be *no son* of the body of the said plaintiff, James Haughton Langston, nor no future son of his, the said testator's, own body, or, there being any such son or sons, if he and they should all die without issue male before any of them should attain the age of 21 years, and there should be two or more daughters of the body of his, the said testator's, said son, the said plaintiff, James Haughton Langston, then they, the same trustees, and the survivor of them, and the executors, administrators, and assigns, of such survivor, should, after the decease of his, the said testator's, said son, the said plaintiff, James Haughton Langston, *and such failure of issue male of his body* and of his, the said testator's, own body, as aforesaid, by mortgage or sale, or other disposition, of all or any part of the premises comprised in the said term of 500 years, or by the rents and profits thereof, or by any other ways or means whatsoever, levy and raise such sum and sums of money for the portion and portions of all and every such daughter and daughters (other than and besides an eldest or only daughter) as thereafter mentioned, that is to say, &c. [here followed directions as to the manner of raising and appropriating such portions, and a proviso for determining the said term of 500 years on the satisfaction of the several trusts thereafter mentioned concerning the same]: And, as to, for, and concerning, the said term of 99 years thereinbefore limited to trustees, he, the said testator, thereby declared that the same term was limited unto them, their executors, ad-

ministrators, and assigns, upon trust, that, in case there should be *no son* or daughter of the body of him, the said plaintiff, James Haughton Langston, nor *no future son* of the said testator's body, or, there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and all and every such daughter and daughters should depart this life without issue, before any of them should attain his her or their age or ages of 21 years, then they, the same trustees, and the survivor of them, and the executors, administrators, and assigns, of such survivor, should, after the decease of the said plaintiff, James Haughton Langston, and such failure of issue as aforesaid, by mortgage or sale, or other disposition of all or any part of the hereditaments comprised in the term of 99 years, or by the rents and profits, or by any other ways and means, levy and raise for the use and benefit of each of the said testator's youngest daughters, Elizabeth Catherine Langston, Caroline Langston, Agatha Maria Sophia Langston; and Henrietta Maria Langston, respectively, or such of them as should not from time to time be in the actual possession of, or entitled to, the hereditaments, under and by virtue of the limitations contained in the said will, for and during the term of their respective natural lives, an annuity or yearly sum of 500*l.* clear of all deductions, and should pay the same unto them, the said testator's said youngest daughters, respectively, or their respective assigns, by equal half-yearly payments, on the 25th day of March, and 29th day of September, in every year, and should make the first payment on such of the said days as should next happen after the commencement of the said term of 99 years in possession. Then followed provisos for the levying and raising annuities for the younger daughters of the testator, &c. The testator then proceeded to declare the trusts relating to the several terms of 600, 700, 800, 900, and 1000 years, which were for raising annuities and portions for the younger daughters of the testator's daughters: and as to, for, and concerning, the said term of 1500 years thereinbefore limited to trustees, he, the said testator, thereby declared that the said term was so limited unto them, their heirs and assigns, upon trust, that, in case there should be *no son* or daughter of the body or respective bodies of

the said plaintiff, James Haughton Langston, or of the said testator's said then present daughters, or of any of them, nor any future son or daughter of the said testator's body, or, there being any such son or sons, daughter or daughters, if all and every such son and sons should depart this life without issue male, and every such daughter and daughters should depart this life without issue, before any of them should attain his her or their respective age or ages of 21 years, then they, the said trustees, and the survivor of them, and the executors, administrators, and assigns, of such survivor, should, within the space of twelve calendar months after the several deceases of the said plaintiff and the said testator's said then present daughters, and failure of all such issue as last aforesaid, by mortgage or sale, or other disposition, of all or any part of the said premises to be comprised in the said term of 1500 years, or by the rents and profits thereof, or by any other ways or means whatsoever, levy and raise the sum of 80,000*l.* of lawful money of Great Britain, together with interest for the same from the commencement of the said term of 1500 years in possession, after the rate of 4*l.* by the year for each sum of 100*l.*, and should pay, apply, and dispose of the same in manner thereafter mentioned (that is to say), one moiety thereof unto his sister, Mary Ann, the wife of George Arnold Arnold, Esq., her executors, administrators, and assigns, and the other moiety thereof unto his nephew, Haughton Farmer Okeover, of Okeover, in the county of Stafford, Esquire, his executors, administrators, and assigns: and in the said will is contained a power or proviso enabling the said plaintiff, James Haughton Langston, by any deed or deeds, or by his last will and testament in writing, or by any codicil thereto, to be by him signed and published in the presence of, and attested by, three or more credible witnesses, to grant, limit, and appoint, any rent, or annual sum, not exceeding in the whole the clear yearly sum of 1000*l.*, to be issuing and payable out of all or any of the manors, messuages farms, lands, tenements, tithes, and hereditaments, thereinbefore devised, unto any woman or women he should marry or take to wife, for and during the life or lives of such woman or women respectively, for or in the nature of her or their jointure

or jointures, and in bar, or without being in bar, of dower; such rent or annual sum to take effect from the death of him the said plaintiff, James Haughton Langston, and to be payable half-yearly or quarterly, on or at such days or times as he should think fit; and the said testator thereby also provided and directed that it should be lawful for the said plaintiff, from time to time during his natural life, in case there should be any child or children of his body lawfully begotten, *other than and besides an eldest or only son*, by any deed or deeds, instrument or instruments, in writing, to be by him sealed and delivered in the presence of, and attested by, two or more credible witnesses, with or without power of revocation, or by his last will and testament in writing, to be by him signed, sealed, and published, in the presence of, and attested by, three or more credible witnesses, to charge all or any part of the said manors, messuages, farms, lands, tenements, tithes, and hereditaments thereinbefore devised, with and for the raising and payment of any principal sum or sums of money, not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of the younger son or sons, or daughter or daughters, of the body of him the said plaintiff, lawfully to be begotten, born in his lifetime, or within due time after his decease, to be paid and payable unto, and to vest, in such younger son or sons, daughter or daughters, respectively, at such time or times, and in such shares and proportions, with such clauses of survivorship, and in such manner, as he, the said plaintiff, should, by such deed or deeds, instrument or instruments, in writing, or last will and testament, to be executed and attested as aforesaid, direct, limit, and appoint; and also charge the same premises, or any part thereof, with or for the payment of any sum or sums of money, yearly or otherwise, as he should think fit, for the maintenance of such younger son or sons, or daughter or daughters, from the time of his death, until such portion or portions, respectively, should become payable, not exceeding the interest of such portions after the rate of 4*l.* *per cent. per annum*; and, the more effectually to secure and enforce the raising and due payment of such principal sum or sums of money, not exceeding in the whole the said sum of 25,000*l.*, as the plaintiff should

think fit and be entitled to charge as aforesaid, the testator thereby willed and declared that it should be lawful for the plaintiff, by the same or by any such like deed or deeds, instrument or instruments, in writing, to be so sealed and delivered as aforesaid, or by such his last will and testament, to be so signed, sealed, and published, as aforesaid, to limit and appoint, by way of demise or mortgage, the hereditaments and premises he should so charge, to any person or persons, for any term or number of years, without impeachment of waste, for the purpose of raising and securing such portion or portions and maintenance, so as the term and estate to be appointed by way of any such demise or mortgage should be made redeemable on full payment of the portion or portions and maintenance, which should be so charged by virtue of the said power, by the person or persons who, for the time being, should be entitled to the next estate in remainder, either at law or in equity, of and in the premises so to be limited and appointed by way of demise or mortgage as aforesaid: and the said testator thereby further willed and directed, that in like manner it should be lawful for each of them, his said daughters thereinbefore named, to whom estates for life, in his said devised estates, were thereinbefore limited, when and as they should respectively be in the actual possession of his said devised estates, in case there should be any child or children of their respective bodies, lawfully begotten, other than and besides an eldest or only son, by any such or the like deed or deeds, instrument or instruments, in writing, to be executed and attested as aforesaid, or by their respective last wills and testaments, or any writing or writings of appointment in the nature thereof, to be signed, sealed, and published as aforesaid, to charge all or any part of the said devised estates, with and for the raising and payment of any sum or sums of money not exceeding in the whole the gross sum of 25,000*l.*, for the portion or portions of any one, two, or more of their respective younger children, with the like power of providing maintenance, and limiting a term of years for raising the said portion or portions and maintenance, and in such and the like manner, to all intents and purposes, as thereinbefore directed with respect to the portion or portions of the younger son and sons,

and daughter and daughters of the plaintiff, James Haughton Langston: and the testator, by his said will, gave all the residue of his personal estate unto the plaintiff, if and when he should attain the age of 21 years; but, if he should die under that age, leaving a child or children, then to such child; or, if more than one, to such children equally; but, if the plaintiff should die under the age of 21 years, and there should be no son or daughter living at the time of his death, then to the testator's daughters equally.

"The said John Langston, the testator, departed this life in February, 1812, leaving the said plaintiff, James Haughton Langston, his only son and heir-at-law (then a minor and a bachelor), and the said testator's said several daughters, him surviving, having previously made three codicils to his said will, the last of which bears date in February, 1812, but none of them making the least variation in, or in any manner affecting, the above-mentioned limitations of his real estates.

"The said plaintiff, James Haughton Langston, attained the age of 21 years, in May, 1817, and has since that time intermarried, and had issue by his wife two sons, *vis.*, Henry Langston, his eldest or first-born son, and Edward Langston, his second-born son.

"The testator had no other son than the plaintiff, at or after the date of the said will."

The question for the opinion of the Court was—whether Henry Langston, the first son of the testator's son, James Haughton Langston, took any and what estate under the said testator's will.

Mr. Serjeant Taddy for the plaintiff.—The words of the will are quite sufficient to give an estate to the *first* son of the testator's son. This is the direct and obvious meaning of the testator; and, if any insertion or transposition be necessary to give the devise this effect, the intent of the deviser is so manifest that the Court would be inclined to assist the plaintiff. It is in fact a mere devise in the ordinary form of strict settlement, only leaving out the word "*first*." The rules of conveyancing have nothing to do with the construction of wills. They are interpreted according to common understanding and the intent of the party. What is the ordinary and straight forward construction of this de-

viser? Suppose the limitation had been "to the sons of the body of the plaintiff, severally and successively," would there have been any doubt that the eldest would have taken? Why then should he be prevented because the second, third, fourth, and fifth sons are mentioned? The words of the devise are, "to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of the plaintiff." It might have borne a different construction if it had been "to the younger sons, &c.;" but there is nothing in the will to limit the estate to younger sons. Other sons must include all the sons, whether first or not. The words "severally and successively, &c." cannot be rejected; because the devise would then be to all the sons contemporaneously, and not in remainder. The words "second, third, fourth, and fifth" may be considered as mere unnecessary specification. The will directs that the sons shall take "as they shall be in seniority of age or priority of birth." In *Doe dem. Blandford v. Applin*, (1) under a devise to A., for life, and, after his decease, "to and amongst his issue, and, in default of issue, then over," it was held that A. took an estate tail. So, in *Doe dem. Chandler v. Smith*, (2) under a devise to A. and the heirs of her body, for ever, as tenants in common and not as joint tenants, and in case A. died before 21, or without leaving issue of her body, then to B.,—it was held that A. took an estate tail. The next question is, when shall the eldest son take? In the construction of wills, the full meaning must be given to all the words. Now here, every word of the devise is complied with by giving the first estate to the first son. The whole will is framed on the supposition that the eldest son is to take the first estate. Consider the circumstances of the family. There is but one son; and there are many daughters. The testator first provides for all the sons of the plaintiff, then for his younger daughters. The provision for the daughters of the plaintiff is on failure of issue male. The consequence, therefore, of the Court holding that the eldest and only son of the plaintiff takes no estate, would be to preclude the possibility of any provision being made for the younger daughters of the testator; for all proceeds on the supposition that there is no son. It is clear that the tes-

(1) 4 T. R. 82.

(2) 7 T. R. 531.

tator intended that the eldest daughter should take the estate, only in case there should be no son: and, the eldest daughter taking, he then provides for the younger daughters. The only case that seems to bear strongly on this is that of *Clements v. Parke* (1), which was a case sent from the Court of Chancery to the Court of King's Bench. There a testator devised an estate to A., for life, and after his decease to the eldest son of the body of his (the testator's) nephew lawfully issuing or issued, and, for default of such issue, then likewise to the second, third, and every other son of his nephew, successively, and in remainder; one after another, as they should be in seniority of age, and the several and respective heirs male of the body of every such second, third, and every other son or sons, the eldest of such sons, and the heirs male of his body, being always preferred before the younger—it was decided that the nephew took an estate tail by implication, in order to effectuate the general intent, and let in the descendants of the first son. *Doe dem. James v. Hallet* (2) is a strong case to shew how the Courts will construe the language of a will where some of the words are equivocal.—There, the testator devised lands to the use of W. H., *only remaining son of Sir T. H.*, for life, and to his first and other sons, &c., and, for default of such issue, to the use of the first, second, and all and every other son and sons of Sir T. H., lawfully *to be begotten*, and the heirs male of the body of such first and other sons; with a proviso, that the said W. H., and his first and other sons, and also the first and other sons *thereafter to be born* of the said Sir T. H., should reside at the family house, &c.—Lord Ellenborough said (3): “It would be a matter of the deepest regret if, in consequence of the joint effect produced by the blunder of the testator, and the neglect of his attorney, we were compelled to put a construction on this will which would defeat the testator's intention, and exclude those whom he meant to make the objects of his bounty. I call it a blunder of the testator, because, if he had read over his will with attention before he executed it, he must have perceived that he had *misdescribed*

W. H. as the only surviving son of Sir T. H., at the time when another son, Walter James, then nine years old, was in being, and, as is stated, was then personally known to him. It was also a neglect on the part of his attorney in not making inquiries, after such a lapse of time as intervened between the first and second will, whether the state of his family had undergone any alteration. But I disclaim all considerations of this sort in the present instance, and am willing that the conjoint omissions of the testator and his attorney should have their full legal effect. The will must stand or fall according to the language of it; but I think that language will not, upon a fair construction of it, disappoint the intention of the testator. The first mistake is, in the description of W. H. as the only surviving son. Now he was not the only son, for there was another living, of the age of nine years. But how does that mistake affect or control the subsequent limitation? The limitation is to the use of the first, second, and all and every other son and sons, &c. i. e. who, at the death of W. H., would become first son. Therefore Walter James is certainly within the comprehension of the words; there is only a misdescription of the first taker. Then come the words ‘lawfully to be begotten,’ which would give rise to a material question if it had not been settled by a series of authorities, and impeached by none, that ‘to be begotten’ means the same as ‘begotten,’ embracing all those whom the parent shall have begotten during his life, *quos procreaverit*. It was so considered in *Hewet v. Ireland* (4), and it was there said that as *procreatis* takes in children to be begotten, and *procreandis* includes children then begotten, so the words ‘which shall be begotten,’ upon which the question turned in that case, should relate to the death of the parent, and then the daughter born before the settlement should be included under that description. The same sense is put upon the words in *Co. Lit.* 20. So in *Cook v. Cook* (5), upon a devise to the issue of J. S., who had a daughter, and afterwards a son, it was held that both should take, and the Lord Keeper said that the words ‘begotten’ and ‘to be begotten’ are the same, as well upon the construction of wills as

(1) 1 M. & S. 130, n.

(2) 1 M. & S. 124.

(3) *Id.* 134.

(4) 1 P. Wms. 426.

(5) 2 Vern. 545.

settlements, and take in all the issue after begotten. But it may be said that neither in *Hewet v. Ireland* nor in *Cook v. Cook* are the words 'in posterum' to be found, the peculiar force of which was supposed in 3 Leon. 87. to control the other words. But what was the case in 3 Leon? There the feoffor made a feoffment to the use of his younger son in tail, and after to the use of the heirs of his body in posterum procreandis. The case, therefore, did not turn entirely upon the effect of the words 'in posterum;' for the feoffor's passing by the eldest son in the first instance was a very important circumstance to indicate an intention to exclude that son altogether. I therefore think that what was said by Wray J. in that case was right. But in *Hebblethwaite v. Cartwright* (1), where the words were, to the heirs male of the body hereafter to be begotten, which are the same as in posterum procreandis in 3 Leon.; yet Lord Talbot held that those words did not confine the limitation to the issue born after, but took in that born before. That decision, indeed, does not affect to over-rule the case from Leon., nor does it appear by the report that that case was cited in argument, and brought under the view of the Court; still it is to be considered as an express decision of that very eminent judge upon the construction of these words. The case, therefore, of *Hebblethwaite v. Cartwright*, disposes of the words in posterum. Here the words 'hereafter to be born,' occur only in the proviso, and I cannot say that 'to be born' are to be taken in a different sense from 'to be begotten' in the former parts of the will, but the same construction will apply to all, and 'hereafter' has been shewn not to restrain their general sense. On the authority, therefore, of all the cases, I think the words 'to be begotten' will include them born as well as to be born, and that Walter James is comprehended within the terms of this will as having become the first son of Sir T. H. upon the death of W. H. without issue." The cases of *Beale v. Beale* (2), *Butler v. Duncomb* (3), and *Duke v. Doidge* (4), are authorities to shew, that, in

the construction of devises, "younger" may be read "elder," and vice versa, according to the manifest intent of the devisor, so, in *Doe dem. Le Chevalier v. Huthwaite* (5), the name was rejected, and the description adopted. Here, the leading intent of the testator was, to make provision for the daughters only in case of failure of issue male of the plaintiff; and the whole intention would be defeated, if the first son were held not to be entitled; for, if he do not take, then the daughters cannot take, they taking only in case there should be no son.

Mr. Serjeant Wilde, contra.—The plaintiff does not take any estate under the will; or, at all events, if he be held to take, he cannot take until after the fifth son. It has been assumed that the will is framed with a view to a general provision for the testator's family; but that is not so. Particular estates are carved out. The will is strictly arbitrary in its provisions; the testator first provides for his son, next for his grandsons, then for his own younger sons, afterwards for his son's daughters, and lastly for his own daughters; giving to the daughters a larger estate than he gives to the sons: for, to the sons he gives in tail male, to the daughters in tail general. This is not reconcilable with any view of the case. Suppose the testator had died leaving a son and a daughter, and each of the latter left a daughter, the daughter of the daughter would have taken before the daughter of the son. The devise is perfectly unambiguous. It often happens that certain sons of a family are provided for by other persons, and the will of the parent is framed to meet the exigency of his family. The Court can have no means of judging in such a case; but the will must be taken without consideration as to its being couched in terms which, unexplained, appear extraordinary. An estate tail can only be implied where there is some ambiguity, as in *Doe v. Huthwaite*. The enumeration, as here, of the second, third, fourth, and fifth sons, is usually adopted to meet the rule established in *Shelley's case*. (6) The introduction of them here makes them words of purchase. The devise will otherwise admit of no sensible construction. Every other son than those mentioned is to take when they

(1) Cas. Temp. Talb. 315.

(2) 1 P. Wray, 244.

(3) Id. 451.

(4) 2 Ves. 203.

(5) 3 B. & A. 632.

(6) 3 B. & A. 632.

have been provided for; and to follow after the *fifth*, "as they shall be in seniority of age or priority of birth;" these words apply to the second class. But, as the testator began, the enumeration by the mention of the *second* son, it was clearly his intention to exclude the eldest or first altogether. By using the word "successively," he must have meant those who should be in *succession* and not the *eldest* son. No doubt, in equity, an elder unprovided son may take as a younger son, according to the cases cited on the other side; but in this case, there is nothing to warrant the assumption that the first son may be held to take before the second and others mentioned in the devise. It has been contended that the eldest son takes an estate by implication. When a devise is in express terms and gives nothing to a particular individual, in that case an implication cannot be set up against it. The creation of an estate by implication can only arise from the necessity of the case—from an utter impossibility to effectuate the intention of the testator without it. The necessity which the ambiguity of the devise creates, it also limits. It does not follow that the mere inconvenience that may arise from the exclusion of the first son will render it necessary to extend the construction of this devise so as to let him in. It is not necessary that he should take in priority. If any implication be required, the more correct one will be that which will do the least violence to the construction of the clause under consideration—viz., that the eldest should rank as an "other" son. It is said, that, unless the first son be held to take, the intent of the testator with regard to the daughters' portions will be altogether frustrated: but I contend that the words "in case there should be no son" must mean "no son capable of taking." In *Chapman v. Brown*, Lord Mansfield said (1) "A court of justice may construe a will; and, from what is expressed, necessarily imply an intent not particularly specified in words, but we cannot, from arbitrary conjecture, though founded upon the highest degree of probability, add to a will, or supply the omissions." If the eldest son be construed to take after the others, there will be no difficulty as to the other settlements and portions.

(1) 3 Burr. 1631.

Mr. Serjeant Taddy, in reply.—There is a direct devise in the ordinary and strict sense of the words. The enumeration of the second, third, &c., and the use of the word "other" afterwards, is the same as if there had been no enumeration at all.

Cur. adv. vult.

The following certificate was on this day sent to *His Honour* the Master of the Rolls:

"We have heard this case argued by counsel, and have considered the same, and are of opinion that the said Henry Langston, the *first* son of the testator's son, the said James Haughton Langston, takes an estate in tail male under the said will, expectant on the death of his father, the said James Haughton Langston.

W. D. Best
J. A. Park
J. Burrough
S. Gaselee."

1828. } JAMES RAGGETT AND JOHN
Nov. 28. } MENDHAM v. WILLIAM BEATY.

Devise—Construction of.

A testator devised lands "to the use of G. B., the second son of his nephew J. B., to enter upon and possess the same after the decease of his father, the said J. B.;" and by his will directed that J. B. and G. B. should, within one year next after his decease, pay 100*l.* to certain trustees named in the will, for them to discharge certain legacies; and that, if J. B. and G. B. did not pay the 100*l.* within the time limited, the trustees should let the premises, and receive the rents, until the 100*l.* should be paid, they keeping possession of the title deeds, and not allowing J. B. and G. B. to sell or mortgage the estate until the legacies were paid; and that, if G. B. should die, and leave no child lawfully begotten of his body, the trustees should sell the premises, and distribute the produce amongst the brothers and sisters of the testator:—Held that, under this devise, G. B. took an estate tail in the premises, upon the death of J. B., his father.

The following case was sent for the
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opinion of this Court, in pursuance of a decree of His Honour the *Master of the Rolls*, dated the 15th December, 1825:—

“By virtue of a certain indenture, bearing date the 1st March, 1766, a certain messuage or tenement, and premises, situate in the parish of Stapleton, in the county of Cumberland, were vested in John Blair, to hold to him, the said John Blair, his heirs and assigns, to the use of such person or persons, and for such estate and estates, uses, intents and purposes, and in such parts and proportions, manner and form, with or without power of revocation, as George Blair, the uncle of the said John Blair, should, from time to time, by any writing or writings under his hand and seal, executed in the presence of two or more credible witnesses, or by his last will and testament, in writing, or any writing purporting to be his last will and testament, to be by him signed, sealed, and published, in the presence of three or more credible witnesses, direct, limit, or appoint, give, devise, or assign the same; and, for default of such direction, limitation, or appointment, gift, devise, or assignment, or, in case any such should be made, when and as soon as the estates or interests thereby limited should respectively end and determine, and as to such part of the said premises whereof no such direction, limitation, or appointment, gift, devise, or assignment, should be made, to the use of him, the said George Blair, the uncle, his heirs and assigns, for ever.

“The said George Blair, the uncle, duly made and published his last will and testament, in writing, bearing date the 24th April, 1784, which was signed, sealed, and published by him, in the presence of three credible witnesses, and thereby, after reciting the indenture last above stated, the said testator devised in the words and figures following (that is to say), ‘Now, it is my will, and I do hereby order, that the said premises shall be to the use of George Blair, the second son of my said nephew John Blair, to enter upon and possess the same after the decease of his father, the said John Blair; and I do further order and direct that they, the said John Blair and George Blair, shall and will pay, or cause to be paid, within one year next after my decease, 100*l.* of lawful money into the hands of my trusty and well beloved friends

William Taylor and Thomas Blair, for them to discharge and pay the legacies hereinafter bequeathed: but, if in case the said John Blair and George Blair do not pay the said sum of 100*l.* within the time limited, it is my will, and I hereby order, that the said William Taylor and Thomas Blair do let the said messuage and tenement, and receive the rents arising from the same until the said 100*l.* be paid, they keeping possession of all the deeds of the estate, and not allowing the said John Blair and George Blair either to sell or mortgage any part of the premises until the legacies be all paid, and George Blair be 21 years of age; or, if in case the said George Blair die and leave no child lawfully begotten of his own body, it is my will that the said William Taylor and Thomas Blair, their heirs and assigns, do sell the said messuage and tenement, and distribute the money arising from such sale amongst his brothers and sisters, and Jonathan Blair, and Hannah Todd, or their heirs, such a share or shares as they, the said trustees, shall think proper.’ The testator then proceeded to give various pecuniary legacies to several persons, amounting together to the sum of 99*l.*; and, after making a disposition of his general personal estate, he appointed the said William Taylor and Thomas Blair executors of his said will.

“The said testator, George Blair, died in the month of ——— without having altered or revoked his said will, and leaving the said John Blair, and the said George Blair, the son of the said John Blair, him surviving; and the said sum of 100*l.* was duly paid to the said William Taylor and Thomas Blair, within a year after the said testator’s death.

“At the time of the said testator’s death, the said George Blair, the son of John Blair, was an infant, but he attained the age of 21 years some time previous to the month of April, 1795; and, by indenture, bearing date the 22nd April, 1795, and made between the said John Blair of the one part, and the said George Blair, his son, of the other part, in consideration of natural love and affection, and of the sum of 200*l.* paid by the said George Blair, the son, to the said John Blair, he, the said John Blair, duly granted and conveyed the said premises, and all his estate and interest therein, to

the said George Blair, the son, his heirs and assigns.

"The said John Blair is since dead."

The question for the opinion of the Court was—what estate and interest the said George Blair, the son of John Blair, under the circumstances aforesaid, had in the said premises, upon the death of his father, the said John Blair.

Mr. Serjeant Wilde, for the plaintiffs.—Under the devise in question, John Blair, the father of George Blair, took an estate for life by implication; and George Blair an estate tail, with a contingent remainder to William Taylor and Thomas Blair, the trustees, in trust, on failure of issue of the body of George Blair. It will be contended, on the other side, that George Blair took an estate in fee, with an executory devise over, to the trustees. It is an unquestionable rule of law, that, if a limitation can operate as a contingent remainder, it shall never be construed to be an executory devise. This can only be, where the testator's intention cannot otherwise be executed. In the case of *Purefoy v. Rogers* (1), is the following passage: "*Winnington*, for the plaintiff, said, that he would not speak to the case, unless the estate limited to the son would enure by way of executory devise; to which *Chief Justice Hale* answered, that clearly it was not an executory devise; for, where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise." If here George Blair be held to take an estate tail, that will bring this case within the rule. In *Walter v. Drew* (2) the testator devised as follows: "It is my will that if William Weeks, my son, shall happen to die, and leave no issue of his body lawfully begotten, that then, in that case, and not otherwise, after the death of the said William, my son, I give and bequeath all my lands of inheritance in L. unto Richard, my son, to have and to hold the same, after the death of the said William, to him and his heirs;" and it was held, that William took an estate tail by implication. In *Goodtitle v. Billington*,

Lord Mansfield said (3): "It is perfectly clear and settled, that, where an estate can take effect as a remainder, it shall never be construed to be an executory devise, or springing use." Here the testator directed that the premises should be "to the use of George Blair, the second son of John Blair, to enter upon and possess the same after the decease of his father, the said John Blair;" and further, "or if in case the said George Blair die, and leave no child lawfully begotten of his own body," that then the trustees should sell the premises, and distribute the money arising from such sale, as is directed by the will. As it appears from this clause of the will, that the estate should go over only on failure of issue of George Blair, that is sufficient to create an estate tail in him. It has been so construed in several cases. It clearly refers to an indefinite failure of issue, and not to a failure of issue at the time of the death. In *Forth v. Chapman* (4), one possessed of a term devised it to A. and B., and if either of them died, and left no issue of their respective bodies, then to C.; and this was held a good limitation to C., if A. or B. left no issue at their death. That case embraced both real and personal property; and although it was the subject of remark by *Lord Kenyon*, in *Porter v. Bradley*, (5) yet it seems to have been since recognized and acted on; for in *Crooke v. De Vandes*, *Lord Eldon* said (6): "When I read the case of *Porter v. Bradley*, speaking with all due deference to the learned Judge who expressed that dictum, it appeared to me that it went to shake settled rules to their very foundation. I had heard the case of *Forth v. Chapman* cited for years, and repeatedly by *Lord Kenyon* himself, as not to be shaken. I never knew it shaken: and if *Porter v. Bradley* has not since been disturbed in the Court of King's Bench, upon the principle expressed by *Lord Alvanley*, in *Campbell v. Campbell*, (7) against shaking settled rules, I will not add to the authority of that dictum. In *Tenny d. Agar v. Agar*, (8) the testator devised

(3) 2 Doug. 758.

(4) 1 P. Wms. 664.

(5) 3 Term. Rep. 146.

(6) 9 Ves. 203.

(7) 4 Bro. Chan. Cas. 18.

(8) 12 East, 253.

(1) 2 Wms. Saund. 328.

(2) Comyns, 372.

lands to his son and his heirs for ever; as to part of the lands, on condition that he should pay to the testator's daughter 12*l.* a-year, until she came of age, and then pay her 300*l.*; and, in default of payment, that she should enter upon and enjoy the said part, to her and her heirs for ever; and, in case his son and daughter both died without leaving any child or issue, he devised the reversion and inheritance of *all* the lands to another; and it was held, that the devise over was not an executory devise, but a remainder limited after successive estates tail of the son, and also of the daughter, by implication; the intent being apparent that the devise over should not take effect till after failure of the issue of the son and daughter, and that it should then take effect; and this being the only construction which would give effect to such intent consistently with the whole of the will taken together. In *Dansey v. Griffiths*, (9) a testator devised lands to R. D., his eldest son and his heirs; but if it should happen that R. D. should die and leave no issue, then to his son W. D., and his heirs; and if he should die without issue, then to his son R. D., &c.—it was held, that R. D. took an estate tail. These authorities shew clearly that words almost the same as those here used have invariably been held to create only an estate tail. The will declares that the devisee shall not be allowed to sell under particular circumstances. It directs that the premises shall not be sold until the legacies are paid. In *Goodtitle v. Maddern*, *Mr. Justice Grose* said (10): "The rule has long been established, that, if the executor be bound to pay the debts by the terms of the devise, he must take a fee in the lands devised to him in respect of which such obligation is thrown upon him; but, if he be only to pay them out of the produce of the land devised to him, or only to take the land *after* payment of debts, then, without words of inheritance, the fee will not pass."

Mr. Serjeant Cross, *contra*.—In the argument on the other side, the case has been considered rather on artificial rules than on the intention of the testator. The testator had a power of appointment. Having this power, he gives an estate for life to

his nephew John Blair; and he then orders "that the premises shall be to the use of George Blair, to enter upon and possess the same after the decease of his father, the said John Blair." He also contemplates the possibility of John and George Blair selling the estate; for he provides that they shall not sell until the legacies are paid; and, in case of the death of George Blair without issue, he gives to the trustees a power of sale. An equitable estate is given to the trustees, with which this Court cannot deal. It is material to shew that it was the intention of the testator that the whole fee should vest in George Blair; for he gives a fee to none else. Words that shew an intent that the devisee should have a greater estate than an estate for life, make an estate in fee, although there be no words of inheritance. In *Collier's case*, (11) a man had issue a daughter, and by his will, in writing, devised part of his land to his daughter, and the other part to his wife, for life, with the profits whereof she should bring up his daughter; and that after her death it should remain to his brother, paying to one 20*s.*, and to others small sums, amounting to 45*s.* in all; and it was held that the brother had a fee-simple. That principle has been followed up by a long series of cases. In *Wellok v. Hamond*, (12) J. S. was possessed of a copyhold in fee of land of the nature of Borough English, descendible to the youngest son and youngest brother. J. S. had issue four sons and a daughter, and surrendered the land to the use of his will, and afterwards devised it to his wife for life, remainder to J. his eldest son, paying 40*s.* to each of his brothers and to his sister, within two years after the death of the wife, and died. The wife entered and died. J. entered, but did not pay the legacies within two years; he afterwards surrendered the lands to the use of his will, devised them to his wife, and died; and it was held that the youngest son of the devisor took an estate in fee. In *Hawker v. Buckland*, (13) it is said that "a devise, paying a certain sum at the end of two years, or any other certain time, and the profits not being sufficient, will pass a fee simple; and so a devise of lands, paying a

(9) 4 M & S. 61.

(10) 4 East, 500.

(11) 6 Co. 16, a.

(12) Cro. Eliz. 204.

(13) 2 Vern. 106.

certain sum, without more, is a fee simple." In *Doe d. Willey v. Holmes*, (14) the words of the devise were, "I give and bequeath my freehold house, with the appurtenances, &c., and all the furniture thereto belonging, to E. G., whom I make executrix of this my last will, *she paying all my just debts and funeral expenses, and the legacies* before mentioned, within twelve months after my death; I likewise leave to the said E. G. all the rest and residue of my personal estate, &c.;" and it was held that E. G. took a fee in the freehold, by reason of the latter words in the devise, "she paying all my just debts, &c." So, here, the words "I do further order and direct that they, the said John Blair and George Blair, shall and will pay, or cause to be paid, within one year next after my decease, 100*l.* of lawful money into the hands of William Taylor and Thomas Blair, for them to discharge and pay the legacies hereinafter bequeathed," clearly convey the fee to George Blair. Besides, the testator goes on to recognize the right in the devisees to sell without any restriction or qualification, the legacies being paid. In *Doe d. Palmer v. Richards*, (15) a devise of all the rest, residue, and remainder of the devisor's lands, hereditaments, goods, chattels, and personal estate, "his legacies and funeral expenses *being thereout paid*," was held to convey to the devisees the fee of all the devisor's real estate. The rule is, that if the devisee be damnified by the payment of the legacies, he takes in fee.

[*The Lord Chief Justice*.—In *Doe d. Willey v. Holmes*, Lord Kenyon says, "In cases of this kind, the question has always been, whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case, the devisee only takes an estate for life; but, in the latter, he takes a fee, otherwise he might be a loser by the devise."]

No child of George Blair could take by purchase under this devise. The words are "in case the said George Blair die and leave no issue," and, in *Forth v. Chapman*, the words "if W. should depart this life and leave no issue," were construed to be a

general failure of issue. Here the trustees have only power to sell, not to take. No estate is vested in them. An estate for life is given to John Blair, with remainder to George Blair; and in case of his death without issue, to the trustees, for the purpose of sale and distribution, according to the directions contained in the will. George Blair, therefore, must, in order to give any intelligible construction to the devise, be held to take an estate in fee in the premises devised, upon the death of John Blair, his father.

Mr Serjeant Wilde, in reply.—The argument on the other side resolves itself into this,—that the charge of payment of the legacies, is such, as to make this devise convey a fee to George Blair. Suppose he had paid the 100*l.* and died, whether would he have had an estate in fee, or in tail? The testator clearly contemplates that the legacies may be paid by the trustees; for he directs, that if they are not paid by the devisees within the time limited, the trustees shall let the premises, and receive the rents arising from the same until the said sum of 100*l.* be paid; and that they shall keep possession of all the deeds of the estate, and not allow the devisees either to sell or mortgage "any part of the premises until the legacies be all paid. The testator thus creates a fund to meet the charge. It was clearly the intention of the devisor that the estate should be to George Blair until failure of issue, and that it should then go to another branch of the family; and if the will can be supported as a contingent remainder, according to an established rule of law, it can never be construed to be an executory devise.

The following certificate was on this day sent to *His Honour the Master of the Rolls*:—

"We have heard this case argued by counsel, and have considered the same, and are of opinion, that the said George Blair, the son of John Blair, under the circumstances aforesaid, took an estate tail in the said premises, upon the death of his father, the said John Blair.

W. D. Best
J. A. Park
J. Burrough
S. Gaselee."

(14) 8 Term Rep. 1.

(15) 3 Term Rep. 356.

1828. }
Nov. 6. } MURRAY v. NICHOLLS.

Venue—where changed.

In an action for a libel, the venue cannot be changed on the common affidavit; but there must be special circumstances shewn by affidavit: and this although there be another cause of action—as, for maliciously apprehending the plaintiff.

Mr. Serjeant Stephen applied upon a rule *nisi* to change the venue in this cause from London to York, on the usual affidavit that the plaintiff's cause of action (if any) arose in that county, and not in London, or elsewhere out of the county of York, and that the plaintiff's witnesses resided there. Two causes of action were stated in the declaration; the one for maliciously apprehending the plaintiff, and causing him to be taken before a magistrate, and the other for a libel.

The Learned Serjeant submitted, that although, in general, the Court will not allow the venue to be changed in an action for a libel, yet the true distinction is between a libel published in one county and circulated in another, and where it is written and published in one and the same county. In the one case the venue cannot be changed, in the other it may.—But

The Court were clearly of opinion, that there was no ground for the application on a general affidavit; and said that, *primâ facie*, the venue cannot be changed in an action for a libel, and that at all events the Court would not interfere unless some special circumstances were pointed out to them by affidavit.

Rule refused.

1828. }
Nov. 7. } LONG v. PRESTON.

Contract—how avoided.

In an action for breach of warranty of a horse, the warranty was not proved, but it appeared that, after it had been returned to him, the defendant had used the horse, and had offered it to a third person for sale:—Held, that by using and offering to

sell the horse, the defendant had rescinded the contract for sale of it to the plaintiff.

This was an action of *assumpsit* for a breach of warranty of a horse. At the trial before the Lord Chief Baron Alexander, at the last Assizes for the County of Norfolk, the plaintiff proved that the horse had been sold to him by the defendant, and that shortly afterwards the plaintiff wrote a letter to the defendant, complaining of the unsoundness of the horse, and imputing to the defendant a breach of warranty, which imputation seemed to apply to a warranty after the sale rather than before. The defendant, however, disclaimed the warranty altogether, on which the plaintiff returned the horse to him at his stables, and he again sent it back to the plaintiff, who a second time returned it to the defendant, who it appeared rode it once or twice, and afterwards offered it for sale to a third person. The Lord Chief Baron was of opinion, that there was no pretence to charge the defendant with a breach of warranty, but left it to the jury to say, whether he had rescinded his contract by keeping the horse, after it had been returned to him a second time by the plaintiff. The jury found that he had, and accordingly gave a verdict for the plaintiff for 35*l.*, being the sum paid by him to the defendant for the horse; leave, however, was reserved to the defendant, to move that the verdict might be set aside, and a nonsuit entered, in case the Court should be of opinion that the plaintiff was not entitled to recover.

Mr. Serjeant Wilde now moved accordingly—and submitted, that, as the defendant had returned the horse to the plaintiff when he first sent it back to him, and as there was no breach of warranty before or at the time of the sale, the plaintiff could not be entitled to recover. When he sent the horse back to the defendant a second time, he was not bound again to return it to the plaintiff, as each party then stood on his own rights; and if the defendant had sold the horse, and obtained a fair price for him, it might have prevented any further litigation between them. The plaintiff sought to recover on the breach of warranty alone, and failed in proving it before the sale. The defendant did not rescind the contract by endeavouring to sell the horse after it had been returned to him a second time; and although he rode

it once or twice, that did not amount to a waiver of the previous contract,—but

By the Court—This question is concluded by the finding of the jury. There can be no doubt that it was properly left to them. Whether the defendant had warranted the horse or not, it appears, that when the plaintiff returned it to him a second time, he not only rode it, but attempted to sell it. He thereby exercised acts of ownership over it, and if he had agreed to take it back, there can be no doubt, but that he would be bound to refund to the plaintiff the sum he had paid for it. The defendant, by acting as he did, rescinded the previous bargain, and the sum paid by the plaintiff for the horse became a debt due to him from the defendant. Although the defendant might have said that the horse was to be kept without prejudice after the second return, yet it could not be so, as he actually used it, and offered it for sale. The question, therefore, was properly left to the jury, and they have drawn a right conclusion.

Rule refused.

1828. }
Nov. 8. } *Ex parte*—CROOKE, VOUCHER.

Recovery—Passing of.

The Court refused to allow a recovery to pass, as to one of two Vouchees who had executed the warrant of attorney two years ago, but had since become insane.

Mr. Serjeant Stephen moved—that this recovery might be perfected, and pass as of this Term, although it had been suffered so long since as Michaelmas Term, 1826. He founded his motion on an affidavit, which stated, that there were two Vouchees, and that they had both executed the deed, to lead the uses; that the warrants of attorney had been taken on different pieces of parchment; and that one of the Vouchees had since become insane, although he was of sound mind when he executed the warrant of attorney. The learned Serjeant referred to the case of *Lang*, demandant, *Lee* tenant, *Woodhouse*, Vouchee, (1) to shew that the war-

rants of the Vouchees might be taken on separate pieces of parchment, and he submitted, that although one of them had become a lunatic since, it was no objection to the passing of the recovery.

But *the Court* thought that as a party might revoke his authority at any time before the recovery was perfected, and as a lunatic could not give his consent, they ordered the recovery to pass as to all the parties, with the exception of the lunatic.

Fiat.

But see *Walcott, Vouches*, 3 Bing. 423, when the Vouchee having become insane between the time of executing the warrant of attorney and the passing of the recovery, the Court would not allow the recovery to pass.

1828. }
Nov. } DUVEROIER v. FELLOWES.

Joint-Stock Company—Illegality of, how pleaded.

In debt on bond, the defendant pleaded that the bond was void, it being conditioned for the payment of a certain sum to the plaintiff, on his forming a company which would be illegal at common law, and on his transferring to such company, when formed, his interest in certain letters patent, in which it was expressly provided that they should not be assigned to, or for the use of, any number of persons exceeding five:—Held, on general demurrer, that the plea was good, and an answer to the action.

This was an action of debt on bond.—The defendant, in his first plea (*non est factum*), craved oyer of the bond and condition. By the former, it appeared that the bond was given to the plaintiff by one J. J. St. Marc, one S. Brooksbank, and W. D. Fellowes (the defendant), for 10,200*l*. The condition was set out as follows: “Whereas the said J. J. St. Marc some time since applied for and obtained several letters patent for the distillation of potatoes; and whereas the said J. J. St. Marc, S. Brooksbank, and W. D. Fellowes, are now engaged in co-partnership together in carrying on a certain distillery to a very large extent, at

Vauxhall aforesaid, called the Belmont Distillery, according to the system and method of distilling, for the use and exercise of which the said several letters patent were granted to the said J. J. St. Marc, and which said distillery has been erected, set up, and established, on certain leasehold hereditaments and premises belonging to them, the said J. J. St. Marc, S. Brooksbank, and W. D. Fellowes; and whereas the said J. J. St. Marc, S. Brooksbank, and W. D. Fellowes, have it in contemplation to dispose of their shares and interest of in and to the said several patents, and of in and to the distillery premises, plant, and stock in trade, in and upon the same, and to part with the same, to a company to be formed for that purpose; and whereas the said J. J. St. Marc, S. Brooksbank, and W. D. Fellowes, have applied to and requested the said A. Duvergier (the plaintiff) to exert his influence amongst his numerous connexions and friends, so as to form such company, intended to be called The Patent Distillery Company, who shall appoint directors and trustees for the conduct and management of the said concern, and that such directors shall issue, under their hands and seals, 10,000 shares, of the value of 50*l.* each share; and whereas the said A. Duvergier, in consequence of his connexion with different merchants, brokers, traders, and others, in the city of London, hath consented and agreed to form the said company, to be called The Patent Distillery Company, among his own immediate connexions and friends, and to bring such persons together for the purpose of appointing directors and trustees for the government and management of such distillery concern, and to procure purchasers for 9,000 shares, of the value of 50*l.* each share; and whereas the said J. J. St. Marc, S. Brooksbank, and W. D. Fellowes, in order to induce the said A. Duvergier to take the trouble of forming such company, and to use his influence among his connexions and friends, and to indemnify him from the charges and expenses that he may be put unto in and about the same, have proposed and agreed as soon as he, or his executors or administrators, shall have effected such object, and procured purchasers for 9,000 of such 50*l.* shares, and obtained for such company the first call upon such shares of 5*l.* each, that

they, the said J. J. St. Marc, S. Brooksbank, and W. D. Fellowes, their heirs, executors, or administrators, or some or one of them, shall and will pay to the said A. Duvergier, his executors, administrators, or assigns, the full sum of 10,000*l.* sterling, by two equal payments or instalments of 3,333*l.* 6*s.* 8*d.*, viz., the sum of 3,333*l.* 6*s.* 8*d.* so soon as the first instalment on such 9,000 shares shall have been paid, the sum of 3,333*l.* 6*s.* 8*d.* so soon as the second instalment on the same shares shall have been paid, and the remaining sum of 3,333*l.* 6*s.* 8*d.* so soon as the third instalment on the same shares shall have been paid. Now, therefore, the condition of the above written bond or obligation is such, that, if the above bounden J. J. St. Marc, S. Brooksbank, and W. D. Fellowes, their executors or administrators, or any or either of them, do and shall, well and truly pay or cause to be paid unto the above-named A. Duvergier, his executors, administrators, or assigns, the full sum of 10,000*l.* of lawful, &c. in manner following; that is to say, the sum of 3,333*l.* 6*s.* 8*d.* part thereof, on the said A. Duvergier, his executors, or administrators, forming the said before mentioned company, and procuring purchasers for such 9,000 shares, and payment of the first instalment or call thereon; the further sum of 3,333*l.* 6*s.* 8*d.* on the second instalment, on such shares having been paid; and the remaining sum of 3,333*l.* 6*s.* 8*d.* on the third instalment, on the same shares having been paid: then the above-written obligation to be void and of no effect, or else to be and remain in full force and virtue."

Second. That the plaintiff, *actionem non debet*, &c.—because, as to the said sum of 3,333*l.* 6*s.* 8*d.*, part of the said sum of 10,000*l.*, in the condition of the said writing obligatory first mentioned, the defendant said, that the plaintiff had not at any time, since the making of the said writing obligatory, hitherto, formed the said company in the said condition mentioned, and procured purchasers for such 9,000 shares therein mentioned, and payment of the first instalment or call thereon, according to the true intent and meaning of the said condition, but had wholly omitted and neglected so to do, to wit, at, &c.; and, as to the said further sum of 3,333*l.* 6*s.* 8*d.* in the said condition of the said writing obligatory

obligatory mentioned—that the said second instalment of such shares in the said condition of the said writing obligatory mentioned, had not at any time since the making of the said writing obligatory hitherto been paid according to the true intent and meaning of the said condition, but the same and every part thereof was still unpaid, to wit, at &c. aforesaid; and, as to the said remaining sum of 3333*l*.6*s*.8*d*. in the said condition of the said writing obligatory mentioned—that the said third instalment on the same shares in the said condition of the said writing obligatory mentioned, had not at any time since the making of the same writing obligatory hitherto been paid according to the true intent and meaning of the said condition, but the same and every part thereof was still unpaid, to wit, at &c.

Third.—That the plaintiff had not, at any time since the making of the said writing obligatory, formed the said company in the said condition mentioned.

Fourth.—That the plaintiff had not, at any time since the making of the said writing obligatory hitherto, procured purchasers for such 9000*l*. shares as in the said condition were mentioned.

Fifth.—That certain of the said several letters patent, in the said condition of the said supposed writing obligatory mentioned, were letters patent of our Sovereign Lord the now King, under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date, at &c., on &c., whereby, after reciting (amongst other things) that the said J. J. St. Marc had, by his petition, humbly represented to our said Lord the King, that, in consequence of communications made to him by certain foreigners residing abroad, and discoveries by himself, he was in possession of an invention of improvements in the process of an apparatus for distilling, our said Lord the King gave and granted unto the said J. J. St. Marc, his executors, administrators, and assigns, his especial licence, full power, sole privilege and authority, that he, the said J. J. St. Marc, his executors, administrators, and assigns, and every of them, by himself and themselves, or by his and their deputy or deputies, servants or agents, or such others as he, the said J. J. St. Marc, his executors, administrators, or assigns, should at any

time agree with, and no other person, from time to time, and at all times thereafter, during the term of years therein expressed, should, and lawfully might, make, use, exercise, and vend, the said invention within that part of the United Kingdom of Great Britain and Ireland called England, our said Lord the King's dominion of Wales and town of Berwick-upon-Tweed, in such manner as to him, the said J. J. St. Marc, his executors, administrators, or assigns, or any of them, should, in his or their discretion, seem meet; and that the said J. J. St. Marc, his executors, administrators and assigns, should, and lawfully might, have and enjoy the whole profit, benefit, and advantage, from time to time coming, growing, accruing, and arising, by reason of the said invention, for and during the term of years therein mentioned, to have, hold, exercise, and enjoy the said licence, powers, privileges, and advantages thereinbefore granted, or mentioned to be granted, unto the said J. J. St. Marc, for and during and unto the full end and term of fourteen years from the date of the said last-mentioned letters patent next and immediately ensuing, and fully to be complete and ended, according to the statute in such case made and provided: and it was, by the said letters patent, provided, and the same were declared to be upon the express condition, that, if the said J. J. St. Marc, his executors or administrators, or any person or persons who should or might, at any time or times thereafter during the continuance of that grant, have or claim any right, title, or interest, in law or equity, of, in, or to the power, privilege, and authority, of the sole use and benefit of the said invention thereby granted, should make any transfer or assignment, or any pretended transfer or assignment, of the said liberty and privilege, or any share or shares of the benefit or profit thereof, or should declare any trust thereof, to or for any number of persons exceeding the number of *five*, or should open, or cause to be opened, any book or books for public subscription, to be made by any number of persons exceeding the number of *five*, in order to the raising any sum or sums of money under pretence of carrying on the said liberty or privilege thereby granted, or should, by him or themselves, or his or their agents or servants, receive any sum or sums

of money whatsoever of any number of persons exceeding in the whole the number of *five*, for such or the like intents or purposes, or should presume to act as a corporate body, or should divide the benefit of the said last-mentioned letters patent, or the liberties and privileges thereby granted, into any number of shares exceeding the number of *five*, or should commit or do, or procure to be committed or done, any act, matter, or thing, whatsoever, during such time as such person or persons should have any right or title, either in law or equity, in or to the same premises, which would be contrary to the true intent and meaning of a certain act of parliament, made in the 6th year of the reign of the late King George the *First*, intituled, &c. (1), or in case the said power, privilege, or authority, should at any time thereafter become vested in, or in trust for, more than the number of *five* persons, or their representatives, at any one time, reckoning executors or administrators as and for the single person whom they represent, as to such interest as they were or should be entitled to in right of such their testator or intestate,—that then and in any of the said cases those letters patent, and all liberties and advantages whatsoever thereby granted, should wholly cease and become void; any thing thereinbefore contained to the contrary thereof in anywise notwithstanding—*prout patet*. [Letters patent under the Grand Seal of Scotland, which were in similar terms to the above, were then set out.] And the defendant further said—that, the said several terms of fourteen years each, in the said letters patent mentioned, at the time of the making of the said supposed writing obligatory, were and yet are unexpired; and that the said company in the said condition of the said supposed writing obligatory mentioned, was meant and intended by the said J. J. St. Marc, and the plaintiff and defendant, at the time of the making of the said supposed writing obligatory, to consist of more than *five* persons, to wit, 10,000 persons, and to be formed for the purposes (amongst other things) of using, exercising and enjoying, the said exclusive liberties and privileges in the said two several letters patent in the said condition and in this plea mentioned, for the use and benefit of the

said persons so exceeding the number of *five*, in that part of the United Kingdom called England, and in that part thereof called Scotland, respectively, under colour of the said letters patent respectively, to wit, at &c. aforesaid; and so the defendant said, that the supposed writing obligatory was and is void in law; and this &c.

Sixth.—That certain of the said letters patent, in the said condition of the said supposed writing obligatory mentioned, were letters patent of our Sovereign Lord the now King, under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date, at &c., on &c., containing therein the like matters and things, and the like proviso, to the same effect as the said letters patent in the said fifth plea first mentioned—*prout patet*. And the defendant further said, that the said term of fourteen years in the said supposed writing obligatory, was, and yet is unexpired, and that the said company, in the said condition of the said supposed writing obligatory mentioned, was, at the time of the making thereof, intended by the plaintiff and defendant to consist of more than *five* persons, to wit, 10,000 persons, and to be formed for the purpose, amongst other things, of using, exercising, and enjoying, the said exclusive liberties and privileges in the said last-mentioned letters patent mentioned, for the use and benefit of the said persons so exceeding the number of *five*, in that part of the United Kingdom called England, under colour of the said last-mentioned letters patent; by means of which premises in this plea mentioned, the supposed writing obligatory was and is wholly void; and this &c.

Seventh.—That certain of the said several letters patent in the said condition of the said supposed writing obligatory mentioned, were letters patent of our Sovereign Lord the now King, under the Great Seal of the United Kingdom of Great Britain and Ireland, bearing date at Westminster on a certain day, to wit, the 20th March, in the 5th year of the reign &c., containing therein the like matters and things, and the like proviso, and to the same effect, as the said letters patent in the said fifth plea first mentioned—*prout patet*. And the defendant further said, that the said term of fourteen years, in the said last-mentioned letters patent mentioned, at the time of the making of the

said supposed writing obligatory was, and yet is unexpired; and that the said company in the said condition of the said supposed writing obligatory mentioned, was, by the said J. J. St. Marc, the said S. Brooksbank, the said defendant, and the said plaintiff, intended, at the time of the making of the said supposed writing obligatory, to consist of more than five persons, and to be formed for the purpose (amongst other things) of using, exercising, and enjoying, the said exclusive liberties and privileges in the said last-mentioned letters patent mentioned, for the use and benefit of the said persons so exceeding the number of five, in that part of the United Kingdom called England, under colour of the said letters patent, and of the acting as a corporate body, and dividing the benefit of the said last-mentioned letters patent, and the liberties and privileges thereby granted, into divers shares exceeding the number of five, to wit, 10,000, *to be transferable and assignable, without any charter from our Lord the King*; and that, before the time of the making of the said supposed writing obligatory, to wit, on the said &c., at &c. aforesaid, it *was corruptly and illegally agreed*, by and between the plaintiff and the said J. J. St. Marc, and the said S. Brooksbank, and the defendant, that the plaintiff should form such company as in this plea mentioned, for the purpose in this plea mentioned, and should sell and dispose of divers, to wit, 9000, of such shares as in this plea mentioned, being the shares in the said condition of the said supposed writing obligatory, and should cause divers large sums of money to be subscribed by public subscription, by numbers of persons exceeding five, to wit, 9000 persons, in order to the raising a large sum of money, to wit, 450,000*l.*, under pretence of carrying on the said liberty or privilege (amongst other things) by the said letters patent granted; such money to be in part received by the said J. J. St. Marc, S. Brooksbank, and the said defendant, for the purpose of carrying on the said liberty and privilege for the benefit of the said last-mentioned persons so exceeding five (amongst others); and that the said J. J. St. Marc, the said S. Brooksbank, and the said defendant, should, in consideration thereof, pay to the plaintiff the sum of 10,000*l.* of lawful &c., in the manner in the said condition

of the said supposed writing obligatory mentioned; and that, for securing the payment of the sum of 10,000*l.*, the defendant should make and seal, and as his own act and deed deliver to the plaintiff, a writing obligatory in the penal sum of 10,200*l.*, conditioned for the payment of the said sum of 10,000*l.* in manner aforesaid. And the defendant further said, that, in pursuance of the said corrupt and unlawful agreement, the defendant afterwards, to wit, on &c. last aforesaid, at &c. aforesaid, made and sealed, and as his deed delivered, the said supposed writing obligatory in the said declaration mentioned, and the plaintiff then and there accepted and received the same of and from the defendant, upon the said corrupt and unlawful agreement: by means of which premises in this plea mentioned, the said supposed writing obligatory was and is wholly void; and this &c.

On the first plea, the plaintiff joined issue; replied to the second, third, and fourth; and demurred generally to the fifth, sixth, and seventh pleas.

The defendant rejoined, taking issue on the replication to the second, third, and fourth pleas; and joined in demurrer.

The case came on for argument on a former day in this term.

Mr. Serjeant Wilde, for the plaintiff.—The first point raised by the seventh plea, is, whether or not the company mentioned in the bond intended to act as a corporate body, without the sanction of an act of parliament, or of a charter from the Crown. The raising of the company which the plaintiff proposed to raise, was a condition precedent to any claim on his part for remuneration. The company was to be under the guidance of directors. The plaintiff was merely to bring together the persons who were to constitute its members, and appoint the directors. The company was not proposed to be raised on any regulations or stipulations previously agreed upon. It does not appear that the assent of the subscribers was required to anything but the making of the purchase. There was no arrangement as to whether the company should act by charter or otherwise. It is said that the company intended to act as a corporate body, and to issue transferable shares,

without a charter from the Crown. The allegation is twofold: first, that the company was to act as a corporate body; secondly, to divide its capital into transferable shares, without the authority of a charter. There is also a total absence of any allegation as to the precise intent of the parties. The introductory part of the plea refers to the intention of the company to assume a corporate capacity; but no agreement to that effect is shewn. The intent of the defendants and of the plaintiff is not alleged in the latter part of the plea. The allegation, that the plaintiff intended that the company should act as a corporate body, is not sufficient. That such was the intention of the company, is matter to be deduced from certain facts. It is a sweeping allegation in law and fact, that *the company intended* to act as a corporation, and tends to bring a legal question under the cognizance of the jury. The plea should have set forth acts, or what amounted to acts, to shew that the shareholders did take upon themselves to act corporately. There is a distinction between persons claiming to act as corporate bodies, and persons usurping corporate offices. A *quo warranto* will lie against a person assuming to act as a public officer: but that is a public matter, not a private remedy. In the case of *Rex v. Cann* (2), the defendant assumed authority to hold a court leet; a *quo warranto* was applied for against him, but the Court refused to grant it, saying, that the matter might very properly be tried in a civil action.

But where an individual merely assumes to act as a corporation, the only consequence is, that his acts are void: the public have nothing to do with it. So, here, it was merely intended to carry on a trade. It was strictly a private matter; nor was it any detriment to the public, nor, in fact, to any individual: and it was no usurpation on the prerogative of the Crown.

If a man intend to do what can be done lawfully, it must be presumed that he intended to do it properly, unless by some means that presumption is excluded. It cannot here be predicated that the intention

of the parties was to do that which is illegal. The bond discloses no illegality.

Then, as to the patent. The shares in it were, of right, transferable without the aid of a charter; they might be assigned to any number of persons the grantees might think fit: at all events, the legal means by which that might have been done was not excluded. What is to prevent a company from issuing transferable shares, and doing other corporate acts, without a charter from the King? The statute 6 Geo. 1. c. 18. recognizes the ordinary modes by which companies are legalized, viz. by charter, and by statute. The plaintiff here was not a member of the company. There was nothing to prevent the company's procuring a charter. It might have been the intention of the parties here to procure an act of parliament. If such had been their intention, they had no means of making it appear on the record, for there is no allegation contained in the seventh plea on which such an issue could be taken. The procuring of an act would have been as legitimate a mode of proceeding as the obtaining of a charter. The plaintiff must be presumed to have intended to act legally. The allegation, therefore, of an intent to act without procuring a charter, is not sufficient: the plea should have gone on to negative the intent to obtain an act of parliament. The mere fact of a company's issuing transferable shares is not in itself illegal; otherwise the numerous partners in banking establishments would render them illegal associations. The statute 6 Geo. 1. c. 18. was passed for the express purpose of remedying an existing evil. The case of *Rex v. Webb* (3) occurred at a time when that act was in full force: and there the company was held not to be within its meaning, the shares not being transferable generally and without limitation. Now, here, it is not alleged that the shares of the company in question were to be transferable of right, or exclusive of all limitation or restriction. In *Pratt v. Hutchinson* (4), the shares were only transferable provided that the purchaser should be approved at a meeting of the society, and should, on his admis-

(2) *Andrews*, 14.

(3) 14 *East*, 406.

(4) 15 *East*, 511.

sion, become a party to the original articles by which the company was constituted. In the case of a partnership, the sheriff may take in execution the property or share of one of the partners. A commission of bankrupt, too, transfers the property to the assignees, who may carry on the trade, and who are entitled to the same degree of interest in the concern as the bankrupt partner possessed at the time of his bankruptcy. Although, in this case, by the terms of the letters patent, a transfer would render them void, still there is nothing illegal in an agreement for such a transfer. The case of *Josephs v. Pebrer* (5) is distinguishable from this; as, there, the company were actually carrying on trade, and had appointed an agent, without being legally authorized. Here, the matter only relates to the future establishment of a company, which, when formed, was, it is alleged, intended to act as a corporate body, and to have transferable shares. There can be no legal objection to the transfer of the shares. It does not appear that the plaintiff was to be a member of the company or a holder of shares. The money mentioned in the bond was to be paid to him on his bringing together a certain number of persons to purchase a certain number of shares, to appoint directors, &c., and to fix times for the payment of the instalments or calls by the subscribers. That was the service for which he was to have a remuneration. It was perfectly distinct from the motives of the projectors of the company, or the mode in which they proposed to carry it on. The distillery was to be carried on by the directors for the benefit of the subscribers. The plaintiff had no controul or authority in the management. The plea should have set forth some acts done by the company shewing its illegality. It has not done so, and is therefore defective. All the cases that occur in the books on this subject, are cases where the companies were in operation, carrying on trade without being duly authorized. Here, all the means by which the company might have been legalized are not negatived.

Mr. Serjeant Taddy, contra.—The questions in this case do not involve the rights

of partners. By a general demurrer, it is admitted, that every allegation is well pleaded; the right of action only is put in issue. One of the allegations here is, that this company intended to act as a corporate body. It has been said that the particular mode in which the company intended to act, or any particular act done by them, was not stated in the plea: but, even if the plea be defective, the defect is cured by the general demurrer. The plea is in accordance with the terms of the condition of the bond, viz. "the first instalment to be paid on the plaintiff's forming the company." The plaintiff, it seems, was to receive no part of the amount until he had performed three things: *first*, he was to form the company; *secondly*, to procure purchasers for 9000 of the shares; *thirdly*, to obtain payment of the first instalment or call on the shares. It has been said, that the assignment of the letters patent was not illegal, but that it merely rendered them void. If that be so, then it clearly appears that the 10,000 persons who were to form the company, were to be cheated and inveigled into the purchase of a thing of no value. Fraud on the crown, on the public, and on the shareholders, is manifestly apparent on the face of the bond; and the question of fraud is properly raised by the seventh plea. The statute 21 Jac. 1. c. 3. legalizes patents under certain circumstances. Here the plea is in the precise terms of the recital of the statute 6 Geo. 1. c. 18. The inconvenience in this case is the presuming to act as a corporate body, which is an inconvenience at common law; also the issuing of transferable shares, which is one of the marks of a corporation. In *Josephs v. Pebrer*, the association was considered illegal for merely carrying on trade. The object there was, the lending of small sums of money on per centage: and Lord Chief Justice Abbot said (6), "If the projectors, before the association has been sanctioned, either by an act of parliament or by royal charter, make shares in the concern transferable without any restriction, at the mere will of the holder, and provide that the purchasers shall render themselves liable to the regulations to be framed by certain

(5) 3 Barn. & Cress. 639; s. c. 5 Dow. & Ryl. 542; 3 Law Journ. K. B. 102.

(6) 3 Barn. & Cress. 642.

persons styling themselves a committee of management, or directors, then, the association assumes an unlawful shape." Here, too, there was no limit to the right of the shareholders to transfer. If the transfer were limited or restricted, the plaintiff should have shewn it; but he has not done so: he has demurred generally. In *Josephs v. Pebrer*, directors were to be appointed, as here. Although the statute 6 Geo. 1. c. 18, on which these cases proceeded, has since been repealed, yet they are material to shew what shall be considered as having a tendency to the prejudice and grievance of the king's subjects; and it is clear that all acts that do so are void by the common law. The obvious tendency of companies of this sort is to introduce gaming, and their effects cannot fail to be most mischievous. All the *indicia* on which the Courts have on former occasions proceeded, are to be found here. In the case of *Buck v. Buck* (7), the company, on account of which the action was brought, was not incorporated either by charter or by statute, and therefore the plaintiff was nonsuited. The plea alleges, that the plaintiff was to form the company in the plea mentioned; and, for the purpose of forming the company, to get together a certain number of persons, who were to choose directors and to exercise certain privileges, and act as a corporate body. That is an express averment of a corrupt agreement and pretence to use and exercise the privilege granted by the letters patent. The demurrer admits that there was such pretence, and that the agreement was corrupt. Had the parties gone a little further, they might have subjected themselves to an indictment: *Rex v. Stratton* (8). It has been objected, that the plea does not negative as well the intention of procuring a statute as that of obtaining a charter. The allegation, that the company had such an intention, should have been made by the plaintiff. The defendant could not make a negative averment. He could not allege that they did not intend to apply to parliament. The affirmant must necessarily make the allegation. An act of parliament is an alteration of the existing law. Now, here, it was

(7) 1 Campb. 547.

(8) 1 Campb. 549, n.

enough for the defendant to shew that the plaintiff meant to contravene the existing law. A statute is a particular exemption. The legislature may at all times alter the law. Every statute is a new enactment, and alters the existing law. A charter is the usual and ordinary mode by virtue of which companies like the present are established. It was not necessary for the defendant here to shew in what particular manner the company intended to act as a corporate body. The general allegation, that they did intend to act as such, is enough; for the Court will intend what the mode of acting must be. The company necessarily meant to assume to itself the power of suing and being sued, of purchasing and alienating, &c., all which acts, according to various authorities, (*Comyns's Digest*. tit. "Franchise" F. 1; 9 Rep. 25 b.; and 10 Rep. 33 b.) are clearly not within the power of a subject, but are such as the King alone or Parliament alone can authorize.

Mr. Serjeant Wilde, in reply.—The case has been argued on another point than that which the court directed the argument should be confined to, viz. that the bond was void, as there was a fraudulent intent in the sale of the patent. The patent was not the only thing which the company was to obtain. The premises, and the goodwill of the trade were also sold, and the exclusive right to them was valuable. The sale of the patent is out of the question. If the plaintiff could assign no interest in the patent to the company, still they would obtain an advantage by his giving up his exclusive right to the use of the invention thereby secured to him. But the only question to be considered, is, whether the seventh plea discloses sufficient matter in law to bar the plaintiff's right of action. It merely alleges that the company was intended to act as a corporate body; but it does not negative their intent to apply for a charter or an act of parliament. It should have negatived both. If a party impute to another as an offence that which might be legalized, he must negative every possible means of making the act legal. The plea sets up a collateral agreement in order to avoid a bond, on the face of which there appears nothing illegal. The bond and condition

are evidently framed with a view to the obtaining of an act. With regard to the cases cited, in all of them the parties were *at the time* acting corporately without charter or statute.

Cur. adv. vult.

The Lord Chief Justice delivered the judgment of the Court as follows :—

It appears from the condition of the bond, that the plaintiff is not entitled to any part of the 10,000*l.* which the obligors had bound themselves to pay him, until he had formed a company and procured purchasers of 9000 shares, and payment of the first instalments or calls on those shares. The forming the company, the selling 9000 shares of what was to be called the stock of such company, and the prevailing on the purchasers to pay one third of their subscriptions, or 150,000*l.*, is a condition precedent to the plaintiff's right of action. The proviso contained in the patent shews that the plaintiff cannot perform this condition without committing a fraud on a vast number of persons; and that, if he could obtain any subscriptions, the subscribers would be entitled to recover back the money paid on them, as being obtained by fraud, or as money paid without consideration. The moment the company was formed, and the patents were transferred to them, they would cease to exist as legal patents; for they would be destroyed by an assignment to more than five persons, or to any persons in trust for more than five persons. The condition of the bond is such, that the patents are to be assigned to a company to be formed by subscription, and the shares in which were to be transferable. Any one of these circumstances would render the patents void. This difficulty was felt by the counsel for the plaintiff, and he attempted to extricate his client from it, by insisting that it was not intended to convey the exclusive right of distilling spirits from potatoes secured by the patent, but only to free the intended company from being liable to the patentee for using his invention. But it is clear, from the terms of the bond, that the object of the parties was not to destroy the patents, but that they professed to assign the privilege

granted by them to the company which the plaintiff was to form. The words of the condition of the bond are, "the said &c. have it in contemplation to dispose of their interest of, in, and to the several patents, and of, in, and to the premises and stock in trade, and to part with the same to a company, &c." These terms indicate an intention not to destroy, but to transfer unimpaired, the monopoly secured by the patents. It has been said, it does not appear from the pleadings that the plaintiff knew of this proviso in the patents, and that the insertion of such a proviso in patents is not required by any law. But we must presume, that he knew the contents of the patents referred to by the bond on which he brings his action—of the patents of which it appears by the same bond he undertakes the sale in the manner stated in that bond. Every man who undertakes to do a thing must be presumed to know what he undertakes, unless he can shew that he has been deceived by the other party. How could the plaintiff undertake to negotiate for the sale of the patents unless he had seen them and knew their contents? If he knew the terms on which they were granted to him, he must know that what he undertook to do could not be done. As he cannot legally perform his part of the compact, he never can be in a condition to recover the compensation stipulated to be paid on its full and complete performance. There are some old authorities, which say that if a man binds himself by the condition of his bond to do what at the time he executed the bond it was impossible for him to do, the bond shall be considered as without condition, and the obligee may recover the penalty. These authorities are rather opposed to the plaintiff's claim; they apply only to cases where there is nothing to be done by the obligee. Here the plaintiff must do something before the bond can be enforced. If what he is to do can never be legally done, the instrument must be inoperative; the plaintiff, not having performed the first condition, can never have a right of action on it. The situation of the plaintiff in this case is like that of the defendants in the cases alluded to. It is his fault that he has undertaken what he cannot perform. In

Pullerton v. Agnew (9), *Holt C. J.* said, "Where a condition is under-written, or indorsed, then that only is void, and the obligation is single; but where the condition is part of the lien itself, and incorporated therewith, if the condition be impossible the obligation is void." In the case before us, the service of the plaintiff, and payment for it by the defendant, are incorporated together; and, if the service cannot be performed, the whole instrument is a nullity. But it is apparent, from the facts disclosed by the condition of this bond and the patents, that the scheme in which the parties to this action were engaged was one of those bubbles by which, to the disgrace of the present age, a few projectors have obtained the money of a great many ignorant and credulous persons, to the ruin of these dupes and their families, and by which a passion for gambling has been excited that has been most injurious to commerce and to the morals of the people; which any one must discover, from reading the instruments, the parties to them must be fully informed of. It cannot be too well known that there is no place for persons engaged in such transactions, in courts appointed for the decision of civil cases. Although the statute 6 Geo. 1. c. 18. is repealed, the common law relating to such schemes is expressly reserved by the repealing statute (10), and no one doubts that, if it can be shewn, as it easily may, that such schemes are mere traps, and injurious to the public welfare, the forming of them is an indictable offence at common law.

The seventh plea states, and the demurrer admits, that the plaintiff and defendant intended that the company, which the plaintiff undertook to form, should act as a corporate body without any charter from the king; that the benefit of the letters patent was to be enjoyed by this pretended corporate body; and that the capital of this body was to be divided into 10,000 shares, which were to be *transferable* and *assignable*. It has been said at the bar, that the parties might have intended to obtain an act of parliament in order to give this body a legal existence. Nothing of this intention appears on the record. It has been further

(9) 1 Salk. 172.

(10) 6 Geo. 4. c. 91.

said, that the defendant should have shewn how the parties intended to act as a corporation. If this is not correctly pleaded, advantage should have been taken of the technical defect by special demurrer. If what they intended to do would not have been acting as a corporation, they should have traversed the plea. By demurring, the plaintiff has confessed himself guilty of intending to form a company that was to act as a corporation. But the shares were to be transferable. There can be no transferable shares of any stock, except the stock of corporations, or of joint-stock companies created by acts of parliament. When it is said the shares were to be transferable, that must mean that the assignee was to be placed in the precise situation that the assignor stood in before the assignment—that the assignee was to have all the rights of the assignor, and to take upon him all his liability. Now, the assignee can join in no action for a cause of action that accrued before the assignment: such rights of action must still remain in the assignor, who, notwithstanding he has retired from the company, will still remain liable for every debt contracted by the company before he ceased to be a member. Indeed the members of corporations cannot assign their interests and force their assignees into the corporation, without the authority of an act of parliament. Such authority is expressly given by the Bank Acts, the South Sea Acts, and the other statutes creating companies that possessed stock which it was deemed proper to render transferable. The pretending to be possessed of transferable stock is pretending to act as a corporation, and pretending to possess a privilege which does not belong to many corporations. But this is put only as one of the proofs of the intention of the projectors of this company that it should act as a corporation. It is not necessary, on these pleadings, to decide whether the forming a company with such shares, is, of itself, without other circumstances, pretending to act as a corporation; because it is, by the pleadings, distinctly admitted that the plaintiff and defendant intended that the company should act as a corporation. Persons who, without the sanction of the legislature, presume to act as a corporation, are guilty of a contempt of the king, by usurping on his prerogative. By

the statute, 9 Anne, c. 20, the Court may not only give judgment of ouster, but may fine a defendant convicted on a *quo warranto*. This shews that the usurpation is considered as a criminal act. But it has been insisted that the usurpation is only criminal where a party without authority acts in a public office, and that the pretended corporation which these parties were to set up did not affect the public, but was a scheme with which certain individuals only were connected. Most of the statutes relative to the writ of *quo warranto*, from the statute of Gloucester down to the 9th of Anne inclusive, have the words offices and franchises. Franchises are privileges for the advantage of the individuals. In *Comyns's Digest* (3) many things are mentioned as matters for which a *quo warranto* will lie, which are valuable only to the individuals who claim them against the crown, and are not connected with any public duty. But it concerns the public that bodies composed of a great number of persons with large disposable capitals should not be formed without the authority of the crown, and subject to such regulations as the king in his wisdom may deem necessary for the public security. The acting as such a corporation without charter from the crown is contrary to law, and no man can maintain an action on a bond given to secure payment of a compensation to the obligee on the formation of any such pretended corporation. For these reasons, there must be—

Judgment for the defendant.

1828. { WALSH, BART. AND ANOTHER,
Nov. 10. { EXECUTORS OF SIR HENRY
STRACEY, BART., v. FUSSELL.

Covenants in restraint of trade or agriculture—what shall be.

In an action on a covenant (entered into by the testator of the defendants, for himself his executors &c. on taking a lease of lands) to indemnify the churchwardens &c. of the parish of E. from all charges in respect of the settlement of any servant or apprentice that

he, the testator, or his executors, &c. should take, the declaration omitted to state that the demised premises were situate within the parish in respect of which the indemnity was taken:—the Court, as the record then stood, declined to decide whether or not the action would lie; but they directed the declaration to be amended in this particular.

This was an action of covenant.

The declaration stated—that heretofore, and in the lifetime of the said Sir Henry, to wit, on the 12th March 1792, at the parish of Elm, in the county of Somerset, by a certain indenture then and there made between the said Sir Henry of the one part, and the defendant of the other part, (one part of which said indenture, sealed with the seal of the defendant, the plaintiffs now bring here into court, the date whereof is a certain day and year, to wit, the day and year aforesaid) the said Sir Henry, for the considerations therein mentioned, did demise, lease, and to farm let, unto the said defendant, his executors, administrators, and assigns, certain tenements, hereditaments, and premises, with the appurtenances, in the said indenture more particularly mentioned and described—to have and to hold the same for a certain term, as in the said indenture mentioned; and the defendant, for himself, his executors, administrators, and assigns, did, in and by the said indenture, in another part thereof, covenant, promise, and grant, to and with the said Sir Henry, his heirs and assigns, amongst other things, that he, the said defendant, his executors, administrators or assigns, should and would, from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and overseers of the poor of the parish of Elm aforesaid for the time being, and all and singular other the owners and occupiers of lands and tenements, and the inhabitants of or within the parish of Elm aforesaid for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for or by reason or means of the said defendant, his executors, administrators or assigns, taking an apprentice or servant who should thereby gain a settlement within, or become chargeable to, the parish of Elm

(3) Tit. "Quo Warranto," C. 4.
Vol. VII. C.P.

E

aforesaid, as by the said indenture, reference being thereunto had, will, amongst other things, more fully and at large appear: by virtue of which said demise, the defendant afterwards, to wit, on &c. aforesaid, entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof; and although the said Sir Henry in his lifetime always, from the time of making the said indenture, well and truly performed, fulfilled, and kept all things in the said indenture contained, on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said indenture, to wit, at &c. aforesaid, yet, protesting that the said defendant hath not performed, fulfilled, or kept any thing in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, true intent and meaning of the said indenture, the said plaintiffs in fact say that the defendant did not nor would from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and overseers of the poor of the parish of Elm aforesaid for the time being, and all and singular other the owners and occupiers of lands and tenements and the inhabitants of or within the parish of Elm aforesaid, for the time being, of and from all manner of costs, rates, taxes, assessments and charges whatsoever, for or by reason or means of the said defendant, his executors, administrators or assigns, taking an apprentice or servant who should thereby gain a settlement within, or become chargeable to, the parish of Elm aforesaid; but, on the contrary thereof, he, the defendant, after the making of the said indenture, and after the death of the said Sir Henry, and during the continuance of the said term, to wit, on the 1st December 1826, took a certain servant, to wit, one William Lansdown, within the true intent and meaning of the said indenture; and the said William Lansdown, by reason of his being such servant to the said defendant, did gain a settlement within the parish of Elm aforesaid, and within the true intent and meaning of the said indenture, to wit, in &c. aforesaid; and the plain-

tiffs further said—that the said William Lansdown having so gained such settlement as aforesaid, did afterwards, to wit, on the 14th February 1827, by reason of the premises, become chargeable to the said parish; and the overseers of the poor of the parish aforesaid for the time being by reason thereof, as such overseers as aforesaid, were therefore, to wit, on &c. last aforesaid, and on divers other days and times between that day and the commencement of this suit, forced and obliged to, and did necessarily pay, lay out, and expend divers large sums of money, amounting in the whole to a large sum of money, to wit, to the sum of 100*l.*, in and about the necessary support, maintenance, and sustaining the said William Lansdown and his family, to wit, at &c. aforesaid: of all which premises he, the defendant, then and there had notice; yet the defendant had not repaid to the overseers of the poor of the parish aforesaid for the time being, or any or either of them, or any or either of their successors, or any person on behalf of the said overseers or their successors, or of the said parishioners, the said sum of money, or any part thereof; nor hath he in any manner indemnified, or saved harmless, the churchwardens and overseers of the poor of the parish aforesaid for the time being, and all and singular other the owners and occupiers of lands and tenements, and the inhabitants of or within the parish aforesaid according to the tenor and effect, true intent and meaning of the said covenant, but hath wholly refused to do so; and by reason of the premises the said churchwardens and overseers and the said owners and occupiers and inhabitants, have been and are greatly injured and damnified, to wit, at &c. aforesaid; and so &c. &c.

To this declaration the defendant pleaded—

First, *non est factum*.—Secondly, that he, the defendant, did not take the said William Lansdown as his servant within the true intent and meaning of the said indenture, in manner and form as the plaintiffs have above alleged.—Thirdly, that the said William Lansdown, by reason of his being such servant to the said defendant, did not gain a settlement within

the said parish of Elm aforesaid, within the true intent and meaning of the said indenture, in manner and form as the said plaintiffs have above alleged.—Fourthly, that the said William Lansdown, by reason of the premises alleged in the declaration in that behalf, did not become chargeable to the said parish, in manner and form as the plaintiffs have above alleged.—Fifthly, that the said overseers did not pay, lay out, or expend, the said sums of money in the said declaration in that behalf mentioned, or any part thereof, in manner and form as the plaintiffs have above alleged.—Sixthly, that the plaintiffs, executors as aforesaid, had not, at any time since the making of the said indenture alleged hitherto, been in anywise damnified by reason or means of any matter, cause, or thing in the said covenant mentioned.

To the five first pleas the plaintiffs added similiter, and to the last demurred specially, assigning for causes—"that the defendant hath, in and by his said plea, attempted to put in issue, to be tried by a jury, a question of law, and not of fact; and also for that the defendant, in and by his said plea, does not plead or set forth any fact, matter, or thing, which is any bar to the said declaration of the plaintiffs; and also for that the defendant, in and by his said plea, confesses the declaration of the plaintiffs, but does not in any manner avoid the same; and also for that the plea is wholly repugnant; and also that the said last plea is in other respects uncertain, informal, and insufficient," &c.

The defendant joined in demurrer.

Mr. Serjeant Wilde, for the plaintiffs.—The objections are to the declaration. It is said that the covenant declared on is illegal. The effect of it is, not to bind the defendant not to take an apprentice or servant which by law he might be bound to do, but it is merely a covenant binding him to indemnify the parish, and to prevent its being burthened thereby. This is an obligation voluntarily entered into. It is an obligation on a man taking a farm; and, when he has got all the benefit he could derive from the bargain, he cannot afterwards object to the terms. In *The Mayor of Congleton v. Pattison* (1), in a

lease of ground, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors, &c. *and assigns*, not to hire persons to work in the mill who were settled in other parishes, without a parish certificate; and it was held, that this covenant did not run with the land, or bind the assignee of the lessee. In that case the covenant went much further than this. The question there undoubtedly was, whether the covenant was a covenant running with the land; but, when the learned persons by whom that case was argued, and the eminent Judges before whom it was argued, are seen, and it is remembered that neither the bench nor the bar took any objection to the legality of the covenant, it may very fairly be presumed that they considered it unexceptionable. In *Rex v. Mursley* (2), it appears that a notion prevailed, that an attempt by a master to prevent his servant from gaining a settlement in his parish by a particular mode of hiring, was illegal: and Mr. Justice Buller said, "A master may, if he please, hire a servant for a less time than a year, for the express purpose of preventing his gaining a settlement." There is nothing in this covenant that is against the general policy of the law. It may appear hard; but, if a man makes a hard bargain, that is no reason why it should not be enforced in a court of law. Every person is by law settled in some parish. No one is supposed to have any interest in gaining a new settlement. Here, the defendant is not precluded from taking all the apprentices he is bound in law to take. The covenant is merely that he shall take upon himself all the consequences of his own voluntary contracts; that he shall not throw upon the parish the burthen of the maintenance of such poor as do not belong to it: in a word, that he shall bear all burthens of his own causing.

Mr. Serjeant Stephen, contra.—The considerations for the covenant are not set forth. The declaration does not even state that the premises demised were in the parish in respect of which the indemnity is taken. The defendant covenanted to indemnify the churchwardens and overseers of Elm, which is not introduced before,

(1) 10 East, 130.

(2) 1 Term Rep. 694.

except in the venue; nor is it stated that the persons taking the covenant were the churchwardens and overseers of Elm. This is the case of a covenant without limitation. The liability is not confined to the period of the demise. It tends to restrain the defendant not only on the property demised, but on all he may possess in the parish; nor is the covenant confined to the defendant, but it extends to his executors, &c. The question is not whether a landlord may or may not take such a covenant from his tenant on granting a lease; but whether or not a stranger may thus impose an intolerable liability on a party. I do not put this case on the mere ground of unreasonableness; perhaps that would hardly be sufficient to support the argument. There is no case in point. The case of *Whiting v. Punchard* (3) seems at first sight to bear against the defendant, but on consideration it will be found distinguishable. There, the tendency of the condition of the bond on which the action was brought, was to enable one *Clarke* to obtain a settlement; but here, the contract is such as to prevent persons from obtaining settlements in any parish. The covenant is void—*first*, because it is to the prejudice of trade and agriculture;—*secondly*, because it is against the general policy of the poor laws, and tends to make parish officers discharge their duty improperly, and is therefore contrary to the spirit of those laws. It is not necessary to trouble the Court with a reference to any authorities to shew that all covenants that tend to the injury of the commonwealth are void. All covenants that tend to the restraint of trade are also void. In the Year Book 2 Hen. 5. p. 26. the Court declared that a bond conditioned for the defendant's not carrying on the business of a dyer, was contrary to the principles of the common law, and void. In *Colgate v. Bachelor* (4), a bond conditioned, that, if the defendant's son should at any time within a certain period, either as apprentice, or servant, or for himself as master, or otherwise, use the trade of a haberdasher within the county of Kent, or cities of Canterbury or Rochester, the defendant

should pay the plaintiff 20*l*. The defendant, after oyer of the condition, pleaded that the bond and condition were against law; to which plea there was a demurrer; and, after argument, it was resolved by the Court—"That this condition is against law, to prohibit or restrain any to use a lawful trade at any time or at any place; for, as well as he may restrain him for one time or one place, he may restrain him for longer times and more places, which is against the benefit of the commonwealth; for, being free men, it is free for them to exercise their trade in any place: and, although it was alleged that here he is not prohibited or obliged absolutely that he shall not exercise the trade of a haberdasher, but that, if he exercise it, he shall pay to the plaintiff 20*l*., and so it differs from the case 2 Hen. 5. 5. b.: yet, the Court said it was all one; for he ought not to be abridged of his trade and living."

The contract here tends to induce the defendant not to take apprentices or servants, or to restrict the number of them to the smallest possible. In *Mitchel v. Reynolds* (5), which was also an action of debt on a bond to restrain the defendant from trading in a particular place, the condition recited, that the defendant had assigned to the plaintiff a lease of a messuage and bakehouse, in the parish of St. Andrew, Holborn, for a term of five years; and that, if the defendant should not exercise the trade of a baker within that parish during the said term, or, in case he did, should, within three days after proof thereof made, pay to the plaintiff the sum of 50*l*., then the obligation was to be void; and Lord Chief Justice Parker, in delivering the judgment of the Court said (6), "General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade or not. Particular restraints are either, *first*, without consideration, all which are void, by what sort of contract soever created; or, *secondly*, particular restraints are with consideration. Where a contract for restraint of trade appears to be made upon a good and adequate consideration,

(3) 3 Wils. 50.

(4) Cro. Eliz. 872.

(5) 1 P. Wms. 181.

(6) Id. 185, 6.

so as to make it a proper and useful contract, it is good.(7) But here it may be made a question, that, suppose it does not appear whether or no the contract be made upon good consideration, or be merely injudicious and oppressive, what shall be done in this case? I do not see why that should not be shewn by pleading; though certainly the law might be settled either way without prejudice; but, as it now stands, the rule is, that, wherever such contract *stat indifferenter*, and, for aught appears, may be either good or bad, the law presumes it *prima facie* to be bad, and that for these reasons:—*first*, in favour of trade and honest industry;—*secondly*, for that there plainly appears a mischief, but the benefit (if any) can be only presumed; and, in that case, the presumptive benefit shall be overborne by the apparent mischief;—*thirdly*, for that the mischief (as I have shewn before,) is not only private, but public;—*fourthly*, there is a sort of presumption that it is not of any benefit to the obligee himself, because, it being a general mischief to the public, everybody is affected thereby; for it is to be observed, that, though it be not shewn to be the party's trade or livelihood, or that he had no estate to subsist on, yet, all the books condemn those bonds, on that reason, viz. as taking away the obligor's livelihood, which proves that the law presumes it; and this presumption answers all the difficulties that are to be found in the books.(8) The application of this to the case at bar is very plain: here the particular circumstances and consideration are set forth, upon which the Court is to judge whether it be a reasonable and useful contract. The plaintiff took a baker's house, and the question is, whether he or the defendant shall have the trade of this neighbourhood: the concern of the public is equal on both sides. What makes this the more reasonable is, that the restraint is exactly proportioned to the consideration, viz. the term of five years." But here the consideration is *unreasonable*. The restraint is far beyond the necessity of the case. His Lordship concluded—(9) "In all restraints of trade,

where nothing more appears, the law presumes them bad; but, if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and, if upon them it appears to be a just and honest contract, it ought to be maintained:" and the plaintiff there had judgment. According, therefore, to the reasoning of that case, the question is, whether or not this is a contract tending to the restraint of trade. It is true the covenant here is not, in terms, a contract to restrain trade, or to restrain the defendant from taking servants; but, as it evidently tends to that end, it is within the principle which controls contracts of that nature. I am not prepared with any cases to shew that a *tendency* to restrain trade is sufficient to avoid a contract; but there are many cases to shew that contracts are void because of their *tendency*. Although the case of *Gilbert v. Sykes* (10) turned on different circumstances, still it will in a degree support this position. There, a wager by which the defendant received from the plaintiff 100 guineas on the 31st May, 1802, in consideration of paying the plaintiff a guinea a day as long as *Napoleon Bonaparte* (then first Consul of the French Republic) should live, which bet arose out of a conversation upon the probability of his coming to a violent death, by assassination or otherwise, was held void, on the grounds of immorality and impolicy, and as tending to the encouragement of assassination. The case of *Mitchel v. Reynolds* has been followed by several, and its principles recognized; amongst others, the cases of *Chesman v. Nainby* (11), *Davis v. Mason* (12), *Gale v. Read* (13), and *Homer v. Ashford* (14), in the latter of which it was fully considered. In all these cases it is established, that covenants in restraint of trade are void unless the consideration be reasonable. Here the covenant is not so set forth that the Court may see that the consideration is legal. There is nothing to connect the covenantor with the covenant.

(10) 16 East, 150.

(11) 1 Bro. P. C. 234.

(12) 5 Term Rep. 118.

(13) 8 East, 60.

(14) 3 Bing. 322; s. c. 11 B. Moore, 91;

4 Law Journ. C. P. 62.

(7) 1 P. Wms. 191, 2.

(8) Id. 196, 7.

(9) Id. 197.

It does not appear that the lessor had any interest at all, or any reversion.

The learned Serjeant was here interrupted by the *Lord Chief Justice*, who observed that the plaintiff had better amend his declaration, and state on the record that the lessor had an interest in the reversion of the demised premises, and where they were situate; for it seemed that the lessor, without any consideration, had arbitrarily imposed this covenant on the lessee: and *Mr. Justice Burrough* expressed a wish, that, if the case should be re-argued, the learned Serjeant would consider what would be the effect on the Poor Laws if every lessor in every parish were to take such a covenant as the above.

Leave to amend.

1828. } ELWORTHY AND OTHERS v.
Nov. 11. } MAUNDER.

Affidavit to hold to bail—where sufficient.

An affidavit, stating that the defendant was indebted to the plaintiffs in a certain sum by virtue of a memorandum, by which he undertook to be answerable to the creditors of W. M. and J. M., on their (the creditors) undertaking not to issue a commission or sue out process against the said W. M. and J. M. on or before a given day—was held insufficient, it not being averred that the creditors had undertaken not to issue a commission or sue out process against W. M. and J. M. within the limited time.

The defendant was held to bail on the following affidavit:—

“William Elworthy, of &c. (one of the plaintiffs) maketh oath and saith, that, by a memorandum in writing, bearing date the 11th August, 1828, and signed by Thomas Maunder, of &c. (the defendant), the said Thomas Maunder did undertake and agree to be answerable to the creditors of certain persons using the style and firm of William Maunder and James Maunder, for the amount of the debts of such creditors, on their, the said creditors, undertaking not to issue a commission of bankrupt, or sue out process, against them, the said William Maunder and James Maunder, on or before Saturday, the 16th August (then) instant;

and this deponent further saith, that he, and one Thomas Elworthy the elder, and one Thomas Elworthy the younger, trading together as co-partners, and using the style or firm of Messrs. Thomas Elworthy & Co., were, and now are, creditors of the said William Maunder and James Maunder; and that they, the said William Maunder and James Maunder, were, on the 11th August instant, and still are, indebted to this deponent, and the said Thomas Elworthy the elder, and Thomas Elworthy the younger, in a certain large sum of money, to wit, the sum of 1000*l.* and upwards, that is to say, the sum of 300*l.* on a bill of exchange, drawn by the said William Maunder and James Maunder upon one Joseph Lambert, and payable to the order of the said Messrs. Elworthy & Co. at a certain day now past; and in the further sum of 700*l.* and upwards for goods sold and delivered by this deponent and the said Thomas Elworthy the elder, and Thomas Elworthy the younger, to the said William Maunder and James Maunder, and at their request. And this deponent further saith, that he, confiding in the said undertaking and agreement of the said Thomas Maunder, did not, nor hath the said Thomas Elworthy the elder, and the said Thomas Elworthy the younger, or either of them, nor have, nor hath (as this deponent is informed and believes) any, or either of the other creditors of the said William Maunder and James Maunder, caused a commission of bankrupt to be issued, or sued out any writ or other process, against them, the said William Maunder and James Maunder, or either of them, on or before the said 16th August (then) instant: yet that the said Thomas Maunder (although often requested so to do) hath not, nor have the said William Maunder and James Maunder, or either of them, as yet paid the said sum of 1000*l.* and upwards, or any part thereof, to this deponent, or to the said Thomas Elworthy the elder, and Thomas Elworthy the younger, or either of them, but that the same still remains wholly due and unpaid: And this deponent further saith, that he, the said Thomas Maunder, is justly and truly indebted to this deponent, and the said Thomas Elworthy the elder, and Thomas Elworthy the younger, in the said sum of 1000*l.* and upwards, upon and by virtue of the said memorandum, and the

undertaking and agreement of the said Thomas Maunder therein mentioned, &c."

On the motion of *Mr. Serjeant Bompas*, a rule was granted, on a former day in this term, calling on the plaintiffs to shew cause why the bail-bond given and entered into by or on the behalf of the defendant, on his arrest in this action, to the sheriff of the county of Devon, should not be delivered up to the defendant to be cancelled, on his entering a common appearance; against which rule—

Mr. Serjeant Jones and *Mr. Serjeant Stephen* now shewed cause.—The affidavit is framed on a memorandum by which the defendant agreed to become responsible for the debts of his two sons. It shews that the plaintiffs were creditors of the sons; and that they, the plaintiffs, confiding in the agreement, did not do that which they might and would have done; which forbearance was the consideration for the defendant's promise. It is not shewn that, at the time of signing the instrument, the plaintiffs were parties to the transaction; but that is not necessary, for, in the case of executory contracts, a party may shew that he afterwards recognized the agreement and forbore in consequence. There is a distinct allegation on the part of the plaintiffs, that the defendant is indebted to them upon the written undertaking. The question is, whether or not this is a sufficiently positive affidavit of the existence of a debt. It states an agreement made with a body of creditors, that the plaintiffs are creditors, and that they forbore in consequence of that agreement. It is objected, that, it is not stated that the plaintiffs were parties to the agreement. That is not necessary; for, if an agent make a contract, and his principal afterwards concur, that makes the act of the former the act of the latter. So, if a man agree with a body of men, that, if they will do a certain act he will pay them a sum of money, and they, in consequence do the act stipulated for, that is a sufficient consideration. The affidavit here is, in fact, too precise. The objection is merely this, that there is no allegation that the plaintiffs agreed to forbear to sue the defendant's sons, and therefore that there is no mutuality, inasmuch as they might or might not have forbore, at pleasure. But it is nowhere laid down that it is necessary to

allege the agreement by the plaintiff in such a case. If it were necessary, mutual promises must be stated in every declaration. This affidavit, however, goes further. It states the agreement with the creditors of the sons of the defendant; it states also that the plaintiffs are creditors, and that, in consequence of the undertaking of the defendant, they did forbear to sue, according to the terms of the agreement. It is alleged in language that would be sufficient to support an indictment if the allegation were untrue. If the objection be that the promise is made to parties not named, that is easily answered. In the case of an advertisement for a thing lost, an action may be maintained by the finder of the article for the amount of the reward offered, and there the promise is even more indefinite than in this case: for here it is sworn that the defendant made a promise to a certain body of creditors, and the plaintiffs connect themselves with that body of creditors by a distinct allegation. The case of *Phillips v. Bateman* (1) may, probably, be adverted to on the other side. There, the promise was confined to the inhabitants of Pembroke; and it may be inferred from what appears in the report of that case, that, if the plaintiff had been an inhabitant of that town, the action might have been supported. Here the plaintiffs are distinctly shewn to be of the body of the creditors of the Maunders.

Mr. Serjeant Wilde, in support of the rule.—The affidavit is manifestly defective. It is made by creditors of the sons of the defendant. The agreement is such as a party could not legally be held to bail at all on, unless under a Judge's order. It states that the defendant promised on their (the creditors) undertaking not to issue a commission of bankrupt, or sue out process against the defendant's sons. The agreement of the defendants depends on an assent or adoption by the plaintiffs and the other creditors, and an obligation on them to forbear; but here, without in any manner binding themselves, the plaintiffs held the defendant to bail.

By the Court.—We do not now say whether or not this action is properly brought,

(1) 16 East, 356.

or whether it may or may not be held finally to be maintainable. It appears that there was to be an undertaking by the plaintiffs and the other creditors of the defendant's sons to forbear for a certain time from molesting them. The plaintiffs have in their affidavit shewn that this condition was performed. Besides, it is not sworn that all the creditors did abstain from issuing a commission or suing for the stipulated time. The undertaking seems to be a condition precedent; and, as there is no allegation that the creditors did forbear, or undertake to forbear, we think the affidavit is not sufficient. The expression is at least very equivocal.

Rule absolute without costs.

1828. } MACKLIN v. W. WATERHOUSE,
Nov. 12. } J. WATERHOUSE, CLENCH, AND
 } WEEKS.
 } RILEY AND ANOTHER v. HORNE
 } AND ANOTHER.

Carriers—Liability of.

In an action against coach proprietors for the loss of a parcel, which was delivered at the office of one of the defendants, a notice limiting the responsibility of "the proprietor of that office" to parcels or packages not exceeding the value of five pounds, was held insufficient to bar the plaintiff's right of action against the joint proprietors.

Semble—That a notice issued at a coach-office in London, stating that the proprietors of coaches running from that office, will not be answerable for any package above the value of five pounds, applies as well to the journey back to London as to that from London.

These two cases being of the same nature, and the judgments in them having been given by the Court together, it was thought advisable to insert them in the same order.

Macklin v. Waterhouse and Others was an action on the case against the defendants, as carriers, for the loss of a parcel entrusted to them to be carried for the plaintiffs from Salisbury to London. The first count of the declaration stated—That

theretofore, to wit, on the 30th November 1826, at &c., the plaintiff, at the special instance and request of the defendants, caused to be delivered to them, the said defendants, and the defendants then and there received into their care and custody, a certain package or parcel containing divers, to wit, three notes, commonly called promissory notes, for the payment of divers sums of money, amounting in the whole to a large sum of money, to wit, the sum of 45*l.*, and payable to bearer on demand, at a certain bank of William Bird Brodie and John Dowding, at Salisbury, in the county of Wilts, that is to say, at the Salisbury Bank, or at Messrs. Remington, Stephenson and Co.'s, bankers, London; three other promissory notes for the payment of divers other sums of money, amounting in the whole to a large sum of money, to wit, the sum of 45*l.*, and payable at a certain other bank of the said W. B. Brodie and J. Dowding, at Salisbury aforesaid, in the said county of Wilts, or at Messrs. Remington, Stephenson and Co.'s, bankers, London; three other promissory notes for the payment of divers other sums of money, amounting in the whole to a large sum of money, to wit, the sum of 45*l.*; three other notes, commonly called county bank-notes for the payment respectively of the sums of 5*l.*, 20*l.*, and 20*l.*; three other notes, commonly called county bank-notes, and divers, to wit, eight pieces of the current coin of this realm called half-sovereigns, of the said plaintiff, of great value, to wit, of the value of 49*l.*, to be safely and securely carried and conveyed by the defendants, by a certain conveyance called the Exeter Mail, from Salisbury aforesaid, to London aforesaid, and there, to wit, at London aforesaid, safely and securely to be delivered for the plaintiff, for certain reasonable hire and reward to the defendants in that behalf: yet the defendants, not regarding their duty in that behalf, but contriving and fraudulently intending to deceive, defraud, and injure the plaintiff in this behalf, did not nor would safely or securely carry, or convey, or cause to be carried or conveyed, by the said conveyance called the Exeter Mail, or in any other manner, the said package or parcel, and its contents aforesaid, from Salisbury aforesaid to London aforesaid, nor there, to wit, at London aforesaid, safely or

securely deliver the same for the plaintiff; but, on the contrary thereof, the defendants so carelessly, negligently, and improperly behaved and conducted themselves in the premises, that, by and through the carelessness, negligence, and default of the defendants in the premises, the said package or parcel, and its contents aforesaid, being of the value aforesaid, became and were wholly lost to the plaintiff, to wit, at &c. aforesaid. There was also a count in trover.

The defendants pleaded the general issue.

At the trial, before the Lord Chief Justice, at Guildhall, at the Sittings after last Easter term, it appeared that a parcel, containing notes and money of the value of 49*l.*, had been delivered by the plaintiff's attorney, or agent, at an office kept by the defendant Weeks, at Salisbury, to be carried to London by the defendants' coach; and that it was stolen by a porter in the employ of Mr. Waterhouse in London. For the defendants, a notice was proved, in the following words: "Take notice. The proprietor of this office will not be accountable for any parcel or package exceeding the value of five pounds, unless entered as such and paid for accordingly." The knowledge of this notice by the plaintiff's agent was also proved. His Lordship told the jury that it was incumbent on the master, in order to rebut the presumption of negligence raised by the fact of a felony having been committed by his servant, to shew that he had had a good character with him: and, it having been objected, for the defendants, that, inasmuch as there was a notice creating a different contract from that set forth in the declaration, there was a variance, his Lordship said, that he had no doubt that a notice would create a special contract which must be declared on, yet he doubted whether the one proprietor could, in such language as that contained in this notice, make a contract to bind the other three.

The jury having returned a verdict for the plaintiff,—

Mr. Serjeant Wilde, in the course of the last term, obtained a rule nisi, that that verdict might be set aside and a nonsuit entered. He contended, that the declaration was not adapted to the contract, inasmuch as the notice limited the contract in a par-

ticular manner; and that there was no evidence of negligence, for that the simple fact of felony in the servant would not alone warrant the jury in finding negligence in the master.

Mr. Serjeant Taddy afterwards shewed cause.—It clearly was not necessary to set out the notice in the declaration. In *Clark v. Gray* (1), it was held, that assumpsit might be maintained against a carrier for the loss of goods which were of above 5*l.* value, and were not in fact paid for accordingly, although it was part of the contract proved by general notice fixed up in the carrier's office, and presumed to be known and assented to by the plaintiff, that the carrier would not be accountable for more than 5*l.* for goods, unless entered as such and paid for accordingly; and Lord Ellenborough there said, "If indeed the contract be of such a nature as goes in discharge of the liability of the party under the contract altogether, in case a particular condition is not complied with, as in *Clay v. Willan* (2), where the goods were not to be accounted for at all unless properly entered and paid for, that will not merely operate in reduction of the damages, but in bar of the action." In *Smith v. Horne*, Mr. Justice Burrough said (3), "The doctrine of notice was never known until the case of *Forward v. Pittard* (4), which I argued many years ago. Notice does not constitute a special contract; if it did, it must be shewn on the record: it only arises in defence of the carrier; and here it is rebutted by proof of positive negligence. I lament that the doctrine of notice was ever introduced into Westminster Hall." No one instance can be found to prove that this notice should be stated as part of the contract in the declaration. These notices go to discharge the contract altogether. How, therefore, can the defendant state that in his declaration which shews that there is no contract at all? In *Yate v. Willan* (5), the plaintiff declared upon a general undertaking by the defendant to carry goods for hire; on which the latter paid 5*l.* into court; and the Court held, that the defendant could

(1) 6 East, 564.

(2) 1 H. Bl. 298.

(3) 8 Taunt. 146.

(4) 1 Term Rep. 27.

(5) 2 East, 128.

not give in evidence that the contract was, that he should not be answerable for goods lost to a greater value than 5*l.*, unless entered and paid for accordingly; although they said, that, if no money had been paid into court, the plaintiff must have been non-suited on such evidence. Here, Weeks, one of the defendants, appears to have been the proprietor of the office, and he is admitted to be a proprietor of the coach in question; and it is contended for the defendants, that the words "proprietor of this office," are to be interpreted "proprietors of coaches running from this office." In *Garnett v. Willan* (6), the notice was, that the proprietors would not be answerable for any package, which, with its contents, would exceed 5*l.*, if lost or damaged, unless the value were specified and insurance paid. As proprietor of the office, the defendant Weeks merely gives notice that he individually will not be responsible for parcels committed to his care as office-keeper. Notices of this nature must be construed strictly; and, if they be at all doubtful, the public should have the benefit of that doubt, rather than those who attempt to impose the limit to that responsibility which the common law attaches to them. In *Beck v. Evans*, Mr. Justice Le Blanc said (7), "I think the exemption of carriers from general liability, by reason of notices of this sort, has been carried to the utmost extent, and cannot be supported on any other ground than this, that they shall not be held liable to a large amount where they only get a small reward for the carriage." In *Kirkman v. Shawcross*, Lord Kenyon, speaking of carriers, said (8), "They have no right to say they will not receive any goods but on their own terms; I believe there is an act of parliament giving power to the Justices at the Quarter Sessions to regulate the price of the carriage of goods. But, be that as it may, when a carrier has given notice that he would not be answerable for goods of a particular denomination unless he received a certain premium, and that notice has come to the knowledge of the party suing, the Courts have considered it as an agreement binding on both parties." Here, if even the notice should be taken to apply to

all the defendants, there was ample evidence to shew that the defendants had been guilty of such a degree of negligence as would in any event make them liable. In *Garnett v. Willan*, Mr. Justice Holroyd said (9), that carriers, notwithstanding notice, were responsible; and Mr. Justice Bayley said (10), "It has been held in many cases that a carrier is responsible for the want of care and diligence of his servants;" and he referred to the cases of *Smith v. Horne* (11), *Bodenham v. Bennett* (12), and *Birkett v. Willan* (13). *Beck v. Evans* is also a strong authority to shew, that carriers are in all cases liable for the negligence or misconduct of their servants. Felony in a servant, in such a case as this, is *per se* evidence of negligence in the master. In *Brooke v. Pickwick* (14), it was also held, that, a notice will not protect a carrier where there is anything from which a jury may draw an inference of gross negligence.

Mr. Serjeant Wilde, in support of his rule.—The first question is, whether or not this notice forms part of the contract in this case. I apprehend it most undoubtedly does. Here is a general coach-office, where coaches receive parcels. Weeks, who keeps the office, acts as agent for all the coaches using his office. He happens to be a part proprietor of one of the coaches on account of which (among others) he has given notice as agent. He, therefore, stands in the situation of one of several partners giving notice on what terms the firm contract. In *Newborn v. Just* (15), the plaintiff declared against the defendant, the keeper of a book-binding-house, for the loss of a parcel. The latter, in his defence, relied on a notice, which stated that he would not be answerable for goods above the value of 5*l.* unless specially paid for; and Lord Chief Justice Best said, that the notice would only protect the defendant from insurance, but not against negligence. Here, a parcel is delivered for the purpose of carriage. The person delivering it has notice of the terms on which it will be taken. The notice must apply to all those who are pro-

(9) 5 Barn. & Ald. 62.

(10) Id. 57.

(11) 2 B. Moore, 18.

(12) 4 Price, 31.

(13) 2 Barn. & Ald. 356.

(14) 4 Bing. 224.

(15) 2 Car. & P. 76.

(6) 5 Barn. & Ald. 53.

(7) 16 East, 247.

(8) 6 Term Rep. 17.

prietors of the office, in respect of their having appointed it as a place for the receiving of parcels for them. It is contended on the other side, that the effect of this notice would be to dissolve the contract of carriage altogether, and therefore that it could not be set forth in the declaration. That, however, is not so; for it is a mere qualification of the contract. In *Yate v. Willan*, the declaration did not state the notice. Five pounds were paid into court; and the Court said, that, if no money had been paid into court, the plaintiff must have been nonsuited on proof of notice; and that notice was similar to the present. In *Clark v. Gray*, the contrary was held, the Court saying that the notice only limited the damages. But, in *Latham v. Putley* (16), Lord Tenterden said, "The result of all the cases upon the subject is, that, if the carrier only limits his responsibility, that need not be noticed in pleading; but, if a stipulation be made, that, under certain circumstances, he shall not be liable at all, that must be stated." There has never been expressed any dissent from that judgment. There are many cases where carriers have been fixed, on slight negligence; but all these are immaterial in a solemn consideration of the liability, because there the questions were not raised at *Nisi Prius*. The acceptance by the defendants is not correctly stated in the declaration. The contract is there set out as a full and unqualified responsibility, whereas the notice, which was part of the contract, limited it. The jury found negligence, which they were not warranted by the evidence in finding. The burthen of proof of negligence rests on those who charge it. If there had been any want of due and proper inquiry as to the character of the person who committed the felony, it was for the plaintiff to shew that. There are many cases to shew that a master is not liable for the wilful trespass of his servant; among others the cases of *Croft v. Alison* (17), and *Finucane v. Small* (18). So, felony not being an act done by a servant in the execution of his duty, the master is not answerable for it. It cannot be assumed that no inquiry was made by the defendant Waterhouse in this instance as to the

character of this individual, merely because no proof was given of any such inquiry having been made; for, the presumption of law is, that every man does his duty. The case of *Nicholson v. Willan* (19) shews that gross negligence is the only thing for which a carrier is responsible. *Low v. Booth* (20) is to the same effect. There are many cases to shew, that, where a contract is the basis of the action, the entire contract must be set forth. In *Weall v. King* (21), where the plaintiff declared on a joint contract made by two defendants, and the proof only established a contract by one of the defendants, the plaintiff was nonsuited. So, here, as the contract proved differed materially from that alleged in the declaration, the plaintiff was not entitled to recover.

Riley and another v. Horne and others was also an action on the case against carriers for the loss of a parcel of goods.

The first count of the declaration stated—That the defendants were common carriers of goods for hire from Kettering to London; that the plaintiffs caused to be delivered to them at Kettering, and that the defendants accepted from the plaintiffs, a certain parcel containing 107½ yards of silk hat-shags of the plaintiffs' of the value of 50*l.*, to be safely conveyed by them, the defendants, from Kettering to London, and there safely to be delivered for the plaintiffs for reward to the defendants in that behalf: yet that the defendants, not regarding their duty as such common carriers as aforesaid, did not safely or securely carry or convey the said parcel and its contents aforesaid from Kettering to London, nor there, to wit, at London, safely or securely deliver the same for the plaintiffs, but wholly neglected so to do, and on the contrary thereof, the defendants, so being such common carriers as aforesaid, so carelessly and negligently behaved and conducted themselves in the premises, that, by and through the carelessness, &c. of the defendants in the premises, the said parcel and its contents aforesaid, being of the value aforesaid, afterwards &c., became and were wholly lost to the plaintiffs, to wit, at &c. The second count stated that

(16) 2 Barn. & Cress. 22.

(17) 4 Barn. & Ald. 590.

(18) 1 Esp. Rep. 313.

(19) 5 East, 507.

(20) 13 Price, 329.

(21) 12 East, 452.

the goods were delivered to the defendants to be taken care of, and safely and securely carried by the defendants from Kettering to London, and there to be safely and securely delivered to the defendants for the plaintiffs within a reasonable time then next following, for reward to the defendants in that behalf; and that, although the defendants accepted and received the last mentioned parcel and its contents aforesaid from the plaintiffs for the purpose aforesaid, and undertook the carriage, conveyance, and delivery thereof as aforesaid, within a reasonable time; and, although a reasonable time for the carriage, conveyance, and delivery thereof, had long since elapsed, yet the defendants, not regarding their duty in that behalf, did not within such reasonable time as aforesaid, or at any time afterwards, although requested so to do, take care of, or safely or securely carry and convey, the said parcel and its contents aforesaid, from Kettering to London, nor there, to wit, at London, safely or securely deliver the same for the plaintiffs, but had neglected so to do; and that, by means of the negligence and improper conduct of the defendants, the said parcel and its contents had not been delivered to or for them, the plaintiffs, at London or elsewhere, and were wholly lost to the plaintiffs, to wit, at &c.

The defendants pleaded the general issue.

At the trial, before the Lord Chief Justice, at Guildhall, at the adjourned Sittings after last Hilary term, it appeared that the defendants were the proprietors of a coach running from a distant part of the country and passing through the town of Kettering, in Northamptonshire, in the neighbourhood of which place the plaintiffs had a manufactory; and that the parcel of goods for the loss of which the action was brought, had been delivered by an agent or servant of the plaintiffs at the coach-office of the defendants at Kettering, to be conveyed to London and delivered at the warehouse of the plaintiffs there; but that it did not reach its destination, having been lost or stolen from the coach. For the defendants, a notice was put in, of which the following is a copy:—

“George and Blue Boar, Holborn, London.—Take notice. The proprietors of carriages which set out from this office

will not hold themselves accountable for any passengers' luggage, truss, parcel, or any package whatever, above the value of 5*l.*, if lost or damaged, unless the same be entered as such, and paid for accordingly, when delivered here or to their agents in town or country; nor will they be accountable for any glass, china, plate, watches, writings, cash, bank-notes, or jewels of any description, however small in value;” and it was contended that this notice formed part of the contract upon which the goods were received. His Lordship thought that the notice did not apply to goods received in the country to be conveyed to London, but only to the journey out.

The jury found a verdict for the plaintiffs.

A rule having been obtained, in the course of the last term, by *Mr. Serjeant Andrews*, calling on the plaintiff to shew cause why that verdict should not be set aside and a new trial had,—

Mr. Serjeant Wilde now shewed cause.—

If this notice applies at all, it applies to all coaches of which the defendants are proprietors travelling from the George and Blue Boar. The Court will pause before they adopt the decision of *Mayhew v. Eames* (22). It is contended here, that, as the principals in London knew of this notice, their knowledge concluded their agent in the country: but a person in London is not bound to give notice to all from whom he receives parcels, that they must not send them by particular conveyances because the proprietors of those conveyances will not be responsible for their safe delivery. This notice, if upheld, precludes the public from all protection. How are people in the country to know what coaches run to the George and Blue Boar? Coaches do not run every journey to the same house. A notice given here cannot apply so as to fix a principal in respect of a contract made by an agent in the country. Here, there was no evidence that the plaintiffs' agent knew to what particular house the coach went in London. The case of *Mayhew v. Eames* cannot apply. To bring them within this notice, the contracts must be begun in London. Notice to the plaintiff in London cannot be held to cast upon him the responsibility of sending to his agents

(22) 3 B. & C. 601; 3 Law Journ. K.B. 108.

all over the country to make them also acquainted with the limitation of the carriers' liability.

Mr. Serjeant Andrews, in support of the rule.—The common law liability of carriers has been considerably relaxed. We must not go back to rigid rules. These notices must be construed according to common sense. The plaintiffs here live in London. They have a manufactory at Kettering. They send parcels from themselves there (by means of an agent) to themselves in London. They had been in the habit of receiving notices from week to week, and yet they now allege that their agent had no notice of the restriction of the liability of the defendants. The Court will assume notice. This case is in principle not distinguishable from *Mayhew v. Eames*; the only difference is that there there was fraud. This notice clearly applies to all coaches running from the George and Blue Boar.

Cur. adv. vult. }

The Lord Chief Justice now delivered the judgment of the Court.

In a state of society such as that we live in, in which we are supplied with the necessities and conveniences of life by an interchange of the produce of the soil and industry of every part of the world, so much property must be entrusted to carriers that it is of great importance that the laws relating to the carriage of goods should be rendered simple and intelligible, and that they should be such as provide for the safe conveyance of property, and at the same time protect the carrier against risks, the extent of which he cannot know, and therefore cannot determine what precautions are proper for his security.

Fearful of laying down any rule which might be injurious either to the public or to those most useful servants of the public, common carriers, we thought it right to avail ourselves of the leisure afforded us by the long vacation to consider of the cases of *Macklin v. Waterhouse*, and *Riley v. Horne*.

When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or

by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carriers' servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give proper security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, viz. the act of God, and the king's enemies. As the law makes the carrier an insurer, and as the goods he carries may be injured or destroyed by many accidents against which no care on the part of carriers can protect them, he is as much entitled to be paid a premium for his insurance of their delivery at the place of their destination, as for the labour and expense of carrying them there. Indeed, besides the risk that he runs, his attention becomes more anxious, and his journey is more expensive, in proportion to the value of his load. If he has things of great value contained in such small packages as to be objects of theft or embezzlement, a stronger and more vigilant guard is required than when he carries articles not easily removed, and which offer no temptation to dishonesty. He must take what is offered to him to carry to the place to which he undertakes to convey goods, if he has room for it in his carriage. The loss of one single package might ruin him. By means of negotiable bills, immense value is now compressed into a very small compass. Parcels containing these bills are continually sent by common carriers. As the law compels carriers to undertake for the security of what they carry, it would be most unjust if it did not afford them the means of knowing the extent of their risk. Other insurers (whether they divide the risk, which they generally do, amongst several different persons, or one insurer undertakes for the insurance of the whole,) always have the amount of what they are to answer for specified in the policy of insurance. If the extent of

risk is ascertained in cases in which persons are not obliged to insure, and, if they do insure, they may fix their own rate of premium, there is greater reason for ascertaining it where one is compelled to become an insurer, and can only charge what the magistrates in Sessions, if they think proper to settle the rates of carriage, will allow under the statute of William and Mary (1), and where no such rates are made, what a jury shall think reasonable. It would be inconvenient, perhaps impossible, to have a formal contract made for the carriage of every parcel, in which the value of the parcel should be specified, as well as the price to be paid for the carriage; but it would add very little to the labour of the book-keeper, if he entered the value of each package, and gave the person who brought it a written memorandum of such entry, like the slips now made on an agreement for a policy of insurance. The giving of such memoranda would entirely put an end to the litigation which the notices of carriers now give occasion to, and would make the practice of carriers, as nearly as circumstances will permit, conformable to that of all other insurers. Perhaps such memoranda might bring the parties within the reach of the stamp-laws; and the apprehension of this may have prevented carriers from adopting a practice so effectual for their security, and driven them to the expedient of giving notices that they will not be answerable beyond a certain sum, unless the parcels are entered and paid for as parcels of value. In *Batson v. Donovan*, (2) the Court of King's Bench considered a notice of this sort, the knowledge of which was brought home to the party sending goods, as equivalent to a request on the part of the carrier to know the value; and that it made it the duty of the owner of the goods to apprise the carrier that the parcel was of value. The legislature would probably think, if its attention were called to the subject, that a stamp-duty on contracts relative to inland carriage would be a very heavy and very inconvenient tax, and would remove the objection to written evidence of such contracts. A carrier has a right to know the value and quality of what he is required to carry. If the owner of the goods will not tell him

what his goods are, and what they are worth, the carrier may refuse to take charge of them: but, if he do take charge of them, he waives his right to know the contents and value. It is the interest of the owner of goods to give a true account of their value to a carrier, as, in the event of a loss, he cannot recover more than the amount of what he has told the carrier they were worth, and he cannot recover more than their real worth, whatever value he may have put on them when he delivered them to the carrier. It was decided, in *Gibbon v. Paynton* (3), that any artifice made use of to induce a carrier to think that a parcel of jewellery contained only things of small value, would prevent the owner from recovering for the loss of his parcel. In *Kenrig v. Eggleston* (4), it was held, that the owner was not required to state all the contents of his parcel, but that it was for the carrier to make a special acceptance. In *Tyly and another v. Morrice* (5), in which the preceding case is recognized and confirmed, it is said that the true principle is, that the carrier is only liable for what he is fairly told of. In *Titchburne v. White* (6), it was determined that a carrier is answerable for money, although he was not told that the box delivered to him contained any money, unless he was told that the box did not contain money, or he accepted it on the condition that it did not contain money. It may be collected from these authorities, that it is the duty of the carriers to inquire of the owner as to the value of his goods, and that, if he neglect to make such inquiry, or to make a special acceptance, and cannot prove knowledge of a notice limiting his responsibility, he is answerable for the full value of the goods, however great it may be. This is a convenient rule. It imposes no difficulty on the carrier. He knows his own business, and the laws relative to it. Many persons, who have occasion to send their goods by carriers, are entirely ignorant of what they ought to do to insure their goods. Justice and policy require that the carriers should be obliged to tell them what they should do. Although a carrier may prove that the owner of goods knew that

(3) 4 Burr. 2298.

(4) Aleya, 93.

(5) Carth. 485.

(6) 1 Stra. 145.

(1) 3 & 4 W. & M. c. 12. s. 24.

(2) 4 Barn. & Ald. 21.

the carrier had limited his responsibility by a sufficient notice; yet, if a loss be occasioned by gross negligence, the notice will not protect him. Every man who undertakes for a reward to do any service, obliges himself to use due diligence in the performance of that service. Independently of his responsibility as an insurer, a carrier is liable for gross negligence. This point is settled by *Sleat v. Fagg* (7), *Wright v. Snell* (8), *Birkett v. Willan* (9), *Beck v. Evans* (10), and *Bodenham v. Bennett* (11). The jury are to decide what is gross negligence. We may, however, observe, that the most anxiously attentive person may slip into inadvertence or want of caution. Such a slip would be negligence, but not such a degree of negligence as would deprive a carrier of the protection of his notice. The notice will protect him, unless the jury think that no prudent person, having the care of an important concern of his own, would have conducted himself with so much inattention or want of prudence as the carrier has been guilty of. If a notice touching the responsibility of the carrier be given, it matters not by whom it is given, or in what form, if it tells the owner of the goods that the carrier by whom he proposes to send them will not undertake for their safe conveyance, unless paid a premium proportioned to their value. We have established these points:—that a carrier is an insurer of the goods that he carries—that he is obliged, for a reasonable reward, to carry any goods that are offered him to the place to which he professes to carry goods, if his carriage will hold them, and he is informed of their quality and value—that he is not obliged to take a package, the owner of which will not inform him what are its contents, and of what value they are—that, if he do not ask for this information, or if, when he asks and is not answered, he takes the goods, he is answerable for their amount whatever that may be—that he may limit his responsibility as an insurer, by notice; but that a notice will not protect him against the consequences of a loss by gross negligence. Let us see how these principles bear on the two cases now under our consideration.

(7) 5 Barn. & Ald. 342.

(8) Id. 350.

(9) 2 Id. 356.

(10) 3 Campb. 267; s. c. 16 East, 244.

(11) 4 Price, 31.

In *Macklin v. Waterhouse*, the notice was in these words:—"Take notice. The proprietor of this office will not be accountable for any parcels or packages exceeding the value of five pounds unless entered as such and paid for accordingly." A Mr. Weeks was the keeper of this office, at which parcels were received and booked for several coaches belonging to different proprietors. No evidence was given that Weeks, the proprietor of the office, was the same Weeks who was one of the defendants, or that the plaintiff or his agent, knew that the office-keeper had any interest in this coach. No one can collect from the notice that the proprietor of the office has anything to do with any of the coaches that take parcels from that office. If he had by his notice told those who had occasion to go to his office, that none of the proprietors of coaches who took parcels from it would be responsible, such a notice would have been sufficient. The persons who carry parcels to coach-offices are generally servants and other persons who cannot have much knowledge of matters of this sort. The notice should be plain, and easily understood by such persons. They are not to be required to determine whether a notice given by the keeper of a coach-office must apply to the risks undertaken by all the coach-proprietors whose coaches are loaded from that office. This is a case without a sufficient notice, and the defendants are subject to the unlimited responsibility of common carriers. It is not necessary to decide in this case whether, if it had been shewn that Weeks was a proprietor of the coach, a notice given by him as a proprietor of the office could form a special condition in his contract as a coach-proprietor. This is an answer to the point made at the trial, that the notice in this case should have been stated in the declaration; for, as there was no sufficient notice, it is the same as if there was no notice. But it was said, that the declaration stated that the loss was through the negligence of the defendant, and that there was no proof of any negligence, certainly not sufficient proof of gross negligence; but, as there was no notice, the allegation of loss by negligence was not a material allegation, and no proof of it was necessary. If any proof of such allegation was necessary, a loss, the cause of which is not shewn, is sufficient evidence of

simple negligence, although not of gross negligence. The book-keeper deposed to a conversation with the servant who brought the parcel, which this servant did not contradict, but merely said that she did not recollect it. It was not considered at the trial that what passed at this conversation limited the responsibility of the defendant. I did not, therefore, put it to the jury to say whether or not they believed that a conversation to the effect deposed to had passed. The book-keeper swore that the woman who brought the parcel said, "that it was a parcel of consequence; that he asked her if it was a parcel of value, and that she said that it was; but that she did not know what its value was: and that the book-keeper told her it ought to be insured." These were the words used by the witness. To talk of insurance to a country servant was not the way to inform her what it was proper for her to do. This agent of the defendants should have told the servant, when she said she did not know the value of the parcel, to go back to her master and ask him what the value of his parcel was, that the agent might know what to charge him for the carriage of it; and that, until he knew the risk that his employers were to be answerable for, he would not take charge of the parcel. Instead of this, he took it, and it was lost; and it was the only parcel that was lost. That I might conform to the opinion of the majority of the Court in *Batson v. Donovan*, I asked the jury whether the agent of the plaintiff had been guilty of any negligence, or failed in her duty to the carriers. They answered in the negative; and I think their answer was the proper one. As the carrier took the parcel without requiring to know its value, he took it without any limitation of his common-law responsibility, and must be answerable for its loss.

It is unnecessary for us to decide whether the entrusting valuable property to a servant of whom the carrier chose to give no account at the trial, was sufficient to authorize the jury to find that the carrier had been guilty of that degree of negligence which would deprive him of the protection of a proper notice.

In *Riley v. Horne*, I was of opinion, at the trial, that the notice did not apply to the journey to London. The Court of King's Bench had determined that such a

notice applies to the journey back, as well as to the journey out. A carriage that returns to a place, must have gone from it; and therefore a notice from the proprietors of coaches going from it, may be applied to their return journey. But, to give effect to such a notice, it must be proved that the person who sent goods on that same journey knew that the coach came from the George and Blue Boar in London. In this case, the plaintiffs had establishments in the country and in London, and were constantly in the habit of sending parcels from London to the country, and from the country to London, by this coach. It is most probable, therefore, that the jury would have found that the plaintiffs knew that the carriage came from the George and Blue Boar, and that this notice applied to its journey out and home. As I thought that the notice was not so plain and direct as it ought to have been, and did not therefore leave it to the jury to say whether or not the plaintiffs knew that the coach was one that started from the George and Blue Boar, there ought to be a new trial in this case, that the question may be put to the jury.

In *Macklin v. Waterhouse*, the rule must be—*Discharged.*

In *Riley v. Horne*, there must be a new trial. *Rule absolute.*

1828. } THE EARL OF FALMOUTH &
November. } GEORGE.

Prescription for toll—*where good.*

A prescription to take a toll of all fish landed in a particular place, in consideration of keeping a capstan and rope for the use of the fishermen, to draw their boats up from the sea:—Held good.

Evidence—*of interested witness.*

Where a party is interested in the destruction of a particular custom, or has himself acted in breach of it, he is not a competent witness to disprove the existence of such custom.

This was an action of debt.

The first count of the declaration stated—That the defendant, theretofore, to wit,

on &c., in the county of Cornwall, was indebted to the Earl in divers, to wit, fifty fish, of great value, to wit, of the value of 10*l.* of lawful &c., then and there due and of right renderable by the defendant to the said Earl, as and for certain tolls of, for, and in respect of, divers, to wit, fifty cargoes of fish, by the defendant before that time brought from the sea, in divers boats then and there used by the defendant, into a certain cove in the county aforesaid, called Sennen Cove, and there landed; each of the said fish respectively being then and there the second best fish of and in each of the said cargoes of fish respectively; in which said cove the said Earl then and for a long time before had a certain capstan and a certain rope belonging thereto, for the hauling up of the boats of all such fishermen coming into the said cove, with boats used by them, as were desirous of using the same for that purpose, and who were entitled to use the same for that purpose: accordingly and by reason thereof the said Earl then and there was entitled and had a right to the same tolls: whereby &c.

The second, third, fourth, fifth, and sixth counts merely varied the mode of stating the claim; the seventh stated that the defendant was indebted to the plaintiff "in divers, to wit, fifty other fish of great value, to wit, of the value of 10*l.*, for so many fish before that time had and received by the said defendant to and for the use of the said plaintiff;" and the eighth was in *detinue* for "certain other goods and chattels, to wit, fifty other fish, &c."

The defendant pleaded the general issue.

At the trial, before *Mr. Justice Burrough*, at the assizes for the county of Cornwall, in the summer of 1827, it appeared that the plaintiff claimed a right to take toll from the fishermen frequenting a cove or inlet called Sennen Cove, situate on the sea shore on or adjoining to a farm called Mayen, the property of a *Mr. Williams*; that a capstan and rope had, from time immemorial, been kept by the proprietor for the time being (or his tenant) of an estate called Penrose, about two miles distant, for the use of the fishermen, to enable them to haul up their boats on shore. The capstan and rope had always

been supplied and repaired by the proprietors of Penrose, though it was proved that on one occasion the fishermen themselves had supplied a rope. It also appeared that it was always the custom for the persons using the cove in question, on their return from sea, to place the toll-fish on a particular spot, and there leave it if no person from Penrose chanced to be there to receive it. This usage was acquiesced in by the fishermen up to the year 1816, when they refused to submit to it any longer. It was also alleged, that formerly Mayen and Penrose both belonged to the same person, from whom they were purchased by Admiral Boscawen, the grandfather of the plaintiff, who afterwards sold Mayen, reserving to himself all the rights and privileges attached to and established at the cove; and they had ever since been transmitted as appurtenant to Penrose estate, though actually situate in Mayen. The estate of Penrose was described in the conveyance to the plaintiff's ancestor as "all that messuage, tenement, and demesne lands, commonly called or known by the name of Penrose, alias Penrose Escalls, and the lands thereto belonging &c.", with the general words "all houses &c., fixtures &c., and appurtenances whatsoever."

On the part of the defendant, a witness who had been in the habit of frequenting Sennen Cove was called to disprove the custom, but was rejected by the learned Judge as being a person interested in the decision of the question, inasmuch as he himself would be exonerated from the payment of tolls in the event of the custom being negatived. The learned Judge told the jury, that, if they found that it had always been the custom for the plaintiff and his ancestors to find the rope, the fact of the fishermen having on one or two occasions found it themselves, would make no difference.—The jury found a verdict for the plaintiff.

Mr. Serjeant Bosanquet, in the course of the last term, obtained a rule calling on the plaintiff to shew cause why this verdict should not be set aside and a new trial had, on the grounds that there was no consideration for the toll in question, if the

parties did not use the plaintiff's capstan, as the plaintiff was not the lord of the manor in which the cove was situate; and also that the witness tendered on behalf of the defendants had been improperly rejected.

Mr. Serjeant Wilde shewed cause.—The cove in question seemed to have been the work of human labour; for there was a groove in the rock in which the boats were placed in order to haul them up from the sea by means of the capstan and rope. It further appeared that the owners of Penrose estate had always, as far back as human memory extended, been in the habit of supplying the rope and repairing the capstan. It is true that the soil of the cove now belongs to the lord of the manor in which it is situate; but the only persons who were proved ever to have exercised any acts of ownership there were the agents of the plaintiff and his ancestors, or those under whom they claimed. This is a toll-traverse. There was no evidence tending to shew that the cove had been used by the fishermen frequenting it antecedently to the time of claiming toll; but, on the contrary, a constant rendering of toll was established by the evidence. The presumption inevitably must be that the cove was made by the original owner of the soil. Toll-traverse requires no consideration. In *Fitzherbert's Natura Brevium* (1) it is said—"Toll-traverse lies in prescription; but not toll-thorough, for it is an oppression of the people. Toll-traverse may be by prescription or grant; but toll-thorough cannot be by either grant or prescription. Toll-thorough is in the highway; but toll-traverse is for passing over another's land." In the case of *Lord Pelham v. Pickersgill* (2) it was held, that, if a person claiming a toll for passing over a highway can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the tolls were before the time of legal memory in the same hands, though severed since, it shall be presumed that the soil was originally granted to the public in consider-

ation of the tolls; and that such original grant is a good consideration to support the demand: and there Mr. Justice Ashurst said (3) "It is properly admitted that toll-thorough cannot be supported without shewing a consideration; but toll-traverse may: and the reason is, that the very circumstance of passing over the soil of a private person, where the public had no right before to pass, imports a consideration. At the same time, if this were a new case, we should inquire into the reason of this distinction; because, in every case which requires a consideration, it ought, from length of usage, to be presumed. For the rule with regard to prescriptions is, that every prescription is good if by any possibility it can be supposed to have had a legal commencement. That is the general rule; and I cannot see why a good consideration for a toll-thorough cannot be presumed as well as for toll-traverse; because the giving of the soil to the public is in itself a good consideration. But in all probability the distinction arose from the difficulty in most cases of shewing that the toll and ownership of the soil were coeval. For there are very few cases where it could possibly be shewn that the soil over which an ancient road passes was the soil of a private person." In *Richards v. Bennett* (4), which was an action of trespass against the lord of a manor, for taking a cheese, the property of the plaintiff, the former in his plea set out various burthens borne by him, and then prescribed, not by reason of those burthens, but generally, as lord of the manor, for a toll upon all goods bought and delivered or bought elsewhere and brought into and delivered in a town within the manor, which from time immemorial had been parcel of the manor,—it was held that this was good as a claim of toll-traverse; and Mr. Justice Bayley said (5) "If a legal commencement of the claim to this toll can be presumed, that is now sufficient, a verdict having been found for the defendants. This toll may very fairly be presumed to have been granted at a time when the lord of the manor was also

(1) 227, note.

(2) 1 Term Rep. 660.

(3) 1 Term Rep. 667.

(4) 1 Barn. & Cross. 223.

(5) Id. 233.

owner of the soil, in return for the dedication of a part of that soil to the public." The cases of *Crispe v. Belwood* (6), *The Mayor of Yarmouth v. Eaton* (7), and *Colton v. Smith* (8), are all authorities to prove, that, although a toll-thorough requires a consideration to be shewn in order to support the demand of it, yet a toll-traverse does not.

The next objection is, that a particular witness was rejected. This person who was called to disprove the custom under which the plaintiff claimed, was himself a person at that moment in the habit of making use of this cove, and therefore liable to the payment of the customary toll; consequently he was interested in the result of the cause; for it is clear, that, in the event of a verdict passing against this defendant, the record in this case would be evidence in any action that might hereafter be brought against the witness. In the case of *The City of London v. Clerke* (9), where the plaintiffs prescribed for a toll on malt brought to London by the west-country barges, and, at the trial, offered in evidence four verdicts obtained against four west-country malsters, and it was urged that they could not be received as evidence against the defendant, who was neither party nor privy to those records, the Court held, that they might be given in evidence; and Lord Chief Justice Holt said—"If a lord of the manor claims suit of his tenants *ad molendinum*, by custom, &c., and in an action recovers against one tenant, that recovery may be given in evidence in a like action to be brought against other tenants, unless the defendants can shew any covin or collusion between the parties in the first action." In *Buller's Nisi Prius* it is said (10), "The exception of its being *res inter alios acta* is not allowed against verdicts in case of customs or tolls; for the custom or toll is *lex loci*, and facts tending to prove that may be given in evidence by any person, as well as those who have been parties to such facts or to such verdicts as have found and determined them; and in such cases it is not material

whether such verdicts be recent or ancient." In *Hockley v. Lamb* (11) it was ruled by Lord Chief Justice Holt, "that, if A. B. C. D. and E. claim common in a place called Dale, exclusively of all other persons, and the common of A. comes in dispute, B. may be a witness to prove that A. has right of common there; because in effect it charges himself, viz. he admits another to have common with himself. But, if the prescription be, that all the inhabitants of *Blackacre* ought to have common there, one of the inhabitants cannot be a witness to prove that another of the said inhabitants ought to have common there; because in effect he would swear to give himself right of common there." In *Bent v. Baker* (12) it was held, that a broker, who had under-written a policy of insurance after getting it under-written by others, was a competent witness for the defendant in an action against any of those who underwrote before him; and Lord Kenyon there said (13), "If the proceedings in the cause cannot be used for him, he is a competent witness, although he may entertain wishes upon the subject, for that only goes to his credit, and not to his competency; as, where he stands in the same situation with the party for whom he is called to give evidence, there is no doubt but that it may influence his testimony; or, where a father is giving evidence for his son: but this does not render him incompetent, and such circumstances are always open to observation." Here, however, all witnesses were received who did not appear to be then in the course of using the right the defendant claimed. The rejected witness appeared, on the *voir dire*, to be in the habit of using this capstan and rope, and was called for the purpose of shewing that what had been done by himself was not a breach of the custom; he was therefore clearly not competent. In the case of *The Company of Carpenters, &c. of Shrewsbury v. Haynard* (14), which was an action on the case against the defendant for the breach of a custom, which was laid to be—that none but members of the company (being a corporation by prescription), or their appren-

(6) 3 Lev. 424.

(7) 3 Burr. 1403.

(8) Cowp. 47.

(9) Carth. 181.

(10) 8th edit. 253 a.

(11) 1 Lord Raym. 731.

(12) 3 Term. Rep. 27.

(13) Id. 33.

(14) 1 Doug. 374.

tices, or journeymen, should exercise in Shrewsbury, or within a certain district round that town, any of the trades mentioned in the title of the company,—it was held, that a person who had acted in breach of the custom was not a competent witness to disprove the existence of the custom: and Lord Mansfield said, "The witnesses rejected were clearly interested in the question. If the company had failed in establishing the custom, they would have been discharged from actions to which they are liable for the breach of it." That reasoning is precisely applicable to the present case.

Mr. Serjeant Bosanquet, in reply.—Two questions arise in this case. The first, whether the prescriptive right claimed by the plaintiff is supported by the evidence; the second, whether or not the witness in question was properly rejected. The land in which this cove is situate is the property of one Williams, not that of the plaintiff. It has been said, that the liability to keep the capstan in repair, and to supply a rope, would be a sufficient consideration to support the plaintiff's claim for toll. Now, there is a manifest distinction between toll-thorough and toll-traverse. If it had been proved that Lord Falmouth, or his ancestors, or those under whom they respectively claimed, had once been in possession of the soil, then, according to the case of *Lord Pelham v. Pickersgill*, there might have been some ground for a toll-traverse by prescription; but that was not proved, therefore that case will not apply. In *Smith v. Shepherd* (15), which was an action of trespass for taking the plaintiff's sheep, the defendant justified, as servant to the Lord B., by prescription, to take two-pence for every twenty sheep passing *per et trans* the vill; and, upon demurrer, it was held, that the prescription to take toll for passing *in viâ regia*, was not good; for that the inheritance of every man for passing in the king's highway is precedent to all prescriptions. In *Warren v. Prideaux* (16), the defendant avowed for toll under a prescription to have a bushel of salt of every ship that came laden with salt into Slipper-Point, in consideration of his maintaining a quay; and Lord Chief Justice Hale said,

(15) Moore, 574; s. c. Cro. Eliz. 710.

(16) 1 Mod. 104.

"The prescription is not for a *port*, but a *wharf*. If any man will prescribe for toll upon the sea, he must allege a good consideration, because by *Magna Charta* and other statutes every one hath a liberty to go and come upon the sea without impediment;" and the prescription was held bad. That case bears most materially on the present; there the claim for toll was made on the ground of the claimant's keeping a quay and bushel, as here the claim is on the ground of the plaintiff's keeping a capstan and rope, for the use of those who may choose to avail themselves of it. No person can set up by user a right to take toll from one who does not derive some benefit from that for which the toll is demanded. In *Harpurt v. Wills* (17), a custom that all ships passing by a certain wharf shall pay a certain duty, was held to be bad. In *Truman v. Walgham* (18), a prescription for toll through the streets of Gainsborough, in consideration of repairing divers streets there, was held ill because it did not say that the party repaired *all* the streets there; and the plaintiff might, for any thing that appeared to the contrary, be passing through a street which he did not repair. In *Colton v. Smith*, the prescription was for all goods landed *within the plaintiff's manor*. In *Lord Pelham v. Pickersgill* too, the Court proceeded on this distinction, as there it appeared that the soil had been in those under whom the plaintiff claimed. That was ground for presuming a good consideration. All these cases shew that a prescriptive custom to take tolls cannot be supported unless it be shewn that there is some benefit accruing to the parties paying it. In *The Mayor of Nottingham v. Lambert* (19), a prescription to take a toll for passing through a bridge or a navigable river in the plaintiff's manor, was held bad.

As to the question of evidence.—The defendant claimed no custom; nor did the witness whose testimony was rejected. They merely contended that the plaintiff had no right to the toll he claims; that it had not always been taken; and that other persons than this plaintiff had repaired the capstan and furnished it with

(17) 1 Mod. 48.

(18) 2 Wils. 296.

(19) Willes, 111.

a rope. The witness was objected to, not because he was a person embraced by the description of any particular custom, but because he was in the present habit of frequenting the cove. The defendant claimed no right to use the plaintiff's capstan and rope, but merely a right to land fish on the soil of Mr. Williams. Under-writers are in the daily habit of being received as witnesses in cases where they are clearly interested.

Cur. adv. vult.

Lord Chief Justice Best now delivered the judgment of the Court as follows:—

The plaintiff claimed the second best fish out of every boat-load of fish that was landed in Sennen Cove.

This claim was founded on a custom, under which the plaintiff and his ancestors had maintained a capstan and rope which were sometimes used by the fishermen to draw up their boats to a place out of the reach of the tide. The plaintiff insisted, and the jury found, that, whether the capstan and rope were used or not, the plaintiff was entitled to this toll. In certain states of the tide, and in tempestuous weather, boats could not be drawn up from the sea with safety to the crews without the assistance of the capstan and rope. Sennen Cove, except the small part on which the capstan stood, was the soil of a Mr. Williams. But it appeared that the part on which the capstan stood had been in the possession of the plaintiff and his ancestors (who were the owners of a farm called Penrose Farm) for as long a period as the oldest witnesses could recollect; and that this part was separated from the rest of the cove by the wall that surrounded the capstan: but the space between this wall and the sea, over which the boats were drawn by the capstan, was left entirely open, and was the property of the person to whom the rest of the cove belonged. It also appeared that Sennen Cove was rendered a proper place for the landing of boats, by human labour; and that rocks had been removed, and a track made for the hauling up boats to a place above the reach of the sea.

It has been objected, that there was no consideration for the custom of taking tolls from the owners of boats who did not make use of the capstan to draw up their

boats from the sea. Although it is not always necessary to use the capstan, yet, if boats in certain seasons could not safely approach this place, unless they were certain of having the assistance of the rope and the capstan to draw them out of the surf of the sea, we think that the keeping of the capstan and rope ready for the use of fishermen who resort to this cove, is a sufficient consideration for a toll to be paid by them, whether they actually use it or not. No boats could put to sea with anything like safety, if proper means were not provided to draw them out of the breakers in case a strong wind should set in towards the land. Although the fishermen may not always use the capstan, it is of advantage to them—nay, it is essential to their safety—that it should be kept ready for them. The keeping of a capstan for such a purpose is a sufficient consideration for a reasonable toll. There is no doubt that the King may at this time establish a reasonable toll for the performance of any duty that the public convenience or safety requires should be performed.

The creation of a toll is only a mode of paying for a public service. The power of creating toll depends upon the necessity of the service, and the reasonableness of the toll taken for it. If the service be not of public advantage, or the toll be unreasonable, it cannot be supported. But it is impossible to contend that this capstan and rope are not of the greatest importance to these fishermen: and it was not suggested, either at the trial, or in the argument here, that the toll demanded was excessive or unreasonable. If the plaintiff had purchased this land a year ago, had made a landing-place in this cove, had built a capstan, provided a proper rope, and undertaken to keep the capstan and rope in a proper state, at all times, for the use of the fishermen, it would have been a sufficient consideration for the grant of such a toll by the Crown, as the jury have found was due to the plaintiff by virtue of a custom.

Now, it is well known that many tolls are good under a custom, of which a good grant could not be made at the present time. A custom which is proved to have existed immemorially will be good if it be

of such a nature that it is possible that it can have had a good beginning. Although it be such as to confer what the King cannot now grant, yet if it be not contrary to reason it may be supported; for it might have had its commencement from an act of the legislature; custom is a local law which supersedes the general law. Littleton gives us the maxim, *Consuetudo, ex certâ, causâ rationabili usitatâ, privat communem legem* (1). The custom on which the plaintiff rests his claim appears to us to be reasonable—convenient even for those who resist its establishment—advantageous to the public, by encouraging a valuable fishery—and highly beneficial, as tending to the preservation of human life: therefore we have no doubt that this is a valid custom. In the case of *The Earl of Falmouth v. Penrose* (2), the validity of the custom was never disputed. The objection there taken, was, that the pleadings were not applicable to the case proved. At the trial of this cause it was proposed to examine, as a witness for the defendant, to disprove the custom, a man who admitted that he was then a fisherman frequenting Sennen Cove. My learned Brother rejected this person's evidence, and we are of opinion that he was not a competent witness. Although the declaration did not set out the custom, yet, as the plaintiff claimed his right upon a custom, and the defence consisted in a denial of it, the judgment in this case, with evidence shewing that the question at the trial was, whether there was a custom or not, would be admissible, should an action be brought against the witness for landing fish in Sennen Cove without paying the toll. Whenever customs are set up, judgments in causes between other parties are admissible in evidence to prove or disprove such customs. The witness had, therefore, a direct and immediate interest to obtain a verdict for the defendant; as he might use such verdict to protect himself in case an action should be brought against him for the non-payment of tolls due on the landing of fish by himself. This point is expressly decided by the case of *The Company of Carpenters v. Haynard* (3), where witnesses were re-

jected who were called to prove that they had worked as carpenters in Shrewsbury though not free of the Company; and Lord Mansfield said, "If the Company had failed in establishing the custom, the witnesses would have been discharged from actions for which they were liable for the breach of it." We do not mean to say that an intention to bring fish into Sennen Cove immediately after the cause was tried, or the having brought fish there without paying the tolls so long ago as that those who brought them were protected by the Statute of Limitations, would render witnesses incompetent. The former have no interest, and the interest of the latter, like that of an heir-at-law, is future and contingent. If such persons were not competent witnesses, none who had any knowledge upon the subject would be received who could disprove a toll-thorough or a toll-traverse. We put the incompetency of the witness upon the ground of his immediate liability to an action in the event of the verdict being for the plaintiff, and of his being relieved from that liability by a verdict for the defendant. We are of opinion that the rule for a new trial must be discharged.

Rule discharged.

1828. }
November. } CROOKER, *Ex parte*.

Fine—Passing of.

Where one of two vouches had become insane after he had executed the deed to lead the uses, but before the passing of the fine, and so remained,—The Court refused to allow the fine to pass as to the lunatic, but directed that it should be taken as to the other vouchee alone.

Mr. Serjeant Stephen, on a former day in this term, moved that this recovery might pass and be perfected as of this term, although it had been suffered so long since as Michaelmas term 1816. The learned Serjeant founded his motion on affidavit, in which it was sworn that there were two vouches; that they had both executed the deed to lead the uses; but that, shortly

(1) Lit. sect. 169.

(2) 6 Barn. & Cress. 385.

(3) 1 Doug. 374.

after having so executed it, one of them had become insane, and so remained at the time of the application. It also appeared, that the warrants of attorney had been taken on different pieces of parchment; as to which the case of *Lang* demandant, *Lee* tenant, *Woodhouse* and others vouches (1), was referred to, where the Court held that it was no objection to the passing of a recovery, that the warrants of attorney of several vouches were on separate pieces of parchment, or that the order in which their names stood therein varied from that which appeared in the *dedimus*.—But,

The Court said, that as one of the vouches had become insane since his execution of the deed to lead the uses, they were inclined to think that the recovery could not be suffered to pass as to him: and, after having taken time to consider, they, on this day, ordered that the recovery should pass as to the other vouches alone; referring to the case of *Jameson* plaintiff, *Fletcher* and others deforcians (2), where it was ordered that a fine might pass as to all the deforcians save one, who had become a lunatic, on the ground, that, had he continued of sound mind, he might have revoked his authority before the fine was perfected, and could not be said to be *consenting* at the time of its passing.

Fiat.

1828. }
November. } HARRINGTON V. M'DOWELL.

Baron and feme.—*Authority of wife to contract for her husband.*

The plaintiff engaged with the defendant; for the services of his (the plaintiff's) wife on a voyage from the East Indies to this country, and the wife, being enceinte and unable to perform the duties she had undertaken, afterwards agreed to procure a substitute at St. Helena, and that the wages paid to such substitute should be deducted from the sum to be paid for her services: to which agreement the husband subsequently assented. By a second agreement, the wife released the

defendant from the residue of the money due to herself:—Held, that by adopting the first contract made by the wife at St. Helena, the plaintiff impliedly gave her authority to enter into the second agreement, and was therefore bound by it.

This was an action of *assumpsit*.

The first count of the declaration stated—That on &c., at Calcutta in the East Indies, to wit, at &c., in consideration that *the plaintiff*, at the request of the defendant, *would suffer and permit one Ann*, then and still being the wife of the plaintiff, to enter into and on board of a certain ship or vessel called the *Princess Charlotte of Wales*, then lying and being in the port of Calcutta in the East Indies aforesaid, and bound on a voyage from thence to the port of London, *and would suffer and permit the said Ann* to proceed therein and therewith as the servant of the defendant, and in that capacity to attend and wait upon the defendant and his family during the said voyage which the defendant and his said family were then about to make in and on board of the said ship, he, the defendant, undertook and promised the plaintiff to retain and employ the said Ann, so being the wife of the plaintiff, as such servant as aforesaid, and to pay the plaintiff eight hundred *Sicca Rupees* for such service on the arrival of the said ship or vessel in England: and the plaintiff averred that he, confiding in the said promise and undertaking of the defendant, did afterwards, on &c. aforesaid, at &c. aforesaid, *suffer and permit the said Ann* to enter into and on board, and the said Ann did then and there accordingly enter into and on board of, the said ship or vessel, and did go and proceed therein and therewith such voyage as aforesaid as such servant as aforesaid, and did in that capacity attend and wait upon the defendant and his said family a great part of the said voyage: and although the plaintiff was always ready and willing to suffer and permit the said Ann, and she, the said Ann, was always ready and willing, to attend and wait upon the defendant and his said family as such servant as aforesaid during the remainder of the said voyage, to wit, at &c., whereof the defendant afterwards, to wit, on &c., there had notice; yet the defendant, not regarding &c., but contriving &c., did not nor would con-

(1) 1 Bos. & Pul. 31.

(2) Mich. 1827.

time the said Ann, so being the wife of the plaintiff, in his said service and employment, or suffer her to attend and wait upon the defendant and his said family during the remainder of the said voyage, but wholly refused and neglected so to do, and on the contrary thereof, the defendant, after the making of his said promise and undertaking, and during the continuance of the said voyage, to wit, on &c., dismissed and discharged the said Ann from and out of his said service and employment, to wit, at &c. : and the plaintiff further said that the said ship or vessel did afterwards, to wit, on &c., arrive in England, to wit, at &c., whereof the defendant there had notice ; yet the defendant, further disregarding his said promise and undertaking, did not nor would then, nor at any time afterwards (although often requested so to do), pay the plaintiff the said eight hundred Sicca Rupees, or any part thereof, but had hitherto refused so to do, to wit, at &c. : and the plaintiff averred that the said eight hundred Sicca Rupees, at the time of making the said promise and undertaking of the defendant, and also at the time when the said ship arrived in England, were, and from thence hitherto have been and still are of great value, to wit, of the value of 100*l.* of lawful &c., to wit, at &c.

The second count stated—That, in consideration that *the said Ann*, so being the wife of the plaintiff, *would*, at the like request of the plaintiff, *enter into and on board of a certain other ship &c., and would proceed therein* and therewith as the servant of the defendant, and in that capacity attend and wait upon the defendant and his family, &c. &c., the defendant undertook &c. &c., as before.

The third count stated—That theretofore, and before the making of the promise and undertaking of the defendant thereinbefore next mentioned, it had been agreed by the plaintiff and defendant that the said Ann, so being the wife of the plaintiff, should enter into and on board of a certain other ship or vessel called &c., and should proceed therein and therewith as the servant of the defendant, and in that capacity attend and wait upon the defendant and his said family during the said last-mentioned voyage which the defendant and his said family were then about to make in and on board of

the said last-mentioned ship, and that the defendant should retain and employ the said Ann, so being the wife of the plaintiff, as such servant as last aforesaid during the continuance of the said last-mentioned voyage, and pay him, the plaintiff, eight hundred Sicca Rupees for such services as last aforesaid on the arrival of the said last-mentioned ship in England ; and that the said Ann, before the making of the promise and undertaking of the defendant thereinafter next mentioned, had entered into and on board of the said last-mentioned ship as such servant as last aforesaid, and had in that capacity attended and waited upon the defendant and his family the said part of the said last-mentioned voyage, to wit, from the port of Calcutta aforesaid to the island of St. Helena, in the Atlantic ocean, to wit, at &c. : and thereupon afterwards, on &c., at St. Helena aforesaid, to wit, at &c. aforesaid, in consideration of the premises last aforesaid, and also in consideration that the said Ann, then and still being the wife of the plaintiff, at the request of the defendant, would find out and engage some other person to supply the place of her, the said Ann, as such servant as last aforesaid, to attend and wait upon the defendant and his said family during the remainder of the last-mentioned voyage, and also in consideration that the plaintiff, at the like request of the defendant, would suffer and permit him to deduct and retain the amount of whatever wages he should be compelled to pay to the person so supplying the place of the said Ann as such servant as last aforesaid, from and out of the said sum of eight hundred Sicca Rupees, so agreed to be paid by the defendant to the plaintiff for the service of the said Ann as last aforesaid, he, the defendant, undertook and then and there faithfully promised the plaintiff to pay him the residue of the said last-mentioned eight hundred Sicca Rupees on the arrival of the said last-mentioned ship in England : and the plaintiff averred that, confiding in the said last-mentioned promise and undertaking of the defendant, the said Ann did afterwards, to wit, on &c. last aforesaid, at St. Helena aforesaid, to wit, at &c., find out and engage a certain other person, to wit, one Mary Romaine, to supply the place of the said Ann as such servant as last afore-

said, and to attend and wait upon the defendant and his said family during the remainder of the said last-mentioned voyage; and the said Mary Romaine did accordingly supply the place of the said Ann, and attended and waited upon the defendant and his family as last aforesaid: and the plaintiff further said that the said last-mentioned ship did afterwards, on &c., arrive in England, to wit, at &c., and the defendant did then and there pay to the said Mary Romaine, for and on account of such voyage as last aforesaid, a certain sum of money, to wit, 30*l*.: and although the plaintiff had always hitherto been ready and willing to permit the defendant to deduct and retain the said 30*l*. out of the said last-mentioned eight hundred Sicca Rupees; yet the defendant, not regarding his said last-mentioned promise &c., did not nor would then or at any time afterwards (although requested &c.) pay the plaintiff the residue of the said last-mentioned eight hundred Sicca Rupees, or any part thereof, but had hitherto wholly refused so to do, &c. &c.

The fourth count stated—that the defendant, theretofore, and before the making of his promise and undertaking thereinafter next mentioned, had taken and retained the said Ann, then and still being the wife of the plaintiff, into the service and employ of him the defendant, to attend and wait upon him, the defendant, and his said family during a certain voyage &c., at certain wages or salary, to wit, &c., which the defendant had agreed to pay to the plaintiff for such services as last aforesaid; and that the said Ann, before &c., had gone and proceeded in and on board of the said last-mentioned ship great part of the said last-mentioned voyage, as such servant as last aforesaid, and had in that capacity attended and waited upon the defendant and his said family the said part of the said last-mentioned voyage, to wit, from the port of Calcutta aforesaid to the island of St. Helena aforesaid, to wit, at &c.; and that the said Ann, before &c., and during the continuance of the said last-mentioned voyage, had become and was sick, ill, and disordered, to wit, at &c., whereof the defendant there had notice; and thereupon afterwards, to wit, on &c., at St. Helena aforesaid, to wit, at &c., in consideration of the premises last aforesaid, and that the said Ann, then and

still being the wife of the plaintiff, at the like request of the defendant, would engage some other person, &c. &c. as before.

Then followed a count for wages and salary due from the defendant to the plaintiff for and in respect of the service of his said wife; counts for work and labour by the plaintiff, his wife and servants; the common money counts; and an account stated.

The defendant pleaded the general issue.

At the trial, before the Lord Chief Justice, at the Sittings in Middlesex, after last Trinity term, it appeared that the plaintiff was a dancing-master, at Calcutta, and, wishing to return to England, agreed with the defendant for the hire of his wife as servant for the voyage, to attend the defendant and his family for eight hundred Sicca Rupees, the value of which in British money, at the then rate of exchange of 2*s*. 0½*d*. per Sicca Rupee, amounted to 81*l*. 15*s*. 4*d*. The plaintiff's wife accordingly entered into the defendant's service on the above terms; but, being in an advanced stage of pregnancy, she became unable to perform the duties she had undertaken, and on the arrival of the ship at St. Helena, it was agreed that she should procure a substitute, and that the wages paid to such substitute should be deducted from the amount stipulated to be paid to the plaintiff. The plaintiff's wife procured for a substitute one Mary Romaine, to whom it was agreed that 30*l*. should be paid for her attendance on the defendant during the remainder of the voyage. As, however, the plaintiff's wife remained on board the vessel, and the defendant would be liable to the captain for the charge of bringing her home to England, she gave him the following discharge:—

“St. Helena, 4th April, 1826.

“I do hereby acknowledge to have received from James M'Dowell, Esq. eight hundred Sicca Rupees, being in full of all demands for my attendance upon himself, Mrs. M'Dowell, and family, pursuant to agreement entered into at Calcutta between Mrs. Henry Sneyd and myself.

Sicca Rupees 800. Ann Harrington.”

Witness, E. Fearon.”

In the course of the voyage home the woman was confined, and necessarily had a cabin to herself and particular attendance,

for which the captain claimed 50*l.* from the defendant, she being in his suite. On the ship's arrival in England the plaintiff brought this action to recover the sum of 51*l.* 13*s.* 4*d.*, being the balance of the sum at first agreed to be paid for his wife's services, after deducting the 30*l.* paid for the substitute procured at St. Helena. The defendant paid 1*l.* 13*s.* 4*d.* into court. His Lordship was about to leave it to the jury to say whether or not from the evidence they thought the plaintiff's wife was authorized to make a new contract, when the plaintiff elected to be nonsuited.

Mr. Serjeant E. Lawes now moved for a rule calling on the defendant to shew cause why that nonsuit should not be set aside, and instead thereof a verdict be entered for 50*l.* He submitted that the payment of the 1*l.* 13*s.* 4*d.* into court admitted the original contract, which had not been rescinded by any act of the defendant, or by any authorized act of the wife, and that although it appeared that whilst at St. Helena she (the wife) had given the defendant a receipt releasing him from all claim for any part of the eight hundred Sicca Rupees, yet that that agreement, being made without the sanction or authority of the plaintiff, was nugatory.

By the Court.—We are of opinion that there is no ground for this application. The facts are these. The plaintiff's wife was engaged to attend upon the defendant and family during a homeward voyage from the East Indies. She was at that time (being enceinte) not in a fit condition to undertake such duties, and she shortly afterwards became totally incapacitated. At St. Helena she procured a substitute, to whom it was agreed that 30*l.* should be paid, and she afterwards continued on board the vessel at the defendant's charge; in consideration of which it seems she agreed to give up all claim to the residue, and signed a receipt to that effect. The first agreement as to the deduction of the 30*l.* was adopted by the plaintiff; it was, therefore, a fair presumption for the jury that the wife had the implied authority of her husband to relinquish her claim to the residue.

Rule refused.

1828. *7 GULLY AND OTHERS v. THE BISHOP*
Nov. 8. *5 OF EXETER, AND DOWLING, CLERK.*

Evidence—Interested Witness.

In a quare impedit, the father of the defendant was called as a witness for him, and it appeared that the witness himself claimed a right of presentation to the vacant rectory, as tenant by the courtesy, in right of his late wife, who was seised of the estate of inheritance:—Held, that his evidence could not be received; although it was contended that his right (if any) had been forfeited by his having neglected to present within six months after the vacancy happened, which would give the bishop a right to present,—it appearing that the bishop had not acted upon that right.

Deed—Consideration for Grant, where sufficient.

By a deed, bearing date the 17th of April 1762, conveying a turn of an advowson, the considerations were thus stated:—"The sum of twenty shillings paid to the grantor by the grantee, and for true and faithful service done unto the former by the latter; as also for divers other good and valuable causes and considerations him (the grantor) thereunto moving:"—Held, that, in the absence of all proof of fraud and covin, the consideration (regard being had to the date of the conveyance,) must be presumed to be valuable.

This was a quare impedit.

The plaintiffs were devisees in trust under the will of William Slade Gully, esq., deceased, and claimed title to present a clerk to the rectory of Berrymaber in the county of Devon, under a grant, dated the 29th of April 1762, from one Robert Isaac, who was then seised in fee of the fourth turn of the advowson, and to which turn the avoidance now belongs. The defendant Dowling claimed as tenant in tail under a settlement executed by the said Robert Isaac on his marriage with a Mrs. Elizabeth Skiffe in 1692. They had issue one daughter, viz. Elizabeth Isaac, who became seised on the death of her father and mother, and afterwards married one Humphrey Pike. Humphrey Pike and his wife died, leaving one Robert Pike their eldest son, who intermarried with Rebecca Lovering. Robert Pike and his wife died, leaving

Elizabeth the wife of John Dowling, their eldest daughter, and Rebecca the wife of one John Cravy, their second daughter, their heirs. Whereupon Dowling and his wife, in right of his wife, and Cravy and his wife, in right of his wife, became seised; and, on the death of the wife of John Dowling, her estate descended to the defendant as her eldest son and heir-at-law.

At the trial, before Mr. Justice Park, at the last Assizes at Exeter, John Dowling, the father of the defendant, was called as a witness, when it was submitted, that, as he himself claimed to present in right of his wife, who in her life-time was seised of an estate of inheritance, being tenant by the courtesy, he was interested in the event of the suit; as, if the plaintiff obtained a verdict, he would be entitled to a writ to the bishop under the statute of Westminster the 2nd, chapter 30, on which the witness's title would be concluded. The learned Judge, thinking the objection well founded, rejected the testimony of John Dowling.

As to the deed of 1672, the defendant Dowling pleaded that it was made for the intent and purpose of fraud and deceit, and contrary to the statute of the 27 Elizabeth, c. 4. (which was the principal question at issue), and, on its being produced, it appeared that the considerations were stated to be, the "sum of twenty shillings paid to Robert Isaac by one Stevings, and for true and faithful service done unto Isaac by Stevings; as also for divers other good and valuable causes and considerations him the said Isaac thereunto moving:" it was thereupon objected for the defendant, that the deed was void for want of consideration, and fell within the provisions of the statute 27 Elizabeth. The learned Judge left it to the jury to say whether the consideration of twenty shillings, coupled with "other good and valuable considerations," was not a sufficient consideration; and whether the deed of settlement under which the defendant claimed was made in fraud of the deed of 1672. The jury found both points in the affirmative, and accordingly gave a verdict for the plaintiff.

Mr. Serjeant Merewether now moved for a rule nisi that this verdict might be set aside and a new trial had, submitting—First, that the testimony of John Dowling, the father of the plaintiff, was improperly reject-

ed, for that, although he might once have had an interest, still that that interest had since expired, and was now become absolutely destroyed, more than six months having elapsed during which he had a right to present.—Secondly, that the deed of 1672 was void, not merely on the ground of the *inadequacy* of the consideration, but on the ground that there was no valuable consideration at all to support it, either at law or in equity; that the first consideration, twenty shillings, was clearly voluntary, and was so considered at the trial; and that, as to the second consideration, "true and faithful services done and performed," it would be too much to *assume* that such service ever was performed. He contended that the proper question for the consideration of the jury was, whether the deed of 1672 was fraudulent and void for want of consideration, and not whether the settlement of 1692 was made in fraud of the former deed; that the deed of 1672 was bad upon the face of it; that no parol evidence could be admitted to prove its validity; and that it appeared by the deed of settlement that Isaac never acted under it. The learned Serjeant cited *Comyns's Digest* (1), where it is said, that, "if a man bargain and sell land in consideration of a marriage before had, or service done, it is not sufficient:" and he argued, that, as in this case it was not possible to shew, and it nowhere appeared, that any service had been performed, or that the party contracting was ever under any liability to perform any at the time the deed was executed, it must clearly be considered a voluntary deed, and fraudulent as against the defendant Dowling, whose claim was founded on the marriage settlement executed by Isaac twenty years after the date of the supposed deed of 1672.

By the Court.—Two objections are made to the verdict which the jury in this case have found for the plaintiff, and in support of the application for a new trial. The first objection is, that the testimony of John Dowling, the father of the defendant Dowling, was improperly rejected. On his being tendered as a witness, however, it appeared that he was tenant by the courtesy, and took a derivative title in right of his wife, who

(1) Tit. "Bargain and Sale," B. 11.

was seised of the inheritance which descended to her from Isaac, under whom the defendant originally claimed. John Dowling, the witness, therefore had a direct interest, and it is clear that he might and ought to have presented when he became possessed of the turn, as the fruits were then in him, and on the death of his wife he was entitled to hold for his life as tenant by the courtesy. Besides, if the plaintiff's right were defeated, nothing could deprive the defendant Dowling of his right to present, as they both claimed under one person; and although it has been said that the interest of the defendant's father has long since ceased, more than six months having elapsed since it was his turn to present, and he not having done so, yet, in the event of the plaintiff's not succeeding, the right of the party possessed for that turn would not be barred until the bishop had taken upon himself to present: for, in case of such default, the right is in the bishop; and, if he do not present, the archbishop may; and if the archbishop do not do so, then the king is entitled, by virtue of his prerogative. But, as the bishop has not acted strictly on his right, the witness might not have been prevented from presenting, although the six months had expired. He, therefore, had a direct interest in defeating the plaintiff's claim, and consequently was properly rejected.

Secondly, it has been urged that the deed of 1672 was voluntary, and therefore void as against subsequent purchasers. In the case of *Doe d. Watson v. Routledge* (2) it was decided, that, in order to make a voluntary settlement void against a subsequent purchaser within the statute of Elizabeth, it must be covinous and fraudulent, not voluntary only; and although in *Doe d. Otley v. Manning* (3) it was held, that if a settlement of lands be purely voluntary, as, if made in consideration of natural love and affection, it is void as against a subsequent purchaser for a valuable consideration; yet the ground was that the law would in such a case infer fraud, upon the true construction of the statute, as the law alone is to judge as to what shall be fraud and covin as arising out of facts and intents. Here, however, the presumption

of fraud fails, as the deed was in part founded on a pecuniary consideration; and although the sum of twenty shillings might be considered as voluntary, yet it was coupled with "true and faithful services done;" and although the subsequent words "and divers other good and valuable causes and considerations" may be supposed to be merely ornamental, yet the two first considerations are, we think, sufficient to support the deed: and, considering that the deed was executed more than one hundred and fifty years since, and regard being had to the variations and fluctuations in the value of money according to times and circumstances, it would be too much for us to say that twenty shillings was at that time nothing more than a nominal consideration. But it has been said, that, if a person bargain and sell land in consideration of service done, it is not a sufficient consideration to support the conveyance; and *Comyns's Digest* has been referred to in support of that position. That learned writer does not lay it down as an express authority, but he merely says, that it seems to be so, and he refers to *Dallison's Reports* (4). It must be admitted, that, if it could be shewn that such services were gratuitous, or without legal consideration, the deed would be void; but here, enough appears to warrant us in presuming that the services done were valuable, and that they had been actually performed. We, therefore, think that the deed of 1672 must prevail against the subsequent one of 1692, and, consequently, that there is no ground for disturbing the verdict.

Rule refused.

1828. }
Nov. 8. } SAME V. SAME.

Pleading—*Allegation of title in Quare Impedit.*

In a quare impedit, the declaration stated that R. R. was seised of the advowson and died intestate; that the advowson descended to his four daughters—Mary the wife of T. W., Jane the wife of W. S., Prudence the wife of J. A., and Grace the wife of Francis Isaac; and that the church became vacant; that

(2) Cowp. 705.

(3) 9 East, 59.

(4) Page 18.

is belonged to T. W. and Mary his wife, in right of the said Mary, to present; and that they accordingly presented: it was then averred that the said Francis Isaac and Grace his wife died so seised of the same one fourth part of the said Grace of and in the advowson, after whose death it came to Robert Isaac, son and heir of the said Grace:—Held, (on motion in arrest of judgment, on the ground that it was not alleged that Grace was seised of a fourth part before her death, but merely that it descended to the four daughters of R. R., that it belonged to T. W. and Mary his wife to present, and that they did so,) that the allegation that Grace died seised of one fourth part, was sufficient.

The declaration in this case stated, that one Richard Roberts, on the 23d of May 1603, was seised of the advowson of the rectory and parish church of Berrymaber in the county of Devon, in gross by itself, as of fee and right; that, on the 25th of December 1622, Roberts died so seised, and intestate; that, after his death, the advowson descended and came to Mary the wife of Thomas Westcott, Jane the wife of William Squire, Prudence the wife of John Amory, and Grace the wife of Francis Isaac, the daughters and co-heiresses of the said Richard Roberts deceased,—that is to say, to the said Mary the eldest daughter, Jane the second daughter, Prudence the third daughter, and Grace the fourth daughter; whereupon Westcott and Mary his wife, in right of the said Mary, Squire and Jane his wife, in right of the said Jane, Amory and Prudence his wife, in right of the said Prudence, and Isaac and Grace his wife, in right of the said Grace, became and were seised of the same advowson; that the church, whilst they were so seised, to wit, on the 17th of January 1630, became vacant, whereupon it belonged to Westcott, Squire, Amory, and Isaac, in right of their respective wives, to present; but, because they did not agree among themselves jointly to present, it belonged to Westcott and Mary his wife, in right of the said Mary, as eldest daughter of the said Richard Roberts, to present for that turn, being the next and first avoidance of the church after the death of Roberts; whereupon, Westcott and Mary his wife, in right of the said Mary, on the 17th of January 1630, presented George.

Westcott, their clerk. It was then averred, that the said Francis Isaac and Grace his wife, on the 1st of November 1662, died so seised of the same one fourth part of the said Grace of and in the advowson; after whose death, the same purparty or fourth part of the said advowson descended and came to Robert Isaac, son and heir of the said Grace.

Mr. Serjeant Merewether now moved in arrest of judgment, on the ground that it was not alleged that Grace was seised of a fourth part of the advowson before her death, as it was merely averred that the advowson descended to the four daughters of Roberts, and that it belonged to the eldest daughter and her husband to present, and that they accordingly did present. In the *Second Institute*, it is said (1), "By the common law, if an advowson descends to divers coparceners, if they cannot agree to present, the eldest sister shall have the first turn, and the second the second turn, *et sic de ceteris*, every one in turn according to seniority; and this privilege extends not only to their heirs, but to the several assignees of every coparcener, whether he hath the estate of them by conveyance, or by act in law, as tenant by the courtesy, he shall have the same privilege by presenting in turn as the sisters had: therefore, albeit the coparceners do make composition to present by turn, this being no more than the law doth appoint, *expressio eorum quae tacite insunt nihil operatur*; therefore they remain coparceners of the advowson, and the inheritance of the advowson is not divided; and, notwithstanding this composition, they may join in a *quare impedit*, if any stranger usurp in the turn of any of them; and the sole presentation out of her turn did not put her sister out of possession in respect of the privity of estate, no more than if one coparcener taketh the whole profits."

It should have been alleged, that, because the four sisters did not agree jointly to present, Grace became seised of one fourth part of the advowson, and that she afterwards died so seised of the same one fourth part; and, as there was no allegation of a seisin in her previous to her death, the declaration cannot be supported.

By the Court.—As it was alleged, that, after the death of Roberts, the advowson descended and came to his four daughters and co-heiresses, and that their husbands respectively became seised in their right, it was sufficient to state in the declaration that one of the daughters died seised of her one fourth part, and that, on her death, the same fourth part descended to her heir.

Rule refused.

1828. } SHARP V. R. ABBEY, W. LEGH,
Nov. 20. } AND C. HARVICK.

Pleading—Bail-bond, how declared on.

On demurrer to a declaration in debt on a bail-bond, for not alleging—"that an affidavit of the cause of action against the defendant in the original suit was made and filed; or that the sum or sums specified in any such affidavit was or were indorsed on the writ; or that the writ was marked or indorsed for bail; or that the bail was taken for the sum or sums indorsed on the writ:"—Held, that these several allegations were unnecessary, and that the declaration was good without them.

This was an action of debt on a bail-bond.

The declaration stated, that, whereas R. Abbey, theretofore and in the life-time of C. S., to wit, on &c., to wit, at &c., was taken and arrested by A. S. and C. S., then being sheriffs of the county of Middlesex, at the suit of the said H. Sharp, the plaintiff in this suit, by virtue of a certain writ of our lord the now king, called a *capias ad respondendum*, directed to the sheriff of the county of Middlesex, out of the Court of our lord the King of the Bench at Westminster, in the said county of Middlesex, before that time in due manner issued, and returnable therein in fifteen days of Easter in the said year of our Lord 1828, at the suit of the plaintiff against the said R. Abbey; by which said writ the said sheriff was commanded that he should take the said R. Abbey if he should be found in his bailiwick, and him safely keep so that he might have his body before our said lord the King's Justices at Westminster in fifteen days of Easter, that is to say, fifteen days of Easter in the said year of our Lord 1828, to an-

swer the plaintiff in a plea of trespass, and also that the said R. Abbey might answer the plaintiff, according to the custom of his Majesty's Court of Common Bench, in a certain plea of trespass on the case upon promises, to the damage of the said plaintiff of 300*l.*, and that the said sheriff should have there that writ: and, whereas the said A. S. and C. S., in the life-time of the said C. S., then being sheriff, &c., as aforesaid, did take bail for the appearance of the said R. Abbey according to the exigency and tenor of the said writ, and thereupon the said Robert Abbey, as principal, and the said W. Legh and C. Harvick, as bail and sureties of and for the said Robert, afterwards, and before the return of the said writ, and in the life-time of the said C. S., to wit, on &c., at &c., by their certain writing obligatory commonly called a bail-bond, sealed with their respective seals, and to the Court of our said lord the King of the Bench now here shewn (the date whereof is &c.), became held and firmly bound to the said A. S. and C. S., then being sheriff of the said county of Middlesex, by the names and description of &c. &c., in the said sum of 260*l.* above demanded, to be paid to the said sheriff or his certain attorney, executors, administrators, or assigns, with a condition to and under the said writing obligatory made and written, that, if the said Robert did appear before the lord the King's Justices at Westminster, in fifteen days of Easter, that is to say, fifteen days of Easter in the said year of our Lord 1828, to answer the plaintiff in a plea of trespass, and also that the said Robert might answer the plaintiff, according to the custom of the King's Court of Common Bench, in a certain plea of trespass on the case upon promises, to his damage of 300*l.*, then that obligation should be void and of no force, otherwise should stand and remain in full force, vigour, and effect; as by the said writing obligatory and condition to and under the same made and written more fully appeared. It was then averred, that the said Robert did not appear before our said lord the King's Justices at Westminster in fifteen days of Easter, in the said condition of the said writing obligatory mentioned, according to the form and effect of the said condition, but therein wholly failed and

made default; whereby the same writing obligatory became forfeited to the said A. S. as surviving sheriff of the said county of Middlesex as aforesaid (the said C. S. having died after the making and giving the said writing obligatory, and before the said fifteen days of Easter in the condition thereof mentioned, to wit, on &c., to wit, at &c., and the said A. S. having then survived him); and the said writing obligatory being so forfeited, and being also unsatisfied and in full force, the said A. S., as surviving sheriff as aforesaid, afterwards, and after the death of the said C. S., to wit, on &c., to wit, at &c. aforesaid, at the request and costs of the said H. Sharp, the plaintiff in this suit, and also the plaintiff in the suit aforesaid, assigned the said writing obligatory to the said plaintiff, according to the form of the statute in such case made and provided, by indorsing the same assignment upon the said writing obligatory, and attesting the same under his hand and seal in the presence of two credible witnesses, according to the form of the statute in such case made and provided, as by the said assignment indorsed upon the said writing obligatory and to the Court of our said lord the King of the Bench now here shewn, the date whereof is the same day and year last aforesaid, more fully appears; of which said assignment the defendants in this suit afterwards, to wit, on &c., last aforesaid, at &c. aforesaid, had notice: by reason of which said premises, and by force of the statute in such case made and provided, *actio accrevit &c. &c.* Breach—non-payment.

To this declaration the defendants demurred specially, assigning for causes, "That there is not in the said declaration any cause of action shewn or stated by or for the said plaintiff, to have or maintain his aforesaid action thereof against the said defendants, inasmuch as there are divers omissions of material statements and allegations in the said declaration; and for that the said declaration contains no statement or allegation that any affidavit was made and filed of any cause of action of the said plaintiff against the said R. Abbey, amounting to the sum of 20*l.*, or upwards; and for that the said declaration contains no

specified in any such affidavit was or were indorsed upon the back of the writ in the said declaration mentioned; and for that the said declaration does not contain any statement or allegation that the said writ was marked or indorsed for bail for any sum of money for which the said defendant might be lawfully held to bail, or for any sum whatever; and also for that the said declaration contains no statement or allegation that the bail taken by the said sheriff in the said declaration mentioned was taken for the sum or sums indorsed upon the said writ; and also for that the said declaration did not shew that the sheriff was in anywise authorized to arrest the said R. Abbey, or to require or take such a bond as in the said declaration mentioned; and also for that the said declaration is in other respects uncertain, informal, and insufficient, &c."

The plaintiff joined in demurrer.

The case now came on for argument.

Mr. Serjeant Wilde for the plaintiff.—

The cause of demurrer in this case is, that it does not appear that any affidavit of debt was filed. In *Hill v. Heale and others* (1), which was an action by the plaintiff, the assignee of a bankrupt, for money had and received by the defendants to the use of the plaintiff as assignee, in order to defeat the bankruptcy, the defendants produced the affidavits of the petitioning creditors, sworn before a Master in Chancery previously to the issuing of the commission, in which it was stated, that the bankrupt was indebted to the first petitioner in the sum of 50*l.* and upwards, to the second in the sum of 50*l.* and upwards, to the third in the sum of 60*l.* and upwards, and to the fourth in the sum of 39*l.* and upwards; and it was insisted, that, as debts to the amount of 200*l.* had not been sworn to before a Master in Chancery, previously to the issuing of the commission, pursuant to the 5 Geo. 2. c. 30. s. 23: the commission was void, and the plaintiff ought to be nonsuited. In argument, the case of *Whiskard v. Wilder* (2) was referred to, where it was determined, upon a demurrer to a declaration on a bail-bond, that the 12 Geo. 1. c. 29, which prohibited arrests under 10*l.*, and directs an affidavit of the debt to

(1) 2 New Rep. 196.

(2) 1 Burr. 350.

be made, does not make the affidavit a condition precedent, but is only directory to the sheriff, and that the bail-bond is good, though no such affidavit be made; as to which case, Lord Mansfield said (3), "The case in *Burrow*, which has been referred to, does not appear to me to apply to this, though the *dictum* which it contains does. The question there related to the form of the declaration. Mr. Justice Denison, who was a pleader of the first eminence, observed, that, in practice, the form of the declaration was sometimes one way and sometimes another, and that he did not think the averment necessary. This was the sole question before the Court. But I should have great difficulty in agreeing with the doctrine imputed to the Court of King's Bench, that the statute of 12 Geo. 1. is merely directory. I cannot help entertaining great doubts respecting that *dictum*. The sheriff must see by the writ whether it be indorsed or not, and I cannot think he could justify an arrest without it. But this was merely a *dictum*, and not necessary to the opinion of the Court. In the present case, considering what has been the practice, especially before commissioners of bankrupt, and attending to the fair construction of the statute, I think that the commission is not void for want of a sufficient affidavit."

By the Court.—If we were now called upon to decide, whether an arrest could be made without an affidavit of debt, we should have no hesitation in saying it could not. But the question before us is, whether or not it be necessary, in an action on a bail-bond, to aver that an affidavit of the cause of action was made and filed. In *Arundel v. White* (4), the case of *Whiskard v. Wilder* was much relied on. It is not necessary for us to decide whether the statute 12 Geo. 1. be directory or not, the defendant having given a bail-bond.

Judgment for the plaintiff.

(3) 2 New Rep. 401.

(4) 14 East, 216.



1828. }
Nov. 8. } SEATON v. ESPINASSE.

Husband's Liability—for Goods supplied to his Wife.—Tender—Effect of.

*Semble, that by a tender of a certain sum in an action of assumpsit for goods sold and delivered, the defendant admits his liability to that extent, but is not precluded from contesting it beyond the sum tendered. Where, therefore, the defendant had tendered 10*l.*, and at the trial the Judge told the jury, that, had the tender not been made the plaintiff must have been nonsuited; but that, the tender having been made, the case was altered; and they accordingly returned a verdict for the residue of the plaintiff's demand:—The Court refused to nonsuit the plaintiff, no leave being reserved; but the Judge certified to deprive the plaintiff of costs.*

This was an action of assumpsit, brought to recover the sum of 28*l.* 5*s.* 6*d.* for goods furnished by the plaintiff to the wife of the defendant. The declaration contained the usual counts, an *indebitatus assumpsit* for goods sold and delivered, a *quantum valent*, the common money counts, and an account stated.

The defendant pleaded *non assumpsit*, as to all but 10*l.*, and as to that, a tender; and the money was paid into court. The plaintiff admitted the tender, and took the 10*l.* out of court.

At the trial, before Mr. Justice Burrough, at the Sittings at Westminster, after last Trinity term, it appeared in evidence, that the plaintiff was a linen-draper and haberdasher, at Richmond, in Surrey; and that the defendant, with his family, occupied furnished apartments in Montpelier-row, Twickenham, at the rent of two guineas per week. The delivery of the goods, which consisted of several pieces of silk, and also silk-stockings, gloves, &c., was proved to have been made to the wife of the defendant, at the plaintiff's shop, with the exception of one small parcel, which was delivered to her at the house in Montpelier-row, but not in the presence of any third person. There was no evidence of any authority by the defendant to the plaintiff, express or implied, to give credit to his (the defendant's) wife, nor did it appear that he

had any knowledge of the dealing, or had ever seen any of the articles in his wife's possession.

For the defendant, it was proved, that his wife was properly supplied with all necessaries suited to her rank in life. The lady's maid was called, who stated that she had the care of her mistress's wardrobe; it was abundantly supplied with all things necessary; and that if any of the articles in question had been worn by her mistress, she must have seen them; but that she never had. A linen-draper and silk-mercator was also called to prove that he had directions from the plaintiff to supply his wife with such articles as she might require in the way of his trade; and that he dealt in every article of the description mentioned in the bill, except gloves, ribbons, and stockings—which formed but a small part of it.

The learned Judge told the jury, that a husband was in law bound to provide his wife such necessaries as were consistent with the rank in life of the parties; that, if he failed to do this, he would be liable for goods of that description purchased by her: but that, on the contrary, if he was in the habit of supplying her with all that was necessary, he was not liable for any thing more.

The jury returned a verdict for the plaintiff—Damages 10s.

Mr. Serjeant Wilde moved for a rule calling on the plaintiff to shew cause why this verdict should not be set aside and a nonsuit entered, or (at the suggestion of the Lord Chief Justice,—no leave having been given to move to enter a nonsuit,) why the learned Judge should not certify under the statute of Elizabeth, in order to deprive the plaintiff of costs. The learned Serjeant contended, that, from the facts which appeared in evidence, it was clear that the articles supplied by the plaintiff to the wife of the defendant had been improperly and clandestinely delivered to her, without the knowledge or consent of the defendant. In *Montague v. Benedict* (1), which is a case of precisely the same nature with the present, the Court of King's Bench held, that the plaintiff ought to have been nonsuited,

on the ground that it was the duty of the plaintiff to make out that the wife of the defendant was the agent of her husband. In *Hill v. Thompson and Forman* (2), which was an action against the defendants for infringing a patent, it was left to the jury to say, whether or not the plaintiff had made out the novelty of the invention for which the patent was taken out; and, the jury having found a verdict for the plaintiff, and a rule for a nonsuit having afterwards been made absolute by the Court, it was submitted, that, as the case depended entirely on the controverted facts and evidence submitted to the jury, there could not be a nonsuit.—*Mr. Justice Dallas* said, that, although the point as to the validity of the specification was not reserved, the plaintiff should have been nonsuited, on the testimony of one of the witnesses alone, as, on his examination in chief by the plaintiff, he shewed that there had been no infringement of the patent. So, here, there was nothing to be submitted to the jury. His Lordship might have nonsuited the plaintiff at the trial, and the Court may therefore now direct a nonsuit to be entered: although leave to enter a nonsuit was not reserved at the trial, the Court has a discretionary power to allow it now. In *Gates v. Ryan* (3), *Mr. Justice Abbott* said, that, if a party had not leave, he could not in strictness move to enter a nonsuit, but could only ask for a new trial; but that, as he had refused on the trial of that cause to give leave, on the ground that he thought it unnecessary, the party ought to be put in the same condition as if leave had been given.

The Court refused to allow a nonsuit to be entered, but the Judge certified.

1828. }
Nov. 17. } *Ex parte UNTHANK.*

Attorney.—Articles of Clerkship, Service under.

Where a party had served for two months under articles, and had then left his master, and relinquished the profession, but after-

(1) 3 Barn. & Cress. 531; s. c. *nomine* *Montague v. Baron*, 5 Dow. & Ry. 539; s. c. 3 Law Journ. K.B. 94.

(2) 2 B. Moore, 458.

(3) 2 Chit. Rep. 271.

wards, and after the expiration of the original articles, caused the same articles to be assigned to another attorney, with whom he served for two years and ten months (being a Bachelor of Arts):—Held, that, as the articles had expired before the assignment, the service under the assignment was not a service under a contract within the statute.

Mr. Serjeant Wilde moved that the applicant might be admitted and enrolled as an attorney of this court, under the circumstances set forth in an affidavit, as follows:—

“*John Unthank*, of North Walsham in the county of Norfolk, gent., maketh oath and saith, that he took the degree of Bachelor of Arts in the University of Cambridge, in the year 1822, in order to enable him to take advantage of an act then lately passed, intituled “An act to amend the several acts for the regulation of attornies and solicitors;” (1) that he was, by a contract

(1) 1 & 2 Geo. 4. c. 48. s. 1, which enacts—“That, from and after the passing of this act, in case any who shall have taken or who shall take the degree of Bachelor of Arts or Bachelor of Law, either in the University of Oxford, or in the University of Cambridge, or in the University of Dublin, shall, at any time after he shall have taken or shall take such degree, be bound by contract in writing to serve as a clerk, for and during the space of *three years*, to an attorney or to a solicitor, or to a six clerk duly and legally sworn and admitted under the provisions and directions of the recited acts of the 2nd and 7th years of the reign of King George the Second, or of this act, or any other act or acts in force for the regulation of attornies and solicitors, in some or one of the courts of law or equity in the said recited acts mentioned, and during the said term of three years shall continue in such service, and during the whole time, of such three years’ service shall continue and actually be employed by such attorney or solicitor, or six clerk, or his or their agent or agents, in the proper business, practice, or employment of an attorney or solicitor, and shall also cause an affidavit &c. (of service)—shall and may be qualified to be sworn, or to take his solemn affirmation, to be admitted and enrolled as an attorney or solicitor respectively (according to the nature of his service) in the several and respective courts of law or equity, as fully and effectually to all intents and purposes as any person having been bound and having served *five* years is qualified,” &c.

in writing, dated on or about the 6th day of February following, bound to William Day, of the City of Norwich, gent., to serve him in his practice of an attorney and solicitor, for the term of *three years* thence next ensuing; that he continued with, and was employed by, the said William Day as his clerk, under such contract, until the 20th day of April following, when he quitted the service of the said William Day: and this deponent further saith, that, at the time of his entering into the said contract, he really and *bona fide* intended to continue the service of such clerk for the said term of three years, in order to qualify himself to be admitted an attorney of one of his Majesty’s Courts at Westminster: and this deponent further saith, that, subsequently to his entering into such contract, circumstances arose which compelled him to abandon his service under the same contract, and that such circumstances continued to operate until a short time before the month of July in the year 1825, when this deponent was assigned to William Unthank of the city of Norwich, gent., to serve him as his clerk in the practice of an attorney and solicitor for the remainder of the term of three years: and this deponent further saith, that the circumstances before referred to were not existing circumstances at the time of such contract with the said William Day, nor then likely to arise; and that, for a part of the time which elapsed between the period of quitting the service of the said William Day and being assigned to the said William Unthank, he, this deponent, resided.

Sec. 4. enacts—“That nothing in this act contained shall extend, or be construed to extend, to any person who shall have taken or who shall take such degree of Bachelor of Arts, unless such person shall have taken or shall take such degree within *six* years next after the day when such person shall have been or shall be first matriculated in the Universities respectively; nor to any person who shall take or shall have taken such degree of Bachelor of Law within *eight* years after such matriculation; nor to any person who shall be bound, by contract in writing, to serve as a clerk to any attorney, solicitor, or six clerk, under the provisions of this act, unless such person shall be so bound within *four* years next after the day when such person shall have taken such degree.”

in England; and, subsequently (during the same period), with the knowledge and consent, and upon an allowance from the said William Unthank, his father, went to France to improve himself in the language of that country."

In support of the application the learned Serjeant referred to *Ex parte Smith* (2), where the party moved for leave to serve a portion of his clerkship with another attorney, with a view to his admittance (his former master being dead), under the following circumstances:—The applicant had served two years and a half with an attorney of the Court of King's Bench, who had died before his clerkship could be completed; and, after an interval of six years, he was desirous of serving the remainder of his clerkship with another attorney, in order to qualify himself for admittance: Mr. Justice Bayley thought the application unnecessary, it being quite competent to the party to serve the remainder of his clerkship with any other attorney; and that learned Judge said: "All that was necessary to qualify him for admittance was, that he should serve a clerkship of five years with an admitted attorney, and it was of no importance, with that view, with whom that clerkship was served. His actual admittance would be a matter for future consideration, when the term of his clerkship had expired, and he applied for admittance. On general principles, he was at liberty to serve the remainder of his time with another master." The learned Serjeant submitted that the three years' service need not be consecutive; and that, on the authority of the above case, the service in the present case under the two contracts was sufficient to entitle the applicant to be admitted.

But the Court said, that, as the term of the original contract or articles of service with Mr. Day had expired before the assignment was made to Mr. William Unthank, and as the assignment was not of itself a new contract of service, but merely a transfer of the old one, there was not any service under a contract within the meaning of the statute.

Refused.

(2) 1 Dow. & Ryl. 14.

1828. }
Nov. 8. } MACKIE v. WARREN.

Practice—Discharging a defendant out of custody.

The Court refused to discharge the defendant out of custody, on the ground that he had before been irregularly taken (under colour of a pretended criminal charge) on a capias sued out on the same judgment, and discharged from that execution on account of the irregularity of the proceeding—the first execution being a nullity.

Mr. Serjeant Ludlow moved for a rule calling on the plaintiff to shew cause why the defendant, who had been arrested by virtue of a *capias ad satisfaciendum*, is sued at the suit of the plaintiff in this cause, should not be discharged out of custody. The affidavit on which the application was founded stated, that the plaintiff, having obtained judgment in the action, sued out a *capias* thereon; and, in order to get an opportunity of executing that writ, caused the defendant to be irregularly apprehended on a criminal charge for which there was no foundation; that the plaintiff had afterwards abandoned the criminal charge, and detained the defendant in custody under the *capias*, from which custody the Court had on a former occasion discharged him on account of the irregularity, the plaintiff paying the costs; and that, after such discharge, he had again been taken into custody, under a second *capias*. The learned Serjeant submitted that, inasmuch as the defendant had been taken under the first process, that must be considered in law as a satisfaction and discharge of the debt; that, although, if a party escape, he might be taken again, yet that the case was different where the caption was fraudulently made, and the party on that account discharged from the execution; and that, in the present case, the plaintiff must be considered as having voluntarily discharged the defendant, as in law every man is supposed to be cognizant of the consequences of his acts.

The Court said, that, where a person had been improperly or erroneously taken, and subsequently discharged because he had been so irregularly taken, he could not be considered as having been taken at all; and

that the plaintiff had been sufficiently punished for his wrongful act by having had to pay the costs on the former occasion.

Rule refused.

1828. }
Nov. 20. } RIDDELL v. SUTTON.

Executors—liable in debt for contracts made by them.

Debt lies against an executor on a contract made by him, or a cause of action accruing after the death of his testator.

Award—Reference by an executor.

By an agreement between the plaintiff and the defendant, as executrix, reciting that disputes and differences had arisen and were depending between them respecting certain unsettled accounts, it was agreed that, for the finally settling such disputes, the said matters in dispute should be referred to the final award and determination of two arbitrators. There was no reservation by the executrix as to assets; and the arbitrators awarded that she should pay the plaintiff a certain sum. In an action of debt on the award:—Held, that a plea of plene administravit was no answer to the action.

Debt on an award.

The declaration stated, that, by an agreement, made the 31st of December 1822, between the plaintiff on the one part, and the defendant, as executrix of Sutton, of the other part, after reciting therein that disputes and differences had arisen and were depending between the plaintiff and the defendant, as executrix as aforesaid, respecting certain unsettled accounts between them, which they had mutually agreed to refer to the award and determination of the persons thereafter named—therefore, for the finally settling such disputes and differences, it was, amongst other things, agreed by and between the parties thereto mutually and reciprocally, that the said matters in dispute between them should be and were thereby referred to the final award and determination of Thomas Rushton and Thomas Birch, so as they should make their award before the 20th of January then next, and if they should not do so, the matters in difference

were referred to the award and determination of such person as umpire as should be named in manner thereafter mentioned—costs to be in the discretion of the arbitrators or umpire; that the said Thomas Rushton and Thomas Birch having taken upon themselves the said arbitration, and having heard and duly weighed the allegations and proofs of both of the said parties concerning the matters so in difference as aforesaid, and having examined the various books, accounts, papers, and writings, relating to the said matters in dispute, and also the said parties themselves, did in due manner, and within the time limited for making the said award, to wit, on the 18th of January, in the year of our Lord 1823, at &c., make their award and determination of and concerning the said matters in dispute so referred to them as aforesaid, in writing, under their hands, ready to be delivered to the said parties, or such of them as should require the same, bearing date on a certain day and year, to wit, the same day and year in that behalf aforesaid. And, by the said award, they, the said Thomas Rushton and Thomas Birch, did find that there remained a balance due from the said defendant to the said plaintiff of 54*l.* 0*s.* 10½*d.*, and they did therefore thereby award, order, and direct the payment of such balance to be made by the said defendant to the said plaintiff on or before the 31st of March then next. And they did thereby further award, order, and direct, that each of the said parties in difference should pay his and her own costs and charges attending the same reference. That the said defendant, executrix as aforesaid, did not, nor would, on the said 31st of March, in the year 1823 aforesaid, make payment to the said plaintiff of the said balance or sum of 54*l.* 0*s.* 10½*d.* in the said award mentioned, or any part thereof, nor has she since paid the same or any part thereof.

The defendant pleaded, first, *non detinet*, on which issue was joined. Secondly, *plene administravit*; and, thirdly, that no evidence was given or offered before the said Thomas Rushton and Thomas Birch, on occasion of the said arbitration, nor did they, the said Thomas Rushton and Thomas Birch, receive any proof, nor was it admitted by or on behalf of the said defendant, that she, the said defendant, as executrix as afore-

said, had, at any time before the making of the said supposed award in that count mentioned, in her hands any goods, chattels, monies, or effects, which were of the said William James Sutton, deceased, at the time of his death, to be administered.

Demurrer and joinder.

Mr. Serjeant Russell, in support of the demurrer.—The pleas are bad. The first, because a mere general submission to arbitration amounts to an admission of assets. In *Barry v. Rush* (1), which was an action of debt on an arbitration bond, by which the defendant bound himself, as administrator, to abide by an award to be made touching all matters in dispute between his intestate and another person, the arbitrator awarded that the defendant, as administrator, should pay a certain sum:—and it was held, that he could not plead *plene administravit*. In that case it was contended for the defendant, that he was not bound by the terms of the award to pay the money awarded absolutely, but only, as administrator, out of the assets of the intestate: but *Mr. Justice Ashurst* said, “There is no doubt but that this plea is bad, for the entering into the bond amounts to an admission of assets, and the defendant shall not afterwards be permitted to dispute it. The bond given by the defendant to abide by the award, was an undertaking to pay whatever sum the arbitrator should award, without any regard to assets.” And *Mr. Justice Buller* said, “This is a bond given by the administrator, by which he bound himself, his heirs, executors, and administrators. The question, then, is, whether he had bound himself personally or not; and I think there can be no doubt but he has.” The case of *Pearson and others v. Henry* (2) may probably be referred to on the other side, to qualify that of *Barry v. Rush*. That, however, was not an action on an arbitration bond, but an action of assumpsit for money had and received, and a submission to arbitration by the defendant, as administrator, was offered in evidence—it was held not to be an admission of assets; for the submission appeared to have been a mere submission to take accounts. In that case, Lord

Kenyon, speaking of *Barry v. Rush*, said, “There, the defendant submitted to pay what was awarded, and the arbitrator did award that he should pay a certain sum; but here, the arbitrator has only ascertained the amount due from the intestate, but has not directed the defendant to pay it.” Here, the submission is of all matters in dispute, and “for the finally settling the disputes and differences” between the parties. In *Robson and another v. —* (3), the Lord Chancellor said, “If an executor or administrator think fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such admission;” and in *Wansborough v. Dyer* (4), where the trustees of an insolvent debtor entered into an arbitration bond, it was held to be an admission that they had assets. Here, the award of the arbitrators directing the defendant to pay a certain sum is, in fact, a finding of assets. *Worthington v. Barlow* (5) is precisely in point. That was a motion for an attachment for non-performance of an award; and Lord *Kenyon* said, “The decision in *Pearson v. Henry* must be taken with reference to the facts of that case. There, the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it, but here the arbitrator has awarded that the defendant, the administratrix, shall pay the plaintiff’s demand. The submission to arbitration by the administratrix was a reference, not only of the cause of action, but also of the other question, whether or not the administratrix had assets; and, as the arbitrator has awarded the defendant to pay the amount of the plaintiff’s demand, it is equivalent to determining, as between these parties, that the administratrix had assets to pay the debt.”

The third plea—that no evidence was given or offered before the arbitrators, nor did they receive any proof, nor was it admitted by the defendant, that she had assets—is also bad. That there was no evidence, was the default of the defendant herself. In *Braddick v. Thompson* (6) a plea of this nature was held bad; and in a

(1) 1 Term Rep. 691.

(2) 5 Term Rep. 6.

(3) 2 Rose, B.C. 50.

(4) 2 Chit. Rep. 40.

(5) 7 Term Rep. 453.

(6) 8 East, 344.

note in *Williams's Saunders* (7) is the following passage: "There seems to be no case or dictum where a plea of this sort has been held pleadable, nor a precedent of such plea to be found in any of the books of entries."

Mr. Serjeant Storks, contra.—The counts do not apply; they are in debt on simple contract, a form of action that cannot be maintained against an executor. Both upon the submission and the award it clearly appears that the submission was of "certain unsettled accounts," and not a reference generally of all matters in difference. The award, too, is uncertain, inasmuch as it orders the defendant to pay a certain sum, but does not state in what character. It was no part of the duty of the arbitrators to find assets. In the cases cited on the other side, all matters in difference between the respective parties were referred. In *Love v. Honeybourne* (8), *the cause and all matters in difference* between the plaintiff's testator and the defendant, were referred to arbitration. The arbitrator, upon the investigation of the accounts, ascertained that there was a balance against the plaintiff's testator of 48*l.* 6*s.*, and by his award directed the plaintiff to pay that sum to the defendant out of the assets in his hands as executor, on a particular day named in the award. A rule *nisi* was obtained on a former day, to set aside the award on the ground that it was void for uncertainty, inasmuch as the arbitrator had not ascertained whether in point of fact there were any assets in the plaintiff's hands to pay the sum awarded. The Court would not decide that the submission to the reference concluded the question of assets, although they refused to set aside the award, holding it good in part. Mr. Justice Holroyd there said, "By the submission, all matters in difference between the parties are referred to the arbitrator, who, instead of finding anything to be due to the executor, finds that a balance of 48*l.* 6*s.* is due to the defendant. Then the award goes on to say that which Mr. Bayley contends makes it uncertain; but, even supposing that part of the award not to be sufficiently certain, for not determining whether the plaintiff has any assets, still that will not vitiate the other part of the award."

(7) To the case of *Vesle v. Warner*, vol. 1, 327, a.

(8) 4 Dow. & Ryl. 814.

Here, however, if even the award had been of all matters in difference, the arbitrators would have had no power to award money to be paid out of the personal funds of the administratrix. They have therefore exceeded their authority. *Worthington v. Barlow* came before the Court on an application for an attachment. The precise terms of the award are not set forth in the report; therefore it must be assumed that it was a reference of all matters in difference, and that the question of assets came before the arbitrators.

Mr. Serjeant Russell, in reply.—The case of *Love v. Honeybourne* is distinguishable from the present, inasmuch as there the arbitrator merely directed the executor to pay the sum awarded out of the assets in his hands. The action is well conceived in debt: *King v. Williams* (9). The only possible objection that could ever be urged to this form of action arose from the now obsolete doctrine of wager of law: but the objection could never apply to contracts made by an executor or administrator; for though the executor could not be cognizant of the debts of his testator, he was perfectly so of those contracted by himself.

By the Court.—In this case it has been objected—First, that debt on simple contract cannot be maintained against an executor or administrator. The reason on which that was founded is said in the old cases to be, that the executor could not wage his law, as the testator himself might have done; but the doctrine of wager of law is now become obsolete. Besides, that principle could only apply to contracts or promises by the testator; for of these the executor could know nothing, and therefore could not wage his law; but it could never apply to contracts made (as here) by the representative herself. It seems, too, that wager of law could not be had on a contract in writing. An award could not, therefore, be the subject of a wager of law.

Secondly, it has been insisted that the plaintiff is well answered by the plea of *plene administravit*. We think not. The case of *Robson v. —* (10) seems to contain all the good sense that bears on this question. There, a bill was filed for a spe-

(9) 4 Dow. & Ryl. 3.

(10) 2 Rose, B. C. 50.

cific performance of an agreement. Upon the bankruptcy of the original plaintiff, the assignees adopted the suit and filed a supplemental bill. A specific performance was decreed; and then all matters in dispute were referred to arbitration; the parties respectively binding themselves to the performance of the award. It was contended that the plaintiffs, as assignees, ought not to be personally charged with the payment of the money in question, unless there had been a special undertaking to that effect, or unless they had been guilty of misconduct. The argument for the defendant was, upon the analogy of the case to that of an executor or an administrator; as to which, Lord Eldon said, "If an executor or administrator think fit to refer generally all matters in dispute to arbitration, without protesting against the reference being taken as an admission of assets, it will amount to such an admission. I see no distinction in the case of an assignee of a bankrupt."

Whether an executor has assets or not, if he do not plead that he has no assets, he must pay out of his own funds. If a reference be made by an executor, and it is not expressly provided that the arbitrator shall not inquire as to the existence of assets, he ought to be permitted to do so; otherwise it would be idle to go to a reference, if the party might afterwards turn round and say that he has no assets.

It has been further objected that the authority of the arbitrator was limited to the arrangement of certain unsettled accounts between the parties, and that he had no authority to award payment. But the declaration goes on to state that, for the *finally settling* the disputes and differences between the plaintiff and defendant, the said matters in dispute should be referred to the *final award and determination* of the arbitrators. The reference of accounts to arbitrators for their *final settlement* clearly gives them power to award payment.

There is also a plea—that no evidence was given or offered before the arbitrators, nor did they receive any proof, nor was it admitted by or on behalf of the defendant, that she had assets of the testator in her hands at the time of the making of the award.—We think that not the proper subject of a plea. If the arbitrators have misconducted themselves, the proper course

would be to move to set aside the award. We therefore think, that, as the arbitrators had full authority given to them, and there was no special reservation, they might properly award payment; and, they having so done, the defendant is concluded, unless she can shew some irregularity on the face of the award.

Judgment for the plaintiff.

1828. { CHURCHILL AND ANOTHER, AS-
Nov. 21. { SIGNEEES OF CADOGAN, A BANK-
RUPT, v. CREASE.

Bankrupt—Payment of money by, after an act of bankruptcy, where fraudulent preference.

A trader in prison under arrest for debt, eight days before the suing out of the commission under which he was declared a bankrupt, obtained a day-rule and went to an insurance-office to receive a sum of money that was due to him. The defendant, a creditor, knowing that his debtor was to receive the money, met him at the office, and there demanded and received payment of his debt. In an action by the assignees to recover the sum so paid to the defendant, as money had and received to their use, the jury having found that the payment was not made with a view to a fraudulent preference, and that the creditor was not at the time aware of an act of bankruptcy by the debtor,—The Court held the payment to be protected by sect. 82 of the 6 Geo. 4. c. 16.

This was an action of assumpsit, brought by the plaintiffs as assignees of one Cadogan, a bankrupt, against the defendant for money had and received by him to the use of the plaintiffs as assignees.

At the trial, before the Lord Chief Justice, at the Sittings at Guildhall after last Trinity term, the facts proved were as follows:—The bankrupt was indebted to the defendant, for work done for him, in the sum of 19l. 10s. A meeting of the bankrupt's creditors was called, to which the defendant was not invited. On the 19th of April 1825, the bankrupt was taken to the Fleet prison at the suit of a creditor. On the 8th of June following, he left the Fleet on a day-rule, and went to the Hope Insurance-office, where he had to receive a sum of money. The defendant, knowing that

the bankrupt would be at the office on that day, met him there and demanded and received from him payment of his account. On the 18th of the same month a commission was sued out against the bankrupt, the act of bankruptcy on which it was founded being the lying in prison. It was submitted for the defendant, that the 6 Geo. 4. c. 16. was retrospective as regards payments really and *bona fide* made by the bankrupt before the date and issuing of the commission, and therefore must regulate this transaction.—On the other hand, it was submitted for the plaintiffs, that this payment was a fraudulent preference, and therefore not protected by the 82d section of the 6 Geo. 4; that that act could not apply, it not having come into general operation until the 1st of September 1825, which was after the date of the commission; and that, as the money was received by the defendant after an act of bankruptcy, and within two months next before the issuing of the commission, the plaintiffs were, under the 19 Geo. 2. c. 32. s. 1, entitled to recover it back. His Lordship reserved the points, and left it to the jury to say, whether the payment in question was made with a view to a fraudulent preference, or *bona fide*.

The jury found that the defendant did not know that the bankrupt had committed an act of bankruptcy, and that the payment was not made with a view to a fraudulent preference.

Mr. Serjeant Wilde, on a former day in this term, moved that this verdict might be set aside and a new trial had:—If a debtor be in prison, free from process, totally uninfluenced by any reasonable inducement to make the payment, and without fear of pressure, his creditor being without motive to press—if, under these circumstances, he pays money, all these facts afford strong grounds for presuming that a fraudulent preference was intended. The evidence did not warrant the jury in finding that this payment was not made with a view to a fraudulent preference.

[*Chief Justice Best*.—It seems to me that the finding of the jury as to fraudulent preference has nothing to do with the question. The difference between the former act and the late one is, that, under the latter, if the party be not cognizant of the insolvency of the bankrupt, the payment is good.]

This case is not within the new act; and even if it be so it will make no difference, for the 82d section (1) expressly excepts cases of fraudulent preference. In the case of *Thornton v. Hargreaves* (2), a trader, being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home, and became a bankrupt,—it was held, that, inasmuch as the act done did not redeem the trader even from any present difficulty, which is the ordinary motive for such an act when really done under the pressure of a threat, it amounted to evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy; and that the sale was therefore void as against the assignees. There, the creditor merely used a threat. Here, the bankrupt was in prison. The creditor used no threats. The debtor was not in a situation to be influenced by threats; but made the payment voluntarily. That payment therefore must be taken to be the result of a predisposition on the part of the debtor to prefer that particular creditor.

A rule nisi having been granted,—

Mr. Serjeant Taddy was about to shew cause, when the Court called on—

(1) Section 82 enacts—"That all payments really and *bona fide* made, or which shall hereafter be made, by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bona fide* made, or which shall hereafter be made, to any bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

(2) 7 East, 544.

Mr. Serjeant Wilde, to support his rule.—By the former statutes, payments made after an act of bankruptcy, when a commission followed within two months, were not good; but by the late act (s. 82), payments made in the ordinary course of trade are protected, unless a commission has actually issued, or the payment be made with a view to a fraudulent preference. In this case, the circumstances clearly shewed an intention in the bankrupt unduly to prefer the particular creditor;—the bankrupt knew his insolvent situation; he had been thirty days in prison, and had called a meeting of his creditors. The defendant was not invited to attend that meeting; and he having received payment under these circumstances, it ought to be shewn that that payment was enforced by pressure and importunity. It must therefore be taken, on the authority of the case of *Thornton v. Hargreaves* (1), that the payment was made voluntarily, and in contemplation of bankruptcy, and with a view to prefer the creditor to whom it was made. But this is not in strictness a fraudulent preference. There is a slight inaccuracy in this respect in sect. 82. 6 Geo. 4. c. 16. A fraudulent preference is usually considered to be a payment made *before* an act of bankruptcy, in contemplation of bankruptcy; but this section speaks of payments made *after* an act of bankruptcy, without notice. The payment therefore could not, either under the old acts or the new one, be protected. It was not within the protection of the former, because it was made within two months of the suing out of the commission, and after an act of bankruptcy, and was not in the fair and usual course of trade; neither was it within that of the latter, inasmuch as that statute can only apply to transactions after the 1st of September 1825, the date at which the act first came into operation. If there be any doubt as to the construction of the act, the 135th section provides that the construction shall be that which will be the most beneficial to the creditors.

By the Court.—The first point in this case is, whether it comes within the meaning of the 6 Geo. 4. c. 16, or of the previously existing acts. We are of opinion

that it must be governed by the 6 Geo. 4. It has been argued, that by the 136th section of that act its operation is postponed to a day posterior to the day of the date of this commission. It is true that the act does not come into *general* operation until the 1st of September 1825; but the sound rule of construction of acts of parliament is, that, where there is both a general and a particular intention clearly expressed, the particular intent forms an exception out of the clause of general intent. Now, the question is, whether or not the 82nd section forms such an exception: it enacts, "that all payments really and *bonâ fide* made, or which *shall hereafter be made*, by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed." The plain and obvious meaning of these words includes as well payments before, as payments after the passing of the act.

The next question is, whether or not this payment was made with a view to a fraudulent preference of the particular creditor. The payment must be fraudulent. Fraud cannot be presumed;—it must be proved. Now, what was there in this case to create a suspicion of fraud or collusion between the creditor and the bankrupt? The jury have expressly negatived fraud. They found that the defendant did not know that his debtor had committed an act of bankruptcy, and that the payment in question was not made with a view to a fraudulent preference. That finding, therefore, is conclusive of the question. But it has been argued, that the evidence did not warrant the jury in finding that this payment was not made with a view to a fraudulent preference; and that argument rests upon the circumstance of the bankrupt's being at the time he made the payment a prisoner in the Fleet, and upon the assumption that he could not be placed in a worse situation, and that, therefore, there was no reasonable and *bonâ fide* inducement for him to pay the defendant his debt. That argument, however, is fallacious; for a detainer might have been lodged against him by the defendant,

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(1) 7 East, 544.

and the apprehension of that would be a sufficient inducement to repel the inference of fraud. That was a question of fact for the decision of the jury. The case of *Thorn-ton v. Hargreaves*, which has been referred to, is very unlike the present; for there the bankrupt gave a bill of sale, by which he assigned to the defendants the whole of his stock, and immediately left his home and business, and became a bankrupt. And Lord Ellenborough said, "Taking the conversation reported between the defendants and the bankrupt to be a threat of process, I do not see how the execution of such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did; for that left him without any property, and he was immediately obliged to break up his business, and leave his home:" and Mr. Justice Lawrence added, "If the bill of sale swept away, as it is said, the whole of the bankrupt's property, it would be difficult to say that it was not made in contemplation of bankruptcy, because it would be in itself an act of bankruptcy." Can that case, where a man assigns his whole substance, be compared with a case like the present, the payment of the small sum of 19*l.* 10*s.* out of a large sum, at the moment of the demand in the hands of the party; and that, too, a payment for work done for ready money? We do not conceive that our judgment on this occasion will clash with any previous decisions.

We have been referred to the 135th section of the statute, which provides that the act shall be construed beneficially for creditors. Are we to do violence to the construction for the purpose of assisting creditors, and thus misconstrue the words of the act?

Under all the circumstances, we are of opinion that there is no ground for the Court to interfere with the verdict. It is not at all improbable, on the facts proved, but that the payment in question was made *bond fide*, and without a view to a fraudulent preference. The jury so considered it, and their finding is conclusive.

Rule discharged.

1828. }
Nov. 10. } PROCTOR v. BRAIN.

Broker—Duty and Liabilities of.

The plaintiff employed the defendant, a sworn broker of the city of London, to purchase goods for him. The defendant made the purchases, but charged the plaintiff a profit beyond the amount of his brokerage. In an action to recover back the surcharges, the declaration alleged that the defendant had charged, and the plaintiff had paid, a larger price than the cost price of the goods. To prove the allegation of payment, an account current between the parties, containing various entries both on the debit and credit sides, was given in evidence:—Held, that the credits in this account sufficiently proved payment of the debits therein, according to priority of date.

This was an action of assumpsit.

The first count of the declaration stated, that, in consideration that the plaintiff, at the special instance and request of the defendant, would retain and employ the defendant as a broker to purchase for the plaintiff divers large quantities of wines and spirituous liquors, for certain reasonable commission and reward to be paid by the plaintiff to the defendant in respect thereof, he, the defendant, undertook and faithfully promised the plaintiff to charge him the *cost price* of all such wines and spirituous liquors as the defendant should from time to time purchase for the plaintiff. The plaintiff then averred, That he employed the defendant as such broker, and that, although he did purchase on account of the plaintiff, divers large quantities of wines and spirituous liquors, to wit, &c., and although the *cost price* of the said wines and spirituous liquors amounted to a certain large sum of money, to wit, &c.; yet that the defendant, not regarding &c., but contriving &c., did not nor would charge the *cost price*, but, on the contrary, charged a much larger and greater price, by which the plaintiff was obliged to pay, and *actually had paid*, a much larger price than the *cost price*.

The second count stated,—that the defendant undertook to charge the plaintiff for such wines and spirituous liquors as he purchased on his account *as cheap a price* as he himself from time to time should pay

for them, but that he charged a greater price, which the plaintiff *had been obliged to pay*.

The declaration also contained the common money counts.

The defendant pleaded—*Non assumpsit*.

At the trial, before the Lord Chief Justice, at the Sittings in London after the last term, it was proved, on the part of the plaintiff, that the defendant was a sworn broker, and the bond given by him to the city of London, conditioned for the due performance of his office of broker, pursuant to the statute 6 Ann. c. 16. s. 4. (1) was given in evidence. The plaintiff also proved his retainer of the defendant to purchase wines and spirits for him, on commission, in his capacity of broker, during the years 1825 and 1826, and produced a book containing the account between them respecting these purchases, among others; and he proved the allegation, as to the overcharges, in the declaration: but it also appeared that this account (which embraced debits and credits to a large amount,) had never been finally settled, there remaining upon the whole a considerable balance due from the plaintiff to the defendant, independently of the overcharges.

Upon this evidence, it was contended, on the part of the defendant, that the allegation of *payment* in the declaration was not supported, and that, consequently, the plaintiff must be nonsuited.

On the other hand, it was insisted, that, as there had been various payments made in part liquidation of the account, according to the principle established in *Clayton's case* (2), those payments must be applied in discharge of the various items in the account, in the order in which they appeared; and it was contended that this was sufficient proof of payment of the items so balanced to support the general allegation of payment.

His Lordship refused to nonsuit; and

(1) By which it is enacted, "That all persons who shall act as brokers within the city of London, and liberties thereof, shall from time to time be admitted to do so by the Court of Mayor and Aldermen of the said city for the time being, under such restrictions and limitations for their honest and good behaviour as that Court shall think fit and reasonable."

(2) 1 Meriv. 605.

the jury returned a verdict for the plaintiff for 119*l.*, the amount of the overcharges proved;—leave being reserved to the defendant to move the Court on the point raised as above.

Mr. Serjeant Taddy now applied accordingly, and contended that the account given in evidence did not support the allegation of payment, inasmuch as no specific appropriation of the credits in the account had been made in liquidation of those items on the debit side which were said to contain the overcharges complained of, and on the whole account a large balance, independently of the alleged surcharges, remained due from the plaintiff to the defendant. In support of the argument, that, in the absence of specific appropriation by a debtor of particular sums paid, the creditor may apply them as he thinks fit, the learned Serjeant cited the cases of *Goddard v. Cox* (3) and *Bloss v. Cutting* (4), in the former of which it was held, that, where there are several demands, the party paying may at the time of payment apply the money to any particular debt, but that, in the absence of such election by the payer, the receiver has the option; and in the latter, that where A. owed B. money on two several bonds, and paid money generally on account, giving no directions as to its application in discharge of either of the bonds, B. might apply it to either.

By the Court (after an ineffectual attempt to procure an arbitration).—The conduct of the defendant in charging the plaintiff a larger sum for the goods he purchased for him in his character of broker than he himself had paid for them, was clearly illegal, and renders him liable to an action for penalties for every instance of the fraudulent surcharge, as well as to indictment. The evidence given at the trial well sustained the declaration. The allegation of payment was supported by proof of the credits in the account current between the parties: for the various items on the credit side were clearly to be applied in discharge of those on the debit side, according to their order of priority. We, therefore, think that there is no ground for this motion.

Rule refused.

(3) 2 Stra. 1194.

(4) Id. 1195, n.

1828. }
Nov. 10. } HENMAN v. DICKINSON.

Bill of Exchange—*Effect of alteration in, after acceptance.*

Where a bill has been altered after acceptance, it is incumbent on the party seeking to enforce it, to shew under what circumstances the alteration was made.

Assumpsit on a bill of exchange for 49*l.* 17*s.* 6*d.*, drawn by one Potter upon and accepted by the defendant, and indorsed to the plaintiff.

At the trial, before Lord Chief Justice Best, at the Sittings at Guildhall after last Trinity term, the wife of the drawer was called as a witness to prove that the bill had been altered by her husband after it had been accepted, and before he indorsed it over to the plaintiff. The alteration was in the date, and also in the amount. For the plaintiff, it was objected that this evidence ought not to be received, inasmuch as it tended to accuse Potter, the drawer, of the crime of forgery, which a wife was not a competent witness to do.

His Lordship was of opinion that, as it appeared on the face of the bill that an alteration had been made upon it, it was incumbent on the plaintiff to shew under what circumstances that alteration had been made, before he could be allowed to recover upon it.

A verdict was therefore taken for the defendant, leave being reserved to the plaintiff to move the Court on the point.

Mr. Serjeant Taddy moved accordingly, citing the case of *Rez v. Cliviger* (1), where it was held that a wife could not be called in any case to give evidence even tending to criminate her husband; and Mr. Justice Ashurst said—"The ground of her incompetency arises from a principle of public policy, which does not permit husband and wife to give evidence that may even tend to criminate each other. The objection is not confined merely to cases where the husband or wife is directly accused of any crime; but even in collateral cases, if their evidence tends that way, it shall not be admitted."

The learned Serjeant submitted that, notwithstanding an alteration apparent on the

face of a bill, the party seeking to enforce it ought not to be called upon to explain the circumstances under which that alteration was made; but that the party charged with the payment of the bill must shew it to have been improperly made.

By the Court.—We are not called upon to decide the first point, viz. whether Mrs. Potter was a competent witness to prove her husband to have committed a forgery.

It is the settled practice, that, if a bill be altered, the alteration has the effect of destroying the bill, unless it be made before the bill is sent into the world; and that it is for the party who sues on the bill to shew the alteration to have been made without fraud, and with the knowledge and consent of the parties liable thereon. This is but reasonable, for the other party can have no means of giving the required evidence.

Rule refused.

1828. }
Nov. 10. } COX v. BENT AND OTHERS.

Landlord and Tenant—*Tenancy from year to year.*

A tenant held premises under an agreement for a lease. No rent was paid; but the tenant, in an account stated between him and his landlord, assented to an item therein debiting him for a half-year's rent:—Held, that the assent was equivalent to a payment, and established a tenancy from year to year, so as to entitle the landlord to distrain.

This was an action of replevin, tried before Mr. Justice Gaselee, at the last Assizes for Stafford. A verdict was entered for the plaintiff on all the avowries, except the nineteenth, which stated, that the plaintiff, for a year ending on the 25th of March 1825, held the premises in question as tenant to the defendants, by virtue of a demise to him thereof made, at the yearly rent of 450*l.* payable half-yearly, on the 25th of March and 29th of September; and, because a year's rent was due, the defendants well avowed, &c.

The plaintiff pleaded, *non tenuit*, and *riens in arriere*.

The premises, which were the subject of the action, were held by the plaintiff under an agreement, bearing date the 7th of December 1824, whereby the defendants agreed to let and demise them to the plaintiff "in consideration of the rent of 450*l.*, and of the covenants and agreements to be entered into by the plaintiff in a certain indenture of lease to be executed on or before September 29, then next ensuing." Under this agreement the plaintiff had possession. No rent had been paid; and the only evidence to charge him with a tenancy from year to year, was an account stated between the parties, in which a sum of 225*l.* had been debited to the plaintiff, for a half-year's rent, and assented to by him.

The learned Judge, taking this assent equivalent to an actual payment of the half-year's rent, directed a verdict for the defendants on that avowry.

Mr. Serjeant Russell now moved for a rule calling on the defendants to shew cause why that finding should not be set aside, and a verdict entered on that avowry as well as the others, for the plaintiff. He submitted that, as by the nineteenth avowry the defendants merely justified the distress by a statement that the plaintiff held the premises under an agreement whereby the defendants "agreed to let and demise" them to him, the avowry for a distress taken for rent alleged to be due on a future demise could not be supported; upon the authority of the case of *Dunk v. Hunter* (1), where the tenant being in possession under a memorandum of agreement to let on lease, with a purchasing clause, for twenty-one years, at a certain rent, it was held, that as this was only an agreement for a future lease, and no lease was actually executed, and no rent subsequently paid, the landlord was not entitled to distrain. The learned Serjeant concluded that an actual payment of rent under the agreement would, according to the case of *Knight v. Bennett* (2), be sufficient to establish a tenancy from year to year by the party; but submitted that the mere admission of an item in an account could not be deemed equivalent to payment.

(1) 5 Barn. & Ald. 322.

(2) 3 Bing. 361; 4 Law Journ. C.P. 94.

By the Court.—The acknowledgment of the account, containing an item charging for a half-year's rent, was equivalent to an actual payment of it, and clearly, according to the principle of *Knight v. Bennett*, established a tenancy from year to year.

Rule refused.

1828. }
Nov. 12. } ROOKE v. WASE.

Practice—*Proceedings for costs of suit, where stayed.*

The plaintiff's attorney having applied by letter to the defendant for the payment of a debt, the latter four days afterwards paid the amount to the plaintiff, not knowing that a writ had been previously sued out against him. The plaintiff's attorney afterwards caused the defendant to be arrested on a writ sued out before the payment was made to the plaintiff:—The Court directed the proceedings to be stayed without costs.

Mr. Serjeant Jones, on a former day in this term, obtained a rule nisi, that the bail-bond, which had been given by the defendant, should be delivered up to be cancelled, and that in the meantime all further proceedings might be stayed. He founded his motion on affidavits, which stated, that, on the 7th October last, the defendant received a letter from the plaintiff's attorneys requiring the immediate payment of 23*l.* due to the plaintiff, and that if it were not discharged, proceedings would be commenced against him; that, on the 11th October, the defendant called upon the plaintiff and paid him; and that, on the 16th, the defendant received another letter from the plaintiff's attorneys in which they told him that he had settled improperly with the plaintiff, as an officer had had a writ against the defendant for several days, and they demanded 3*l.* 12*s.* for the costs attending such writ. The defendant also swore, that, when he paid the plaintiff on the 11th October, he did not know that any writ had been issued against him; and that, on the 3d November he was arrested at the plaintiff's suit for the full amount of his demand, and detained in custody of the sheriff till he gave a bail-bond and paid the costs attending the arrest.

Mr. Serjeant Taddy now shewed cause, on an affidavit, which stated that the writ under which the defendant was arrested, was issued on the 8th October and put into the hands of an officer on the same day; and it was insisted, that, as the debt was not paid till the 11th, and without any communication with the plaintiff's attornies, they were entitled to proceed for the costs of the writ.

But the Court, thinking that the plaintiff's attornies had been guilty of sharp practice, ordered the rule to stay proceedings to be made

Absolute, without costs.

1828. }
Nov. 26. } *SYMES v. ROSE.*

Practice—Payment of Money into Court in lieu of Bail.

The defendant having deposited the amount of the sum for which he was arrested, with 20l. for the costs, with the sheriff, and which sums were paid into court, under the statute 7 & 8 Geo. 4. c. 71, and the defendant obtained a verdict and judgment:—Held, that he was not entitled to have the sums paid in, repaid without producing certificates from the Clerk of the Judgments and the Prothonotary, that judgment had been signed, and the money paid into court; and the rule for repayment is only a rule to shew cause.

The plaintiff having arrested the defendant under a *capias* issued out of this court for 120l., he deposited that sum, together with 20l. as a security for costs, with the sheriff; both which sums were paid into court, according to the provisions of the statute 7 & 8 Geo. 4. c. 71. s. 2. (1) The

(1) Section 2. enacts—"That in all cases in which any defendant shall have been discharged from arrest upon making such deposit as is required by the act, and the sum so deposited shall have been paid into court, it shall be lawful for such defendant, instead of putting in and perfecting special bail in the action, according to the course of practice of the court, to allow the sum so deposited with the sheriff, and by him paid into court as aforesaid, together with the additional sum of 10l. to be paid into court by such defendant as a

cause having gone down to trial, and the jury having found a verdict for the defendant, on which judgment was entered up, accordingly—

Mr. Serjeant Andrews, on a former day, moved that the money so deposited and paid into court might be repaid to the defendant; and he produced the *postea*, to shew that the proceedings had been regular, and submitted that the rule for repayment should be made absolute in the first instance.

But the Court were of opinion, that, as the plaintiff might bring a writ of error, there ought only to be a rule to shew cause;

further security for the costs of the action, to remain in the court to abide the event of the suit; and in all cases where any defendant shall have been arrested and shall have given bail to the sheriff, or shall have been arrested and remain in custody, it shall be lawful for such last-mentioned defendant, instead of putting in and perfecting special bail, to deposit and pay into the said court the sum indorsed upon the writ, together with the amount of the king's fine, if any, upon the original writ, and the further sum of 20l. as a security for the costs of the action, there to remain to abide the event of the suit; and thereupon the said defendant may, and he is hereby required to enter a common appearance, or file common bail in the action, within such time as he would have been required to have put in and perfected special bail in the action according to the course of the said court, or in default thereof, the plaintiff in the action is hereby empowered to enter such common appearance or file common bail for the said defendant, and the cause may proceed as if the defendant had put in and perfected special bail; and in case judgment in the said action shall be given for the plaintiff, he shall be entitled, by order of the Court, upon motion made for that purpose, to receive the said money so remaining in, or so deposited or paid into the court as aforesaid, or so much thereof as will be sufficient to satisfy the sum recovered by the judgment and the costs of the application; and if judgment be given in the said action for the defendant, or the plaintiff discontinues the suit, or be otherwise barred, or in case the sum deposited and paid into court be more than sufficient to satisfy the plaintiff, the said money so deposited or paid into court, or so much thereof as shall remain, shall by order of the Court, upon motion to be made for that purpose, be repaid to such defendant."

and that, before it was made absolute, it was not only necessary to produce the *postea*, but also a certificate of the Clerk of the Judgments that judgment had been duly signed; and also a certificate from the Prothonotary that the money had been paid into court.

The learned Serjeant, on this day, produced the certificates as required, and an affidavit that notice of this rule had been served on the plaintiff; on which the Court ordered it to be made

Absolute.

1828. }
Nov. 27. } SMITH v. SCOTT.

Practice—Payment of Money into Court in lieu of Bail.

The defendant having deposited with the sheriff the amount of the debt for which he was arrested, and 20l. for costs, in pursuance of the statute 7 & 8 Geo. 4:—Held, that the bail-bond, which he had given on his arrest, must be delivered up to be cancelled.

Mr. Serjeant Wilde, on a former day in this term, obtained a rule *nisi*, that the bail-bond which had been entered into and given by the defendant in this cause, might be delivered up to be cancelled on an affidavit of the defendant, which stated, that, since the arrest, he had paid into the hands of one of the Prothonotaries of this court the sum of 28l., the amount of the debt, and 20l. for costs, in pursuance of the statute 7 & 8 Geo. 4. c. 71. (1)

Mr. Serjeant Merewether now shewed cause, and submitted, that although the latter sum had been paid in lieu of special bail, still that it was no ground for the Court to order the bail-bond to be cancelled.

The Court, however, thought that it fell within the terms and meaning of the statute, and ordered the rule to be made

Absolute.

(1) See the section, *ante*, p. 70.

1828. } In the matter of HOUGHTON AND
Nov. 27. } FALLOWS.

Attachment—Affidavit for, how entitled.

A rule nisi for an attachment for non-payment of money under an award, was entitled, "In the matter of—," but the affidavit of service was entitled "Between A. B. plaintiff, and C. D. defendant":—Held irregular, as it should have been entitled the same as the rule.

A rule *nisi* had been obtained by *Mr. Serjeant Taddy*, for an attachment against John Fallows for non-payment of money, pursuant to an award. Disputes had arisen between Houghton and Fallows, and by an agreement were referred to arbitration; the agreement had been made a rule of court, but no action was brought. The rule *nisi* for the attachment was entitled as above, but the affidavit of service was entitled "Between Matthew Houghton, plaintiff, and John Fallows, defendant." The objection made by the officer was, that the affidavit was wrongly entitled, as it should have been entitled the same as the rule.

The Court decided the objection to be valid, and the learned Serjeant took nothing by his rule (1).

1828. } WEBB, DEMANDANT;
Nov. 28. } LANE, TENANT.

Writ of Right—Amendment in, where allowed.

The word esplees having been omitted in the count, and it having been indorsed by an attorney in the country, the tenant signed judgment of non pros.—The Court held it to be irregular, and gave the demandant leave to amend on payment of costs.

This was a writ of right, and a blank having been left in the count for the word "*esplees*," and it having been indorsed by an attorney in the country, and not by an agent or attorney in London, the tenant signed judgment of *non pros*.

(1) See *Bevan v. Bevan*, 3 Term Rep. 601; *Bainbridge v. Houlton*, 5 East, 21.

Mr. Serjeant Wilde, on a former day in this term, obtained a rule nisi that this judgment might be set aside.

Mr. Serjeant Taddy now shewed cause, and insisted that the omission of the word *esplees* in the count rendered it a nullity, and he referred to the case of *Charlwood v. Morgan* (1), where the Court refused to allow the demandant to amend the mistake of a christian name in the count, although an affidavit accounting for the mistake was produced. Besides, as the name of a London attorney was not indorsed on the back of the count, it was clearly irregular, and the tenant could not be compelled to deliver his plea to an attorney at a great distance in the country.

But the Court held, that the tenant either ought to have demurred, or moved to set aside the proceedings for irregularity; and that the mere omission of the word *esplees* did not render the count so deficient as to entitle him to sign judgment; and they gave the demandant leave to amend on payment of costs.

1828. } EDWARDS V. FAREBROTHER AND
Nov. 11. } OTHERS.

Sheriff—Where protected in taking Goods under an execution.

Where a woman has cohabited with a man for several years and passed as his wife, it seems that she cannot maintain trespass against a sheriff for taking goods in execution against the man, they being in the house where the parties resided; but, it having been left to the jury to say, whether they thought that the property might not have been given up by the woman to the man during cohabitation, and they having found in the affirmative,—Held that their verdict is conclusive.

This was an action of trespass against the sheriff of Middlesex, and several other persons, one of them being a judgment-creditor of a man named Salmon.

At the trial, before the Lord Chief Justice, at Westminster, at the Sittings after the last term, it appeared that the plaintiff,

Mrs. Edwards, lived with Salmon as his wife, and the action was brought for the breaking and entering the house in which they resided, and the seizure of the goods that were in it. It also appeared that Salmon and the plaintiff had cohabited together for several years, and that the plaintiff had, during that time, answered to the name of Mrs. Salmon when addressed by persons who called at the house; and that they had a child christened, and entered in the register as "Emma, daughter of Thomas and Sarah Mary Salmon" (Sarah Mary being the christian name of the plaintiff.) It was also proved that the house was rented in the name of Salmon till a short time before the execution, when it was altered to the name of Edwards by the landlord's agent, in consequence of a false representation made to him by Salmon, and that the landlord had afterwards consented to the alteration.

The plaintiff proved, that, about ten years since, she was possessed of goods amounting in value to 22*l*., but it did not appear that all, or even what part of them were in the house at the time of the seizure in question. For the defendants, it was contended, that a woman who lives with a man, uses his name, and passes as his wife, cannot recover in trespass for taking her goods in the house in which they both reside, because she, by her own conduct, had led the world to believe that they were the goods of the man with whom she lived, and whom she had passed off as her husband; and in the case of *Mace v. Cadell* (1), where, in an action of trover, brought by a woman to recover goods which had been taken by the assignees of a man named Penrice,—the plaintiff, who kept a public-house, represented herself as married to Penrice, but afterwards denied the marriage, and asserted that the goods were her own sole property,—the Court said, "that, after a solemn declaration by the plaintiff that she was married to Penrice, and that these were the goods of Penrice in her right, she should never be allowed to say that she was not married to him, and that the goods were her sole property."—For the plaintiff, the case of *Edwards v. Bridges* (2) was relied on, which was an action by the present

(1) 1 Cowp. 232.

(2) 2 Stark. N.P.C. 396.

(1) 1 New Rep. 64.

plaintiff against the sheriff of Middlesex, in 1818, where Lord Tenterden said, "that, in point of law, the circumstance of the plaintiff's having lived with Salmon, as his wife, and having answered to his name, did not render the goods liable to an execution against him, and, therefore, that the only question was, as to the value."—Lord Chief Justice Beat was at first inclined to nonsuit the plaintiff on the authority of *Mace v. Cadell*; but, on the case of *Edwards v. Bridges* being cited, he left it to the jury to say, whether the goods in the house at the time of the execution were the plaintiff's; that, if they thought they were, and were not given up to Salmon during the continuance of the connexion between them, they would find a verdict for the plaintiff; but that, if they were of opinion they were not hers at the time of the seizure, but had been given up to Salmon under the circumstances of such connexion, then that the defendants would be entitled to a verdict. The jury found for the defendants.

Mr. Serjeant Taddy now applied for a rule calling on the defendants to shew cause why this verdict should not be set aside and a new trial granted; and relied on the case of *Edwards v. Bridges*, which he submitted was distinguishable from *Mace v. Cadell*, as there the question arose between a bankrupt and his assignees; and that Mr. Starkie, in a note to *Edwards v. Bridges*, had said, that, if Salmon had become bankrupt, the question as between the plaintiff and his assignees would have been very different, as they would, probably, have been entitled to the property under the statute 21 Jac. 1. c. 19. s. 11. It should, therefore, have been left to the jury to say, either what the goods were worth, or whether the plaintiff was Salmon's wife at the time of the alleged trespass, and if she were not, the defendants could not be justified in taking them in execution. But—

By the Court.—The question was properly left to the jury, and as the value of the goods claimed by the plaintiff could not possibly exceed 20*l.*, as she only proved that they were worth 22*l.* ten years ago, we ought not to interfere to set aside the verdict, and more particularly so as she did not shew what part of them were in the house at the time of the seizure. The case of Vol. VII. C.P.

Mace v. Cadell seems to have laid down a good and moral principle; and in *Batthews v. Galindo* (3), it was decided, that a woman who lives with a man and passes as his wife, is a competent witness on his behalf in an action brought against him, as the mere circumstance of co-habitation only tends to affect her credit, and does not go to her competency.

Rule refused.

1828. }
Nov. 11. } PALMER v. THOMAS.

Ship-owner—*Demurrage, when entitled to.*

The consignee of a cargo requested the master of the vessel not to take her alongside a wharf, as, if he did, it would get down the price of the goods. The master consequently delayed procuring the certificate required by the statute 7 and 8 Geo. 4. c. 56. s. 15, authorizing the landing and unshipping the cargo:—Held, that the owner was not thereby precluded from claiming demurrage, as the delay or detention of the vessel was attributable to the act of the consignee.

This was an action for demurrage.

At the trial, before the Lord Chief Justice at Guildhall, at the Sittings after the last term, it appeared that the plaintiff was the master of a coasting vessel, which arrived in the River Thames on the 9th of February last with a cargo of potatoes, consigned to the defendant, and made deliverable at *Topping's* wharf; that, on her arrival, as potatoes were likely to fall in the market, the defendant went on board and requested the plaintiff not to take the vessel alongside the wharf, or shew himself there, assigning as a reason, that if he did, it would get down the price. The plaintiff accordingly lashed the vessel to a tier in the river, where she remained until the 18th February, when she was taken to the wharf. It was contended for the defendant, that the plaintiff could not be entitled to demurrage, as he had not procured the certificate of the payment of dues to the Corporation of London, as required by the statute

(3) 1 Moo. & Pay. 565; s. c. 6 Law Journ. G.P. 138.

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7 and 8 Geo. 4. c. 56. s. 15. (1) until the morning of the day on which the vessel was taken to the wharf.

The Lord Chief Justice, however, thought that, as the defendant had requested the plaintiff not to take the vessel alongside the wharf, or shew himself there, as, if he did, it would get down the price of potatoes, he could not afterwards object to the plaintiff's claim for demurrage, as his delaying to procure the certificate at the mansion-house was attributable to the defendant's own act. The jury accordingly found a verdict for the plaintiff.

Mr. Serjeant Wilde now applied for a rule calling on the plaintiff to shew cause why this verdict should not be set aside and a nonsuit entered, or a new trial granted; and insisted that it was the duty of the plaintiff to have obtained the necessary certificate immediately on the arrival of the vessel in the port of London, and without which the potatoes could not have been unshipped. In *Barret v. Dutton* (2), which was an action by a ship-owner against the freighter, founded on a charter-party, dated the 6th January 1814, for a voyage from London to Heligoland, whereby "thirty running days were allowed for loading the ship at London, and discharging her at Heligoland, and ten days on demurrage at 4*l.* per day;" and the declaration alleged that the defendant detained the ship thirty-two days in loading and discharging her beyond the thirty running days:—but, in point of fact, she was ready to take in her cargo on the 8th January, on which day

(1) By which, for the purpose of enabling the mayor and commonalty and citizens of the city of London, and their successors, to ascertain and collect the amount of the dues payable to them upon the several articles thereafter mentioned, imported coastwise into the port of London,—it is enacted, "that, if all or any of the goods of the description therein-after mentioned, that is to say, firkins of butter, fish, fruit, roots eatable, &c. &c. brought coastwise into the port of the said city, and which are liable to the said dues, shall be landed or unshipped at or in the said port, before a proper certificate of the payment of the said dues shall have been obtained, such goods shall be forfeited, and may be seized by any officer of his Majesty's customs empowered to seize any goods landed without due entry thereof."

(2) 4 Campb. 333.

some goods were actually taken on board; and a severe frost immediately after set in, and continued several weeks, during which time the River Thames was frozen over; the loading of the ship was rendered impossible, and she could not have sailed if she had been loaded. On the ice breaking up the loading was resumed, and completed on the 25th February. The custom-house was then burnt down; and her clearances could not be obtained till the 9th March, on which day she sailed. She was employed four days in discharging at Heligoland. A witness stated, that it was the *business of the owner to procure the ship's clearances*. Under these circumstances, the plaintiff claimed demurrage from the 7th February, when the thirty running days expired, to the 9th March, when the ship sailed, together with the four days employed in unloading her at Heligoland; and it was contended for him, that, as she was necessarily detained during all that time, the defendant was answerable, although the detention arose from circumstances over which he had no controul.

Lord Chief Justice Gibbs concurred in this reasoning, and held, that the frost was no defence. There was an absolute undertaking, by the freighter of the ship, to load and discharge her in thirty days; and whether it was possible or impossible for him to do so from the state of the weather, was totally immaterial. He had made a contract against all events, and he must abide by it. But the defendant was, of course, not liable for the detention of the ship at London, after the 25th February, when her loading was completed, it having been *the duty of the plaintiff to obtain her clearances*; and as this had become impossible, from the custom-house having been burnt down, the detention in the interval was considered as belonging to the plaintiff and not to the defendant. And his Lordship there referred to *Blight v. Page* (3), where it was decided, that if a merchant hires a ship to go to a foreign port, and covenants to furnish a lading there, a prohibition by the government of that country to export the intended articles, neither dissolved the contract, nor excused a non-performance of it. Although the defendant requested the plaintiff not to

(3) 3 Bos. & Pul. 295, n.

take the vessel alongside the wharf, still he ought to have procured the certificate of the payment of the dues; and until he had done so, the defendant could not be liable for demurrage. But—

By the Court.—Although it is the duty of the master of the vessel to obtain her clearances, still, if he is prevented from so doing by the act of the freighter or consignee, the latter is liable for demurrage, and the owner is entitled to compensation, the delay or detention of the ship being attributable to the act of the consignee alone. If the plaintiff had procured the necessary certificate, it would have been useless, until the vessel came to the wharf to unload; and it did not appear that the defendant requested him to take her there previously to the day on which the certificate was procured; and, as the defendant requested the plaintiff not to take the vessel to the wharf, and he acted upon it, it would be too much to say that the defendant should not be bound also.

Rule refused.

1828. } TURNER AND ANOTHER v.
Nov. 17. } PRINCE.

Costs—Defendant, where entitled to, under the Statute 43 Geo. 3. c. 46. s. 3.

The defendant was arrested for 100l.; he paid 10l. into court, and at the trial a verdict was entered for the plaintiffs, subject to an award, and the costs were to abide the event. The arbitrator awarded 40l. only to be due. The Court refused to allow the defendant his costs under the stat. 43 Geo. 3. c. 46. s. 3, it appearing before the arbitrator, that there was a complicated account between the parties, and that the defendant was entitled to claim certain deductions from the plaintiff's original demand.

This was an action of assumpsit, and brought to recover 125l. 9s. 8d., which the plaintiffs alleged the defendant owed them for extra work done to a house in the Regent's Park.

At the trial, before Mr. Justice Park, in London, at the Sittings after the last term, it appeared, that the plaintiffs were builders,

and agreed to let the house in question to the defendant on lease,—after they should have finished it according to a specified plan;—and, under the agreement, any variation from the proposed mode of finishing the house was to be paid for by the defendant, or allowed for by the plaintiffs according to its value: that is to say, that if the plaintiffs did any extra work, the defendant was to be chargeable with it; but if he did not require the house to be fitted up in so expensive a manner as was at first proposed, he was to have an allowance accordingly. The house having been finished, and the defendant let into possession, the plaintiffs, in August 1826, sent him a bill of 125l. 9s. 8d. as their charge for extra work. The lease not being then prepared, the defendant refused to pay; but it was executed in March 1827. The plaintiffs then renewed their application for payment of their bill for extra work, and the defendant still refusing to pay, the plaintiffs arrested him on the 26th April, under an affidavit of debt for 100l. and upwards, for work and labour, and materials found. The defendant paid 10l. 9s. 3d. into court;—and, at the trial, in July last, a verdict was taken for the plaintiffs by consent, subject to the award of an arbitrator, to whom the cause, and all matters in difference between the parties were referred:—the costs of the cause were to abide the event of the award; and the costs of the reference were to be in the discretion of the arbitrator. On the parties going before him, the defendant shewed that he was entitled to claim an allowance from the plaintiffs, for deviations from the proposed plan of finishing the house, to the amount of 63l. 13s. 2d.; he not having required several of the ornamental embellishments. The arbitrator directed the defendant to pay the plaintiffs 29l. 8s. 9d., besides the 10l. 9s. 3d. paid into court, amounting together to 39l. 18s.; and also the costs of the cause, and of the award. The plaintiffs' costs of the cause, as taxed, amounted to 68l. 6s. 3d., which, with the above sum of 29l. 8s. 9d., the defendant paid into court, under a Judge's order, who directed all proceedings to be stayed, until an application could be made to the Court to allow the defendant his costs, under the statute 43 Geo. 3. c. 46. s. 3.

Mr. Serjeant Wilde, on a former day in

this term, accordingly obtained a rule nisi, submitting, that, as the plaintiffs had held the defendant to bail for 100*l.* and upwards, for work and labour; and the arbitrator had found that 39*l.* 18*s.* only were, in fact, due, the defendant had been arrested for the larger sum without any reasonable or probable cause.

Mr. Serjeant Taddynow shewed cause.—By the terms of the submission, the costs of the cause were to abide the event of the award; and as the arbitrator directed that the defendant should pay these costs, his award is conclusive, particularly as the plaintiffs were thereby entitled to retain their verdict. In *Keene v. Doeble* (1), where a defendant was arrested, and held to special bail for 28*l.*, and paid 3*l.* into court, and afterwards, the cause, before it came on for trial, and all matters in difference were referred to an arbitrator, who had power to examine the parties, and call for books, &c.; and it was agreed, that the costs should abide the event:—the arbitrator having awarded to the plaintiff the sum of 1*l.* 19*s.* only, a motion was made to allow the defendant his costs,—it was held, that this was not a case within the 43 Geo. 3. c. 46. s. 3, and that the defendant was not entitled to costs: and Lord Chief Justice Abbott there said, that the cause was stopped in its progress by an agreement to refer all matters in difference; and it was made a part of the rule, that the costs should abide the event of the award. He was, therefore, of opinion, that money awarded on such a reference is not money recovered, within the meaning of the act, and that the rule must be discharged. In *Paine v. Acton* (2), it was held, that if a defendant be arrested for 100*l.*, and the cause be afterwards referred to an arbitrator, who finds that 20*l.* only are due to the plaintiff, still that the defendant is not entitled to his costs, under the statute 43 Geo. 3. c. 46; and Mr. Justice Richardson there said, that the defendant litigated the question before the arbitrator, and depended on the agreement entered into between him and the plaintiff. So here, there was a complicated account between the parties, and the arbitrator might have received evidence which the defendant might not have been able to

avail himself of at the trial: and in *Dryson v. Simcox* (3), which is the latest decision on this subject, where the defendant was arrested for 80*l.*, and it appeared, at the trial, that the plaintiff was indebted to the defendant in a small sum, a verdict was taken for the former, for nominal damages, subject to a reference to an arbitrator for ascertaining the amount, and he found that 12*l.* only were due from the defendant to the plaintiff,—it was held, that the defendant was not entitled to costs under the statute 43 Geo. 3. c. 46. s. 3, although he had tendered the sum awarded before the commencement of the action, as he ought to have pleaded the tender.

Mr. Serjeant Wilde, in support of his rule.—Even admitting, that, by the terms of this submission, all matters in difference between the parties were referred to an arbitrator, yet they could only relate to the subject-matter of the agreement between the plaintiffs and the defendant, which was the only question in the cause, and if the arbitrator had taken any other matters into his consideration, he would have exceeded his authority: and, although the plaintiffs might, in strictness, be entitled to charge the defendant with the full amount of the extra work, yet they must have been aware that he was entitled to deduct the sum allowed by the arbitrator, and to which the defendant was entitled by the express terms of the agreement. The plaintiffs therefore ought not to have arrested the defendant for the whole amount: and in *Summers v. Formby* (4), the Court said, that a reference is equivalent to a trial, and that it has been so held, so as to entitle the defendant to costs where the plaintiff does not recover the sum for which the defendant was arrested under the 43 Geo. 3. c. 46. s. 3. But—

By the Court.—Although a defendant may, in some cases, be entitled to his costs under the statute, where he has been arrested for 100*l.*, and the plaintiff recovers only 40*l.*, yet it must be a strong case. Here, the transactions between the plaintiffs and the defendant arose from the terms of an agreement, and the account being of a complicated nature, it was highly prudent to refer it to an arbitrator; and he might either

(1) 3 B. & C. 491; a. c. 5 D. & R. 383; a. c. 3 Law Journ. K.B. 76.

(2) 3 B. Moore, 605.

(3) 1 Moo. & Pay. 353; a. c. 3 Law Journ. C.P. 20.

(4) 1 B. & C. 200; a. c. 1 Law Journ. M.B. 36.

have examined the parties, or heard evidence which could not be admitted at the trial. But the case of *Thompson v. Atkinson* (5) appears to be decisive of the question. There, the defendant was arrested for 179*l*. At the trial, a verdict was found for the plaintiff, subject to the award of an arbitrator, to whom the cause, and all matters in difference between the parties were referred, and the costs of the cause were to abide the event of the award. The arbitrator by his award found, that, at the commencement of the suit, there was due from the defendant to the plaintiff the sum of 45*l*. 10*s*., and that the plaintiff had no reasonable or probable cause for arresting the defendant for 179*l*.; and that the defendant, by reason thereof, was entitled to compensation or damages to the amount of 20*l*. The arbitrator then ordered the verdict to be finally entered for the plaintiff, for 25*l*. 18*s*., the balance due to him, after deducting therefrom the damages awarded to the defendant. The Court refused to allow the defendant costs under the statute 43 Geo. 3. c. 46, inasmuch as, by the terms of the reference, the costs were to abide the event of the award, and that was in favour of the plaintiff.

Rule discharged.

1828. } CHRISTIE v. HAMLET AND
Nov. 19. } OTHERS.

Award—*When, and on what terms, set aside.*

By a Judge's order, made at chambers, upon hearing the attornies on both sides, and by their consent, the cause was referred to arbitration. It was recited in the award, that the cause was referred by an order of Nisi Prius:—Held, that such award was bad, and that the performance of it could not be enforced by attachment; but the rule nisi for setting it aside, not stating it to have been drawn up on reading the order of reference,—held irregular.

On the 17th June last, Lord Chief Justice Best made an order at chambers as follows, namely, "Upon hearing the attornies on both sides, and by their consent, I order, that

this cause, and all matters in difference between the above parties, be referred to the award of Thomas Ashton the younger, and Joseph Soames; and, by the like consent, I further order, that this order shall be made a rule of the Court of Common Pleas, if that Court shall think fit." The arbitrators made their award on the 10th September last, and which began by reciting, that, at the Sittings of Nisi Prius, held at Guildhall, in and for the city of London, on the 17th June 1828, before Sir William Draper Beat, Lord Chief Justice, &c., a cause came on to be tried between the above-named plaintiff and defendants; and that, upon such trial, with the consent of the plaintiff and defendants, their counsel and attornies, an order or rule was made, that it should be referred to the arbitrators named in the order, to settle and ascertain what damages the plaintiff had sustained, and that a verdict should be entered accordingly.

Mr. Serjeant Wilde, on a former day in this term, upon an affidavit stating, that no such order of Nisi Prius as that set forth in the award had been at any time made in this cause, as it was made by the Lord Chief Justice at chambers, obtained a rule nisi to set aside the award, which was drawn up upon reading the above affidavit, and a paper writing thereto annexed, which was a copy of the award.

Mr. Serjeant Taddy now shewed cause; and submitted, that, as the order of reference was merely recited in the award, it was no ground for setting it aside; and that, as it was a mere technical objection, the rule for setting it aside was also objectionable, as it was not drawn up on the reading the rule or order of reference, under which alone the arbitrators had power to act. Besides, the Court of King's Bench requires the objections to an award to be stated in the rule nisi, and the same practice prevails here.

By the Court.—We are of opinion, that an attachment cannot be issued against the defendants to enforce performance of the award, as no such order of Nisi Prius existed, or was ever made as is recited in the award. But the rule for setting it aside should certainly have been drawn up on reading the order of reference, and the objections to the award should also have been stated in the

(5) 6 B. & C. 193; s. c. 3 Law Journ. K.B. 101.

rule: (1)—the rule, therefore, must be discharged, but without costs.

Rule discharged accordingly.

1828. } AMNER AND ANOTHER, EXECU-
Nov. 24. } TORS, V. CATTELL.

Practice.—Venue—on what terms changed.

The defendant obtained a rule nisi to change the venue from London to Warwick, on the usual affidavit. Cause was shewn on an affidavit, which stated, that the defendant's attorney had declared that he should change the venue, to postpone the trial till the Assizes, when Lord Tenterden's Act, 9 Geo. 4. c. 14, would have come into operation, and thereby beat the plaintiffs, as they had no promise in writing. The Lord Chief Justice, and Mr. Justice Park, were of opinion that the rule should be discharged. Mr. Justice Burrough, and Mr. Justice Gaselee thought, that the defendant's attorney should have an opportunity of answering the affidavit; but as he did not do so effectually, the rule was ultimately discharged.

This was an action of assumpsit for goods sold and delivered by the plaintiffs' testator, in his lifetime, to the defendant.

Mr. Serjeant Adams, on a former day, obtained a rule nisi, on the part of the defendant, to change the venue from London to Warwick, on the usual affidavit, that the plaintiffs' cause of action, if any, arose in that county, and not elsewhere.

Mr. Serjeant Merewether shewed cause, on an affidavit of the plaintiffs' attorney, which stated, that, before the commencement of the action, he wrote to the defendant's attorney, informing him of the defendant's admissions and promises of payment of the debt in this suit; that he called on the defendant's attorney for his undertaking for the defendant's appearance, when the attorney said, that he should plead the Statute of Limitations, and that Lord Tenterden's Act came into operation on the 1st of January, and that he should change the venue and beat the plaintiffs, as they had no promise in writing. For the plaintiffs it was submitted, that under these circumstances the defendant ought not to be allowed to change the venue, as the only

object of his attorney was to postpone the trial of the cause until after the statute 9 Geo. 4. c. 14. came into effect, and by which the plaintiffs' claim would be wholly defeated (1).

(1) The 1st section, after reciting an act passed in the 21st year of the reign of King James I., whereby, it was among other things enacted, "that all actions of debt for arrearages of rent, should be commenced within three years after the end of the then session of parliament, or within six years next after the cause of such action or suit, and not after;"—and that various questions had arisen in actions founded upon simple contract, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the said enactment; and that it was expedient to prevent such questions, and to make provision for giving effect to the said enactment, and to the intention thereof:—it was enacted, "that in action of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactment, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactment, so as to be chargeable in respect, or by reason only of any written acknowledgment or promise made and signed by any other or others of them: Provided always, that nothing therein contained shall alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever: Provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear, at the trial or otherwise, that the plaintiff, though barred by the said recited act, or this act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given, and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."—And by the tenth section it is enacted, "that the act shall commence and take effect on the first day of January 1829."

(1) But on this point, see post 80.

Mr. Serjeant Adams, in support of the rule, submitted, that the affidavit of the plaintiff's attorney was no answer to the application to change the venue; and that the plaintiff could be only entitled to retain it, upon undertaking to give material evidence in London. The rule, therefore, must be made absolute, or, at all events, the Court ought to allow the defendant's attorney to answer the matters of the affidavit of the solicitor for the plaintiffs.

The Lord Chief Justice and *Mr. Justice Park* were of opinion, that the venue ought not to be changed, and that the plaintiff was entitled to retain it, without undertaking to give material evidence in London, where it was laid: as, if a cause of action arise in two counties, or the witnesses reside in a distant county, or a material witness be confined to his bed by illness, or if a fair trial cannot be had in the county where it was originally laid; either of these circumstances is a ground for discharging a rule to change the venue. It seems that the late statute was intended to apply to parol acknowledgments made before its provisions came into actual effect; for it was with a view to prevent an *ex post facto* operation, with respect to actions already commenced, that the period of the act's coming into force was postponed for six months after it had passed: and if the trial of this cause were delayed until the next Assizes, the act would have previously come into operation; whereas, if the venue be not changed, the plaintiffs may try their cause at the Sittings after this term.

Mr. Justice Burrough and *Mr. Justice Gaselee*, were inclined to think, that the rule should be made absolute, as the defendant had applied to change the venue on the usual affidavit, and the plaintiff had not denied that the cause of action did not arise in Warwickshire, nor had he given an undertaking to give material evidence in London;—that, at all events, the defendant's attorney ought to have an opportunity of answering the affidavit of the plaintiffs' attorney.

The rule was accordingly enlarged for that purpose; and, the defendant's attorney not having denied the facts as sworn to by the attorney for the plaintiffs,—

The Court ordered the rule to be

Discharged.

1828. }
Nov. 27. } BEDDINGTON v. BEDDINGTON.

Practice—Scire facias.

If a plaintiff direct the sheriff to return nihil to a writ of scire facias, and the latter refuse to return the writ until he has been paid a fee, the plaintiff is not entitled to the costs of applying to the Court, in calling on the sheriff to return the writ.

Quære—Whether, hereafter, two nihilis will be permitted to operate as a scire feci.

Mr. Serjeant Wilde, on a former day in this term, obtained a rule calling on the sheriff to shew cause, why he should not return a writ of *scire facias*, which had been left with him by the plaintiff, to be returned *nihil*. And it was also prayed, that the sheriff might pay the costs of this application, which was founded on an affidavit by the plaintiff, which stated, that the sheriff would not return the writ, because the plaintiff had refused to pay him a sum which he demanded, and to which the plaintiff thought he was not entitled, it being more than the usual fee. The sheriff, on being served with the copy of this rule, returned the writ.

Mr. Serjeant Russell now shewed cause against that part of the rule which required the sheriff to pay costs, and relied on the case of *The King v. Jones* (1), where it was held, that a sheriff is not liable to an attachment for not returning a writ, if not called upon by a rule of court within six months after the expiration of his office, notwithstanding he was requested by the party to return it before the six months were expired: and the Court there said, that if this mode of desiring the return of a writ were to be allowed, it would be productive of numberless questions, as to what should be deemed a calling on the sheriff; and here, the moment the sheriff had notice of the rule, he caused the writ to be returned.

Mr. Serjeant Wilde, in support of his rule, submitted, that, as the plaintiff was compelled to apply to the Court, he was entitled to the costs of the motion; and the under-sheriff did not demand a fee until after the return of *nihil* had been indorsed upon the writ.

(1) 2 Term Rep. 1.

By the Court.—The greatest injustice is done by parties directing a return of *nihil* to be made to a writ of *scire facias*. The defendant always ought to have notice of such a writ. We cannot say, whether the sheriff attempted to exact a fee to which he was not entitled; and if the plaintiff had not directed him to return *nihil*, the Court might have directed him to pay the costs of the application; and we will take care in future, that if two *nihil*s be returned, it shall not operate as a *scire feci*, and we trust, that the commissioners will not only notice this practice in their report, but discountenance it altogether.

Rule discharged, without costs.

1828. }
Nov. 27. } DICAS v. JAY, GENT. ONE, &c.

Award—Where, and on what terms set aside.

In assumpsit against an attorney for negligence in the conduct of a suit, the declaration contained several special counts, and the usual money counts; the defendant paid money into court sufficient to cover the plaintiff's demand on the latter counts. The cause being referred under an order of Nisi Prius, the arbitrator found that the plaintiff had good cause of action for a certain sum, and directed a verdict to be entered for him for such sum:—Held, that the award was sufficiently certain. Although the objections to an award should be stated in the rule nisi to set it aside; yet if it be not done, the Court is not precluded from entering into any valid objection that may be raised to the award.

Mr. Serjeant Cross, on a former day in this term, obtained a rule *nisi*, that an award which had been made in this cause might be set aside, on an affidavit, which stated, that the plaintiff had commenced an action of special assumpsit against the defendant, as his attorney or agent, for negligence in the conduct of a suit; that the declaration contained eleven special counts, assigning several special breaches for neglect, and the usual money counts, and that the defendant had paid a sufficient sum into court to cover the plaintiff's demand on the latter counts;

that the cause was referred to arbitration, under an order of *Nisi Prius*, and that the arbitrator had found by his award, that the plaintiff had good cause of action against the defendant for £3*l.* 14*s.* 10*d.*, and directed a verdict to be entered for the plaintiff for that sum accordingly. Under these circumstances, it was submitted, that, as the arbitrator must have received evidence of the general causes of action referred to him, namely, the negligence of the defendant, as well as a pecuniary demand on him by the plaintiff, the arbitrator should have stated on which of the causes of action he had founded his award; and that he should have directed a verdict to be entered for the plaintiff on the counts to which the finding applied.

Mr. Serjeant Wilde and *Mr. Serjeant Jones* now shewed cause; and as the grounds on which it was sought to set aside the award were not mentioned in the rule *nisi*, it was objected, that the Court in the exercise of their discretion, and according to the late practice, would not entertain the application: at all events, the objection which has been raised, is no ground for setting aside the award, as it must be assumed that the arbitrator found that the plaintiff had a good cause of action on the whole declaration, and costs have been taxed accordingly.

Mr. Serjeant Cross and *Mr. Serjeant Russell*, in support of the rule, observed, that, although there was a rule in the Court of King's Bench, that when a rule to shew cause is obtained to set aside an award, the objections intended to be insisted upon at the time of making such rule absolute must be stated in the rule to shew cause; yet there is no such rule in this Court, nor does the practice require it—and even if it did, it would not preclude the Court from entertaining any valid objections that may be raised to the award, which in this case is void for uncertainty; for as the plaintiff charged the defendant with negligence, and also sought to recover a sum due to him for monies advanced during the progress of the cause, the arbitrator should have specified on which of those causes the plaintiff was entitled to recover; and in *Dillon v. Rimmer* (1), where the defendant, being indebted

(1) 1 Blag. 100; s. c. 7 B. Moore, 427.

to the plaintiffs on a bill of exchange, renewed the bill when it became due, by giving another at a longer date, together with a warrant of attorney to confess judgment, in case the second bill should not be paid when it became due, and agreed to pay the expenses of the warrant of attorney, which was drawn up by the plaintiffs' solicitor; and the first bill was not given up, but the plaintiffs retained it in their possession, and the second bill was paid when it became due, but not the expenses of the warrant of attorney, amounting to 2*l.* 12*s.* 6*d.*; whereupon, the plaintiffs sued the defendant in assumpsit, and declared on the first bill, adding the common money counts and a count on an account stated; and the jury found a verdict for the plaintiffs for 2*l.* 12*s.* 6*d.*, without specifying on what counts it should be entered up:—the Court, with a view to a suggestion to deprive the plaintiffs of costs, allowed the verdict to be entered on the money counts; on the ground that the plaintiffs had no right to sue on the first bill. But—

By the Court.—The rule in the King's Bench, that objections to an award must be stated in the rule *nisi* to set it aside, although it has been adopted in the Exchequer, has not been recognized by this Court, and the practice is not so inveterate as to controul or preclude us from hearing any valid objections to an award, although they be not stated at the time of the application for setting it aside. But the arbitrator in this case has precluded us from considering the objections that have been raised to this award; he has in effect directed a verdict to be entered for the plaintiff on the whole of the declaration; which is in terms a general verdict, and the judgment has been entered up accordingly.

Besides, the arbitrator has found that the plaintiff had good cause of action; that, therefore, is equivalent to his saying, that he had good cause of action on the whole declaration, and he directed a verdict to be entered for the sum for which the plaintiff had such cause of action; and even if he had mistaken the law, it would be no ground to set aside the award, unless the defect appeared upon the face of it.

Rule discharged.

VOL. VII. C.P.

1828. }
November. } HUGHES v. REEVES.

The defendant in the height of altercation having jostled the plaintiff, he went before a magistrate, and swore to an assault, on which the defendant was bound over to appear at the sessions, and the Grand Jury threw out the bill. The defendant afterwards indicted the plaintiff for perjury, and he was acquitted. The plaintiff then commenced an action against the defendant for a malicious prosecution. The jury having found a verdict for the plaintiff, on the ground that the defendant was actuated by malice in indicting the plaintiff, the Court refused to disturb the verdict.

This was an action on the case for a malicious prosecution. At the trial, before Mr. Justice Gaselee, at the last Assizes at Hertford, it appeared that the plaintiff and defendant were farmers; that, on the 30th of May 1827, they met in the turnpike road, that a dispute took place, and high words passed between them, but no blows were actually struck. The defendant, however, pushed against the plaintiff, and jostled him with his elbow. On the following morning, the plaintiff went before a magistrate, and made oath, that the defendant had violently assaulted and ill-treated him on the preceding day, on which the plaintiff was bound over to prosecute, and the defendant entered into recognizances to appear at the sessions. The Grand Jury having found no bill for the assault, the defendant afterwards indicted the plaintiff for perjury, and he having been acquitted, commenced the present action. The learned Judge was of opinion, that there was no probable cause for the indictment, and left it to the jury to say whether the defendant had been actuated by malice in preferring the indictment against the plaintiff. They found in the affirmative, and gave a verdict for the latter, damages 50*l.*

Mr. Serjeant Russell now applied for a rule *nisi*, that this verdict might be set aside and a new trial granted, on the ground that the defendant had probable cause to charge the plaintiff with perjury, as he believed that he had never assaulted him, and

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therefore that he had sworn falsely. Although the defendant might have jostled the plaintiff with his elbow, it would not justify the latter in swearing to a violent assault and ill-treatment by the defendant; and although it might amount to an assault in point of law, the true question is, whether a man of common understanding would so consider it. But,

The Court being of opinion, that, as the parties were in altercation at the time the defendant pushed the plaintiff with his elbow, it amounted to an assault, so as to warrant the latter in applying to a magistrate; and as they considered the prosecution for perjury to be, under the circumstances, uncalled for,—

Rule refused.

1828. }
Nov. 24. } VICKERS v. GALLIMORE.

Costs—on several issues in trespass—
Plaintiff where entitled to, although the defendant succeeds on one.

To an action of trespass for breaking down the plaintiff's wall, the defendant pleaded Not guilty, and seven special pleas, justifying under a right of way; the plaintiff joined issue on Not guilty, traversed the other pleas, and new assigned. The defendant joined issue on the traverses, and suffered judgment by default on the new assignment. The jury found a verdict for the plaintiff on the plea of Not guilty, with 1s. damages; and 40s. damages were assessed on the new assignment; the parties consenting that the question of costs should not be affected thereby. But a verdict was found for the defendant on one of the special pleas:—Held, that the plaintiff having been obliged to go down to trial on the plea of Not guilty, he was entitled to the general costs of the cause.

This was an action of trespass for breaking and entering the plaintiff's close, pulling down his wall, and converting the materials thereof to the defendant's own use.

Pleas—first, Not guilty; and then, seven special pleas, justifying the breaking down

the wall, under an alleged right of way. The fourth plea stated, that the defendant was seised of a dwelling-house, adjoining the *locus in quo* on which the wall was built; and that he and his servants had a foot-way from the front door of the said house into, over, and along the *locus in quo*, to fetch and carry water at all times of the year.

Replication—joining issue upon the plea of Not guilty, and denying the right of way; and new assignment for pulling down the wall, *extra viam*.

The defendant joined issue on the plea denying the right of way, and suffered judgment by default on the new assignment.

At the trial, before Mr. Justice Bayley, at the last Assizes at York, the jury found a verdict for the plaintiff, on the plea of Not guilty, with 1s. damages, and on all the other issues, except the fourth, on which they found a verdict for the defendant. The damages on the new assignment were, by consent, assessed at 40s., it being understood, that that sum should not affect the taxation of costs.

Mr. Serjeant Cross, on a former day, obtained a rule *nisi*, that the *postea* might be delivered over to the defendant or his attorney, on the ground, that, as the jury had found a verdict for the defendant on the fourth plea, which was a complete answer to the whole of the plaintiff's cause of action, he was entitled to the general costs.

Mr. Serjeant Wilde now shewed cause.—In *Taylor v. Nicholls* (1), to trespass *quare clausum fregit*, the defendant pleaded Not guilty, and a justification of a right of way; and the plaintiff, in replication, admitted the right of way, and new assigned *extra viam*; and the plaintiff, having obtained a verdict on the new assignment, with 1s. damages, was held entitled to full costs. So, if the plaintiff take issue on special pleas, and also new assign, and he succeeds on the new assignment, and the defendant on the special pleas, the plaintiff is still entitled to the costs of the action minus the costs of those pleas on which the defendant has obtained a verdict. That principle was esta-

(1) 3 Barn. & Ald. 443.

blished in *House v. the Commissioners of the Thames Navigation* (2), where Lord Chief Justice Dallas, in delivering the judgment of the Court, after time being taken to consider, said—"The cases of *Postan v. Stanway*, *Trotman v. Holder*, *Day v. Hanks*, *Griffiths v. Davies*, and other cases, seem to have established a rule, that where the plaintiff's demand is altogether denied by the defendant's pleas, and at the trial, the plaintiff obtains a verdict for part of his demand, and the defendant obtains a verdict as to the other part, the plaintiff is entitled to the costs of the issues found for him, which include the general costs of the trial, but do not include the costs of the issues found for the defendant; on which last-mentioned issues, however, the defendant is not entitled to claim any costs from the plaintiff:—but where the defendant suffers judgment by default as to part of the plaintiff's demand, and pleads only as to the other part, and the plaintiff takes issue on the pleas, and at the trial, all the issues are found for the defendant, he is entitled to the costs of the issues found for him; and the plaintiff is entitled only to the costs of the judgment by default." There, to an action of trespass, the defendant pleaded the general issue to the whole declaration, and several special pleas as to part, and the plaintiff new assigned. The defendant suffered judgment by default as to the new assignment, and the plaintiff was bound to go to trial to get rid of the general issue, which would otherwise have barred his whole action, and he could not by any other means have obtained damages on the judgment by default:—it was held, that the plaintiff was entitled to the general costs of the cause, including those of the trial, although the jury found a verdict for the defendant on one of the special pleas,—the costs of such issue being deducted, but not allowed to him on that issue. So, in *Longden v. Bourn* (3), in trespass for cutting down trees.—Plea, first, Not guilty; second, justifying, because the trees obstructed a highway. Replication joined issue on the plea of Not guilty, and denied the highway; and new assigned cutting down trees, *extra viam*. Defendant joined issue on the special plea,

and suffered judgment by default on the new assignment. The jury having found a verdict for the defendant, on the issues on the special pleas, and assessed damages on the new assignment,—it was held, that the plaintiff was entitled to full costs, except upon the issues on the special pleas; and that defendant was not entitled to costs even on those issues. In a note, by *Mr. Patterson* and *Mr. Williams*, to *Green v. Jones* (4), it is said, "As the slightest excess is sufficient to entitle the plaintiff to a verdict on a new assignment, it is very dangerous for the defendant to plead to the new assignment, and, in most cases, it is a prudent thing to let judgment go by default on the new assignment; for, though the doing so ensures the plaintiff his costs, as far as such judgment, yet, if he proceed to trial on the special plea, and fail, the defendant will be entitled to the general costs; for the plaintiff might have entered a *nol. pros.* as to that plea, and assessed his damages on the new assignment before the sheriff: *Thornton v. Williamson* (5). The defendant, however, must take care that a plea of Not guilty to the declaration be not left entire on the record, when judgment by default is suffered on the new assignment; for, if it be, it is held, that the plaintiff cannot assess his damages before the sheriff, but is compelled to go to trial on such plea of Not guilty, notwithstanding the judgment by default." So here, as the defendant has left the plea of Not guilty entire on the record, it was necessary for the plaintiff, in order to get rid of that plea, which would have otherwise barred his whole action, to go down to trial at the Assizes; and he could not by any other means have obtained damages or costs on the judgment by default.

Mr. Serjeant Cross, in support of the rule.—The case of *House v. the Commissioners of the Thames Navigation* is distinguishable from the present; as there, the declaration contained several counts, and the defendant pleaded Not guilty to the whole declaration, and a plea of licence to the first, second, and third counts, on which

(2) 6 B. Moore, 324.

(3) 1 Barn. & Cress. 278.

(4) 1 Wms. Saund. 5th edit. 300.

(5) 13 East, 191.

alone the defendant obtained a verdict; and Mr. Justice Park, who tried the cause, certified, that the trespass was wilful and malicious: and in *Longden v. Bourn*, the damages were assessed on the new assignment at 100*l.*; whilst here, they were assessed at 40*s.* only, by the consent of the parties, and by which the costs were not to be affected. But in *Otherv. Calvert* (6), where, in trespass for breaking and entering the plaintiff's closes, some issues were found for the plaintiff, and others for the defendant, and the latter obtained a verdict on an issue which went to the whole of the plaintiff's cause of action:—it was held, that he was entitled to the general costs of the cause; and the plaintiff to the costs of those issues only which were found for him, which extended only to the costs of the pleadings: and in *Harber v. Rand* (7), where, in an action of trespass for breaking and entering the plaintiff's close, the jury found a verdict for the defendant, on the issue taken on a common right of way pleaded, and found 1*s.* damages, *by consent*, on a new assignment, to which there was a judgment suffered by default, the defendant was held to be entitled to the general costs of the trial, and the plaintiff to be not entitled, on the taxation of costs, to have allowed to him the costs on the assessment of damages, as the costs of executing an inquiry, although he had a witness attending at the trial to prove notice given to the defendant, before action brought, not to trespass *extra viam*. The principle to be deduced from all these authorities is, that if the defendant obtain a verdict on a plea which goes to the whole of the plaintiff's cause of action, he is entitled to the general costs of the trial.

By the Court.—This case falls expressly within the principle laid down in *House v. the Thames Navigation*, and which is fortified by the subsequent decision of the Court of King's Bench, in *Longden v. Bourn*, where, in the absence of all authority, the Master informed the Court, that the practice uniformly was, to tax the costs as was there done. The pleadings in that case were

precisely similar to the present: and the defendant not having withdrawn the plea of the general issue, the plaintiff could not obtain an assessment of damages on the judgment by default, without going down to trial; and as he obtained a verdict on the general issue, and damages were also assessed for him on the judgment by default, he is entitled to the general costs of the cause, including those of the trial. The case of *Harber v. Rand*, to which we have been last referred, is materially distinguishable from the present, as there, the defendant did not plead the general issue; but went down to trial on a single plea, justifying a right of way.

Rule discharged.

1828. { *CARRUTHERS AND OTHERS v.*
Nov. 27. { *PAYNE, ASSIGNEE OF MAC-*
 { *LEAN, A BANKRUPT.*

New Bankrupt Act—Construction of.—
Trover, where maintainable.

The 44th section of the statute 6 G. 4. c. 16, by which, every action brought against any person, for anything done in pursuance of the act, must be commenced within three calendar months next after the fact committed, does not apply to the case of an assignee.

The plaintiff ordered a chariot of a coach-builder, and paid him for it, and when completed in other respects, he ordered a front seat to be added, and afterwards sent for it repeatedly, and the builder promised to deliver it.—The plaintiff being afterwards dissatisfied with it, directed it to be sold, and it remained on the builder's premises for that purpose, who afterwards became bankrupt, the front seat not having been added; and the chariot was seized by the assignee, and sold under the commission:—Held, that the plaintiff was entitled to recover in an action of trover brought against the assignee, as the chariot did not pass to him as being in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of the 72nd section of the statute 6 Geo. 4.

This was an action of trover for a chariot. At the trial, before the Lord Chief Justice, at Guildhall, at the Sittings after the last

(6) 8 B. Moore, 239.

(7) 9 Price, 336.

term, the bankrupt's son stated, that his father was a coach-maker; that the plaintiff came to him in September 1826, and ordered a chariot to be built to order, which was done, and its full amount paid for by the plaintiff; that, after the chariot had been completed in every other respect, the plaintiff desired to have a front seat added; but his father not having executed the order, the plaintiff frequently sent for the chariot, and the former promised to deliver it, but not having done so, and the plaintiff being dissatisfied with it, he directed it to be sold, and it was left on the premises of the coach-maker for that purpose. It was also proved, that, according to the practice of coach-makers, and the custom of the trade, carriages ordered for sale by persons to whom they belonged, stood on the premises of those who built them, for the purpose of exposing them for sale; and that the chariot in question was seized by the defendant, as assignee of Maclean, who had become bankrupt,—the front seat not having been added, and it being in the warehouse of the latter for the purpose of sale; and it was afterwards sold by the assignee under the commission. The seizure was made on the 27th of June 1827, and the present action was not commenced until Easter term 1828. Under these circumstances, it was objected for the defendant—first, that an action of trover could not be maintained, as the chariot was not finished or completed, so as to be in a state for delivery; secondly, that the chariot was in the possession, order, or disposition of the bankrupt, within the meaning of the 72nd section of the statute 6 Geo. 4. c. 16. (1);

(1) By which it is enacted, "that if any bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels, whereof he was reputed owner,* or whereof he had taken upon him the sale, alteration, or disposition as owner, the Commissioners shall have power to sell and dispose of the same for the benefit of the creditors under the commission: Provided, that nothing herein contained shall invalidate or affect any transfer or assignment of any vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of 4 Geo. 4. c. 41."

* 5 Dow. & Ry. 240.

and lastly, that under the 44th section of that statute, the action ought to have been commenced against the defendant as assignee, within three calendar months next after the seizure (2). His Lordship was strongly inclined to think, that there was no weight in either of the objections; but as he considered the last to embrace a most important point, he reserved it for the consideration of the Court; and the jury found a verdict for the plaintiff for 208*l.* the value of the chariot,—leave being reserved to the defendant to move to set it aside, and that a nonsuit might be entered, in case the Court should be of opinion, that either of the objections was well founded.

Mr. Serjeant Taddy, on a former day in this term, accordingly obtained a rule *nisi*, and, in support of the first objection, he relied on the case of *Mucklow v. Mangles* (3), where it was held, that if a person contracts with another for a chattel, which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him. And on that case being cited, in *Woods v. Russell* (4), its authority was not questioned, but a distinction drawn by the Court between the one and the other. Secondly, as the chariot was in the warehouse of the bankrupt for sale, at the time of his bank-

(2) "That every action brought against any person for anything done in pursuance of this act, shall be committed within *three calendar months* next after the fact committed; and the defendant or defendants in any such action may plead the general issue, and give this act and the special matter in evidence at the trial, and that the same was done by authority of this act; and if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, the jury shall find for the defendant or defendants; and if there be a verdict for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, or discontinue his or their action or suit after appearance thereto, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall recover double costs."

(3) 1 Taunt. 318.

(4) 5 Barn. & Ald. 942.

ruptcy, with the consent of the plaintiff, and as it was not distinguishable from the other stock of the bankrupt, it was in his order and disposition within the 72nd section of the statute. In *Thackthwaite v. Cock* (5), it was held, that a custom, that purchasers of hops, from hop-merchants, should leave them in the merchant's warehouse, for the purpose of resale, upon rent, undistinguished from the merchant's stock, was not such a custom of trade as would prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order and disposition: and in *Knowles v. Horsfall* (6), where A., a spirit-merchant, sold to B., a wine-merchant, several casks of brandy, some of which, at the time of the sale, were in A.'s own vaults, and others in the vaults of a regular warehouse-keeper:—it was agreed between the parties, that the brandies should remain where they were, until the vendee could conveniently remove them. Immediately after the sale, the vendee marked the several casks with his initials. It was notorious to the persons carrying on the wine trade, at the place where the parties resided, that this sale had taken place, but no notice of such sale had been given to the warehouse-keeper, with whom some of the casks were deposited. A. having become bankrupt while the brandies remained where they were originally deposited:—it was held, that the whole of them passed to his assignees, as goods in his possession, order, and disposition, by the consent and permission of the true owner, within the 21 Jac. 1. c. 19. s. 11; and *Thackthwaite v. Cock* was there referred to, and its authority recognized and adopted. Lastly, as the chariot was seized on the 27th of June 1827, and the present action was not commenced until Easter term 1828, it was too late, as the thing done in pursuance of the act, was the conversion of the plaintiff's chariot by the defendant as assignee, and which was completed by the seizure and sale under the commission.

Mr. Serjeant Wilde afterwards shewed cause.—There is no ground for the first ob-

jection, as the chariot was not only an existing carriage, and completed, but identified as such by the plaintiff, and paid for accordingly; and as it remained in the bankrupt's warehouse for the mere purpose of having a front seat added to it, it must be considered as if it were standing there for the purpose of repair, in case an accident had happened to it. In *Woods v. Russell*, a ship-builder contracted to build a ship for the defendant, who was to pay for her by instalments, as the building proceeded; and, the builder having registered her in the defendant's name, and some of the instalments were paid:—it was held, that the property in the ship was not in the possession of the builder as reputed owner, or of his assignees, although he had become bankrupt before she was finished or launched. And the Court there said, that the bankrupt could not be injured, by having the general property in the ship considered as vested in the defendant, because he would still have a lien upon the possession for the residuum of the price; and they thought, the legal effect of signing a certificate for the purpose of having the ship registered, was, from the time the registry was complete, to vest the general property in the defendant. That case is far stronger than the present, as there the vessel was neither completed, nor was her full price paid. Here, however, if the chariot had been burnt, it is quite clear that the plaintiff must have borne the loss, as he had not only purchased but paid for it.—With respect to the second objection, as it appeared that the plaintiff had frequently sent for the chariot, expecting the alteration to have been made, and that the bankrupt had promised to deliver it, it was not in his possession, order, or disposition, by the consent and permission of the true owner, within the meaning of the 72nd section of the statute. With respect to the last objection, as to the 44th section; it must be taken in connection with the 41st, the 42nd, and the 43rd, which apply to commissioners only; so the 44th was only intended to apply to actions brought against commissioners, or other persons acting as public officers in the discharge of a public duty.

Mr. Serjeant Taddy in support of his rule.—First, it is an established principle,

(5) 3 Taunt. 487.

(6) 5 Barn. & Ald. 134.

that trover will not lie for a chattel, which is not deliverable, or in a state to be delivered, according to the terms of the contract; and here the plaintiff had contracted to have a chariot with a front seat, and as it was not finished, as contemplated by him, he had no right to demand it, nor was the builder bound to deliver it; besides, the seat was not put on at the time the chariot was seized under the commission; and in order to enable the plaintiff to maintain trover for it, it must be capable of being delivered according to the express terms of the contract. Although, in *Woods v. Russell*, the ship was not completed, yet she was registered in the name of the defendant, on which the judgment of the Court mainly turned.

Secondly, the 72nd section of the statute 6 Geo. 4. was introduced in lieu of the 21st James 1. c. 19. s. 11; and the builder of the chariot must be considered as the true owner, and it was in his order and disposition as such, until it was completed according to the contract; and here there was no delivery to the purchaser, nor was the chariot ever out of the possession of the person who built it.

Lastly, the question whether the 44th section does or does not apply to the case of assignees, is one of considerable importance. It contains the most general words, and cannot be confined to commissioners or other public officers; for it enacts, that "*every action brought against any person, for anything done in pursuance of the act, shall be commenced within three calendar months next after the fact committed.*" The statute 39 G. 3. c. 69. s. 184. directs that "the West India Dock Company shall sue in the name of their treasurer, in all actions by or on behalf of the company; and he shall be sued for the recovery of any claim or demand upon, or of any damages occasioned by the company;" and sec. 185, after extending the protection of the statute 24 Geo. 2. c. 44, for privileging Justices of the Peace in actions brought against them as such, to the Lord Mayor and Aldermen of London, acting under the act, beyond the limits of the city,—directs, that "no action shall be commenced against any person or persons for anything done in pursuance or under colour of the act, until

after fourteen days notice in writing, or after tender of amends," &c.; and it was held, in the case of *Wallace v. Smith* (7), that the treasurer of the company is a person within the last clause; and being sued for an act done by the company, which induced an injury to the plaintiffs, was entitled to such notice before an action brought; and that such notice was necessary in actions for trespass or tort, and this was an action of the latter description. And in *Gaby v. the Wills Canal Company* (8), where a canal company were empowered to supply the canal with water from all streams whatsoever within the distance of two thousand yards, except as thereafter mentioned, with a proviso, that nothing should extend to authorize them to take water from certain specified streams, between the 10th of June and 10th of September, except only, that if one of those streams should overflow, the same might be taken into the canal so long as such overflowing should continue, and that all actions should be brought for any thing done in pursuance of the act, or in the execution of the powers and authorities before given, within six calendar months after the fact committed; or in case of a continuation of damages, within three calendar months after the committing such damages should have ceased,—it was held, that the taking, and continuing to take the water by the company from specified streams during the prohibited times, might, nevertheless, be so far a thing done in execution of the powers and authorities given them by the act, as to entitle the company to the protection of the act, as to the time of commencing the action against them. And Lord Ellenborough there said, "It appears to me, that the clauses of the act were meant to relate to persons entrusted with, and in the fair execution of its powers, though they may have done that which the act does not permit, to this extent, that any question touching those powers should be brought to a speedy decision, and no farther." And here the assignee must be considered as a person acting in the execution of the powers of the act, and the defendant was consequently not liable to be sued after the

(7) 5 East, 115.

(8) 3 Maa. & Selw. 580.

expiration of three months from the time of the seizure of the chariot.

By the Court.—Three objections have been raised to this verdict—first, that trover was not maintainable, as the chariot was in an unfinished state :—if it had rested as it was, immediately after the bargain, there might be some ground for the objection, and the case might fall within that of *Mucklow v. Mangles*; and Mr. Justice Heath there said, “A tradesman often finishes goods, which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods sold.” If a similar case should again occur, that of *Mucklow v. Mangles* might deserve consideration, but this case is altogether distinguishable from it; for, after the contract, the plaintiff dealt with the chariot as if it were his own, and it was treated as finished, both by him and the builder. The plaintiff merely desired an additional seat to be put to it, and he was not only disposed to take it, but desired several times that it should be sent to him, and he paid the full price for it, and as such payment was made for a specific thing then in existence, it became the property of the plaintiff, and he had a right to take it away whenever he pleased; and although the plaintiff left the chariot on the premises to be sold, it was not in the possession of the builder as the reputed owner, and therefore this case falls within the principle established in *Woods v. Russell*, as the bankrupt himself treated it as the chariot of the plaintiff. This, therefore, disposes of the second objection; for the plaintiff was the true owner from the time of the purchase and payment of the money. With respect to the third objection, as it raises a question of considerable importance, we will take time to consider.

Cur. adv. vult.

Lord Chief Justice Best now said, that himself, Mr. Justice Park, and Mr. Justice Burrough entertained no doubt whatever as to the construction to be put on the statute 6 Geo. 4. c. 16; and that although Mr.

Justice Gaselee still entertained some doubt, he was not prepared to say that he altogether differed from the rest of the Court.

The question is, whether, in an action of trover against assignees of a bankrupt, it is necessary that the action must be brought within three months from the time of the alleged conversion, or the act committed, which gave occasion to the plaintiff's right of action, under the 44th section of the statute. When the point was first raised at Nisi Prius, I felt, that if the objection were well founded, it would be most alarming to persons engaged in commerce in this country; because, if persons sending their goods from all parts of the world to this country, either to be deposited or transferred, or for the purpose of home consumption, should be deprived of all redress;—in case their agents became bankrupts, and they had not been able to make a claim, or commence proceedings within three months;—it would be most mischievous to say, that their right to the property would cease to exist; it would be highly detrimental to the mercantile world at large; and I therefore thought, at the trial, that this case did not fall within the meaning or operation of the 44th section of the statute; and, having attentively looked at the act since, I entertain the same opinion, and think that that section does not apply to cases of this description. By that section, it is enacted, “that every action brought against any person for any thing done in pursuance of the act, shall be commenced within three calendar months next after the fact committed; and the defendant or defendants in any such action, may plead the general issue, and give the act and the special matter in evidence at the trial, and that the same was done by authority of the act; and, if it shall appear so to have been done, or that such action was commenced after the time before limited for bringing the same, the jury shall find for the defendant or defendants; and if there be a verdict for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, or discontinue his or their action or suit after appearance thereto, or if, upon demurrer, judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall recover double costs.” It

seems extraordinary, that the legislature should intend to impose on a party double costs, for failing to establish an ordinary claim against the assignee of a bankrupt, when, if they had not succeeded, they would have been liable to no more than the usual charges.

Why should the assignees of a bankrupt's estate be placed in a situation different from any other person in the country, who is liable only to single costs? For a man who claims a right to property generally, if he fail to establish such right, can only be called on to pay his single costs. Is then the property of a bankrupt to be placed in a different situation, merely because a party chooses to assert a right against his assignees? It is impossible that the legislature could have intended it; but the words of the act are certainly very general, as they embrace every action brought against any person for anything done in pursuance of the act. Now, the words, "anything done," can scarcely apply to any acts done by the assignees, as they have only the disposal of the bankrupt's property, after they become possessed of it. The act of taking possession is by virtue of a warrant under the commissioners, and with which the assignees have nothing to do;—so far from it, they are total strangers to such act, and are only to dispose of the bankrupt's property after it is delivered to them; therefore, the acts done by the assignees cannot be considered as a thing done in pursuance of the act, but done by them in right of property of the bankrupt, put into their possession, with the acquiring of which they have nothing whatever to do.

We therefore think, that the statute was only intended to apply to such acts as are done for the purpose of taking possession of the property, and which must be confined merely to acts done by the commissioners, who are public officers, or messengers acting under them. It is highly proper that such persons should have a degree of protection which others have not. Persons acting only in a public capacity have no funds to answer the expense of proceedings brought against them, and it is therefore fit that they should have double costs, in order that they may be completely indemnified against the consequences of that which they

have done; and if they have acted properly, it is very easy to understand why they should have double costs. But it is impossible to extend such a protection to the assignees of a bankrupt, who have a right to funds to be derived out of his estate, and who may indemnify themselves against the consequences of their own acts, as they stand in the same situation as the bankrupt himself.

The Court of King's Bench, in the case of *Wallace v. Smith*, seem to have decided expressly in the same way as we should have done in case we had not been referred to it. But that case is distinguishable from the present. By the statute on which that decision turned, the West India Dock Company could only sue and be sued in the name of their treasurer, and if the protection given by the 185th section did not apply to the company, it applied to no one. There were no commissioners or superior persons who were to direct what was to be done, or who were to be the actors in the first instance, and no action could be maintained against the company, but only against the person whom they had appointed as their agent, and who represented them as such: and Lord Ellenborough, in concluding the judgment of the Court, there said, "The plaintiffs themselves, have, by their own action and declaration, so far put a construction upon the thing done, as having been done under colour of the act, that they have made the *treasurer* defendant in a case, where the only grievance complained of is imputed to the *company*." In that case too, the words of the act were very different from the present, as there it was enacted, "that no action should be commenced against any person, for anything done in pursuance or under colour of the act." Here, the latter words are omitted; and in the late case of *Sellick v. Drake* (8), which was an action against the treasurer of the West India Dock Company, I decided in the same way as the Court of King's Bench had done, on the authority of *Wallace v. Smith*, and the Court afterwards confirmed my decision. But both these cases are distinguishable, as there the treasurer was the sole actor, and he alone was to answer for the acts of the

company. Here, however, the assignees do not act at all, except in the disposition of the bankrupt's property, and they then act in right of such property which has been previously acquired, and not by virtue of any powers conferred on them by law, or for any special purposes under the act. As

therefore it appears to us, that this case does not fall within the words or meaning of the statute, and that if we were to extend it as contended for by the defendant, it would be productive of great inconvenience and evil, this rule must be

Discharged.

END OF MICHAELMAS TERM, 1878.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

IN

HILARY TERM, 10 GEO. IV.

1829. } FERGUSON V. CRISTALL AND
Jan. 24. } ANOTHER.

which the ship was chartered, were not completed at the time of the sale.

Trover.—Reversionary Interest.

Messrs. F. & Co. chartered the plaintiff's ship for three voyages, and covenanted by the charter-party to pay for the provisions and seamen's wages. On the return of the vessel from the first voyage, the charterers removed the anchors and cables to the defendants' wharf, the vessel then lying alongside it. A few days afterwards, the ship was arrested under an Admiralty warrant by the holder of a bottomry bond, given by the captain of the charterers for the outfit of the ship and provisions. The ship was afterwards sold under a decree of the Admiralty, but the cables and anchors were not included in the catalogue, and the plaintiff demanded them before the sale, but not afterwards:—Held, that he was not entitled to recover the cables and anchors in an action of trover against the defendants, although the jury found that they had been removed by the charterers, to avoid the process of the Admiralty Court, and not in the due course of business:—Held also, that the removal was no injury to the plaintiff's reversionary interest, as the three voyages, for

This was an action on the case. The declaration alleged, that the plaintiff was the owner of the ship *Mailand*, together with the furniture, anchors, cables, and tackle, thereto belonging; that he had let her to hire on freight to Messrs. Fraser, Living & Co., to perform three voyages, on certain terms expressed in a charter-party of affreightment, and by which the ship was chartered to them; but that the defendants, intending to injure the plaintiff's reversionary interest in the ship, and its tackle and furniture, on the 8th of December in the year 1827, took the anchors, cables, and other tackle of the ship out of the custody of Fraser, Living & Co., and converted them to their use; to this was added a count in trover, for the anchors and cables.

At the trial, before the Lord Chief Justice, at Guildhall, the Sittings after the last term, it appeared, that, in 1825, Messrs. Fraser, Living & Co. had chartered the plaintiff's ship for three voyages, and that, by the terms of the charter-party, the charterers were to pay for the provisions, and also the seamen's wages; that the ship

went on the first voyage to Calcutta; and that, immediately on her return home, the charterers removed the anchors and cables from the ship to the defendants' wharf, (the vessel then lying alongside of it,) they being wharfingers and ship-breakers; that, a few days afterwards, the ship was arrested under an Admiralty warrant, by the holder of a bottomry bond, given by the captain of the charterers for the outfit of the ship, as well as for provisions: and afterwards other warrants were lodged against the ship for seamen's wages; and on the 21st of March, the Admiralty issued a decree, that the ship should be sold, and the proceeds returned to that court for the benefit of those who might be entitled to them; that the ship was sold on the 1st of April, that the proceeds amounted to 6200*l.*, and that the cables and anchors were not included in the inventory or catalogue; and that, on the 28th of March preceding, the plaintiff demanded them from the defendants, who refused to deliver them up. Under these circumstances, it was contended for the plaintiff, that the anchors and cables had been improperly or fraudulently removed from the ship by the defendants, in order to avoid the Admiralty process; and that, if they had remained on board, and been sold with the ship, a surplus would have remained after satisfying the demands the Admiralty might have upon her; or that, at all events, the right to them revested in the plaintiff, so as to enable him to maintain trover.—For the defendants, it was submitted that, the charterers had a right to remove the anchors and cables from the ship to the wharf, and that the plaintiff's reversionary interest in the ship was not injured, as neither the anchors nor cables were sold: and that as he could have no right to the possession of them, till the completion of the three voyages, according to the terms of the charter-party, he had not such a right of possession as would enable him to maintain trover. The case of *Pain v. Whittaker* (1) was relied on, where goods lent on hire had been wrongfully taken in execution by the sheriff; and it was held, that the owner could not maintain trover against the sheriff, he not having the right of possession as well as the

right of property at the time of the sale.—His Lordship left it to the jury to say, whether the anchors and cables had been removed from the vessel fraudulently, in order to avoid the process of the Court of Admiralty, and not in the due course of business, and whether the plaintiff had sustained any actual injury thereby: the jury found that the anchors and cables were removed in order to avoid the proceedings instituted in the Admiralty Court, and that the plaintiff had been placed in a worse situation by their removal; as, if they had been seized and sold with the ship, he would have been entitled to them, after satisfying the demands of the Admiralty for the sum due for seamen's wages and other charges; and a verdict was found for the plaintiff for 240*l.* being the value of the anchors and cables.

Mr. Serjeant Wilde, in the last term, obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered, and submitted, that as the anchors and cables had neither been seized, nor sold under the Admiralty process, there could have been no injury to the plaintiff's reversionary interest; for, in the case of *Jackson v. Pesked* (2), it was held, that if the plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state the injury to be of such a permanent nature, as to be necessarily injurious to his reversion.

Mr. Serjeant Merewether now shewed cause.—If the anchors and cables had not been removed, but had been sold under the process of the Admiralty Court, the plaintiff would have had the benefit of such sale; and his reversionary interest, expectant on the completion of the three voyages, as specified in the charter-party, was injured to the extent of the sum which he would have been entitled to receive, in case the anchors and cables had been sold, with the ship. At all events, the plaintiff was entitled to recover on the count in trover; for, in the late case of *Loeschman v. Machin* (3), the hirer of a piano, who sent it to an auctioneer to be

(1) 1 Ryan & Moody, 99.

(2) 1 Man. & Sel. 234.

(3) 2 Starkie, 311.

sold, was held to be guilty of a conversion; and so was the auctioneer, who refused to deliver it up, unless the expenses incurred were first paid. Lord Chief Justice Abbott there said, "The general rule is, that if a man buy goods, or take them on pledge, and they turn out to be the property of another, the owner has a right to take them out of the hands of the purchaser; except, indeed, in the case of a sale in market overt. With that exception, it is incumbent on the purchaser to see that the vendee has a good title. And, I am of opinion, that if goods be let on hire, although the person who hires them has the possession of them, for the special purpose for which they were lent; yet, if he send them to an auctioneer to be sold, he is guilty of a conversion of the goods; and that, if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money which he claims, he is also guilty of a conversion." Although in *Gordon v. Harper* (4), it was held, that where goods leased as furniture with a house, had been wrongfully taken in execution by the sheriff, the landlord could not maintain trover against the sheriff pending the lease, because, to maintain such an action, he must have the right of possession as well as the right of property at the time; Yet that case is distinguishable, as there the tenant was in the actual occupation of the house, and had an interest in the furniture, and the defendant was a sheriff, who took the goods under a writ.

Mr. Serjeant Wilde, in support of the rule, was stopped—

By the Court.—We are of opinion, that the rule for entering a nonsuit must be made absolute, on the ground that, under the circumstances proved at the trial, the action of trover cannot be maintained, according to the principle laid down in *Gordon v. Harper*; and although in *Pain v. Whittaker*, it was said, that that case had been overruled at Nisi Prius; yet Lord Chief Justice Abbott said, "I am not aware that that case has been overruled; it is cited in the last edition of *Selwyn's Nisi Prius*, without any notice that it has been overruled. I think myself bound by that case, the principle on which it pro-

ceeds is, that the plaintiff has neither the possession or right of possession of the goods at the time they are taken; and therefore the allegation, that 'he was lawfully possessed,' is not supported by the evidence." So here, the plaintiff had neither the possession nor right of possession of the anchors and cables at the time they were taken, as he had let them to the charterers for three voyages, one of which only was completed. But, it has been said, that when they were removed from the ship to the defendants' wharf by Fraser, Living & Co., and the jury found that they had not been removed in the ordinary course, the right of possession reverted to the plaintiff, on the authority of *Loeschman v. Machin*. This might have been so, if the removal had been wrongful, as in that case; there the piano-forte was merely let on hire, and, therefore, the lender had no right to send it to be sold, and by so doing, he became a wrong-doer, and was clearly guilty of a conversion. Here, however, although the anchors and cables were not removed in the ordinary course of business, yet, as they were taken to the defendants' wharf, it is but fair to presume, that they were to remain there for the use of the ship, and that they might be replaced on the commencement of the second voyage. If the plaintiff had demanded them after the ship had been sold, perhaps an action of trover might have been maintained, but he demanded them previously to the sale, when Messrs. Fraser, Living & Co. might have required them for the use of the ship. Until the sale, therefore, as the defendants had received them from the charterers, who had a right to the possession of them, although their conduct might have been improper, yet it would be too much to say that the defendants were wrong-doers in detaining the articles left with them by the charterers, who had a controul over them at the time; and when the demand was made, they did not know that the plaintiff was the owner, or that he had a special property in them. With respect to the alleged injury to the plaintiff's reversionary interest in the ship and her tackle, if the anchors and cables removed had remained on the defendants' wharf, without being injured, and in the same situation in which they were left, it would not be such an injury to the plaintiff as to entitle him

(4) 7 Term Rep. 9.

to maintain this action; and, for anything that appeared at the trial, they might have been in as good a state as when they were placed on the wharf. The plaintiff has still a right to demand them, and if the defendants have damaged or disposed of them, the plaintiff has a right to bring another action, in which he may recover all that he has lost, particularly as Fraser, Living & Co. cannot commence the second voyage, the ship having been sold under the decree of the Admiralty Court.

Rule absolute for a nonsuit.

1829. } ELIZABETH SOULBY V. PICKFORD
Jan. 24. } AND OTHERS.

Special Contract—By what pleading and opening of his case, plaintiff will be deprived of availing himself of.

The plaintiff declared for work and labour generally, and proved the value of the work done, and rested her claim on the general quantum meruit count. The defendant proved, that the plaintiff agreed to do the work on certain specified terms. The plaintiff then proposed to shew, that the work was done under another contract consistent with the original demand:—Held, that she could not do so, as she should have relied upon such contract in the first instance.

This was an action of assumpsit for work and labour. The first count of the declaration stated, that the defendants were indebted to the plaintiff in the sum of 50*l.* as well for work and labour, care and diligence, before that time done, performed, and bestowed by the plaintiff and her servants for the defendants, as for divers materials, and necessary things before that time, found and provided by the plaintiff for the defendants, and used in and about the said work and labour. The second count was on a *quantum meruit*; to these were added, counts, for money lent, money paid, money had and received, and an account stated.

Plea—as to all the promises in the declaration mentioned, except as to the sum of 11*l.* 11*s.*, parcel of the said sums of money in the declaration mentioned, *non assumpsit*; and as to the sum of 11*l.* 11*s.*,

parcel &c., that, after the making the said promises in the declaration mentioned, as to that sum, and before the commencement of this suit, to wit, on &c., the defendants were ready and willing, and tendered, and offered to pay the plaintiff the said sum of 11*l.* 11*s.*, parcel, &c.; but that the plaintiff refused to accept it, and that the defendants had always hitherto, and still were ready to pay the said sum, and they brought the same into court here, ready to be paid to the plaintiff, if she would accept the same. The plaintiff, in her replication, admitted the tender as in the plea alleged, and took the sum tendered out of court, and therefore, as to that sum, that the plaintiff was satisfied.

At the trial, before Mr. Justice Park, at Guildhall, at the adjourned Sittings after the last term, it appeared that the plaintiff was a printer, and, by the particulars of her demand, she sought to recover 28*l.* 13*s.* for printing and ruling certain rate-books for the defendants, who were common carriers by water, having wharfs at the City Basin, in the City Road, and various receiving houses in the city, for the conveyance of goods by canal. The plaintiff proved the work done, and that it exceeded in value the amount sought to be recovered by her in the particulars of demand; and she rested her case on the second count of the declaration.

For the defendants, three witnesses proved that there was an agreement between the plaintiff and defendants, that she was to print the books for 10*l.* if they did not exceed seventy-eight pages, and ten quires of paper; that, if they exceeded that, they were to be paid for accordingly; and that the plaintiff consented to print the books on those terms, as the defendants were in the habit of using a great number of them in the course of their business.

The plaintiff then proposed to call witnesses, to shew that the books extended to one hundred and sixty-eight pages, and to set up another contract between her and the defendants. But the learned Judge refused to allow such witnesses to be examined to set up such contract, or contradict what the defendants' witnesses had sworn; as the plaintiff should have relied on her contract in the first instance, and not opened their case, on the second count of the de-

claration, by which she sought to recover for the value of the work done. The jury found a verdict for the defendants.

Mr. Serjeant Jones now applied for a rule nisi, that this verdict might be set aside and a new trial granted, and submitted, that the plaintiff was entitled to call witnesses to contradict those of the defendants, as they could not set up a contract in direct violation of the work proved to have been done by the plaintiff, and that she was entitled to recover, according to the value of such work; and although the defendants might shew a contract, the plaintiff ought not to be excluded from shewing that the work was not done under it. In *Penson v. Lee* (1), in an action on a policy of insurance, with a count for money had and received, where the defendant paid no money into court, but established as a defence, that the risk never commenced, the plaintiff was entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening his case. And *Mr. Justice Chambre* there said, "In practice great indulgence is allowed to the counsel in cases of this sort. Some inconvenience may perhaps arise from not stating the whole case to the jury in the opening, but justice is often better obtained by not holding the counsel too strictly to the statement in the opening." And in *Murray v. Butler* (2), *Lord Kenyon* thought, "that although the plaintiff's counsel might have set out with only claiming the balance of a settled account, yet, if he failed in proving it, he should not be precluded from going into evidence, to charge the defendant with money had and received to the plaintiff's use: so here, as the plaintiff sought to recover the value of the work done, although the defendants set up a contract between them, she in reply might shew, that she was not to be limited by such contract, but that she was to be paid according to a certain rate, which would correspond with the demand she originally sought to recover.

By the Court.—This was an action for work and labour, and in which the plaintiff's counsel opened the case, as if there were no contract between her and the defendants, and that she was entitled to recover accord-

ing to the value of the work done. Now, if there were a contract in writing, it would be inconsistent with justice if the usual course were not pursued, and it was incumbent on the plaintiff to have proved the contract in the outset. The defendants proved by three witnesses that the plaintiff undertook to print the books for 10*l.*, if they did not exceed a certain number of pages, and a given quantity of paper. The plaintiff's counsel might have cross-examined those witnesses, but instead of that he proposed to abandon the original ground of action, and present another, founded on a different contract from that proved for the defendants. This ought not to be allowed, either on the principles of convenience or justice; for the plaintiff must have known that there was such a contract in existence, and that it was inconsistent with the general counts of the declaration, on which she sought to recover. The case of *Penson v. Lee* is distinguishable from the present, the plaintiff being entitled to a verdict for the return of premium, as a consequence of law, when the defence set up imports that the risk has never commenced, although the right to a return of premium be not mentioned during the progress of the cause. So, in *Murray v. Butler*, the counsel, in his opening for the plaintiff, said that the action was brought to recover the balance of a settled account, which the defendant had admitted; and although he failed in charging the defendant with a specific balance, he was not thereby precluded from charging him with money belonging to the plaintiff, which had come to his hands, because the proof of the latter was not inconsistent with the former demand. In pleading, the plaintiff in his replication is bound to confine himself to the allegations in his declaration, and if he do not, it is a departure. And here, when the plaintiff sought to set up a contract which she concealed in the first instance, she could not be entitled to recover on her original demand; and as she declared on the common counts, she could not afterwards set up a special contract.

Rule refused.

(1) 2 Bos. & Pul. 330.

(2) 3 Esp. Rep. 105.

1829. }
Jan. 24. } ABBEY V. LILL.

Evidence. — *Post-mark on letter, how proved.*

A date of a letter varying from the post-mark, it was objected, that the post-mark could only be proved to be genuine by calling the person from the post-office who impressed the letter; on which the Judge offered to stay the cause till the arrival of such clerk. But the jury found that the post-mark was genuine without his being called. The Court refused to disturb the verdict.

Costs—*Plaintiff, where deprived of, under Court of Conscience Act.*

In an action to recover 3l. 6s., remaining due to the plaintiff, on a bill of exchange for 8l. 6s., which bill was given to secure the balance of an account between the parties originally amounting to more than 100l.:—Held, that the defendant was not entitled to enter a suggestion to deprive the plaintiff of his costs, under the Boston Act, 47 Geo. 3. sess. 2. cap. 1, the 15th section ousting the commissioners of their jurisdiction to determine any cause for any debt, being the balance of an account or demand originally exceeding 5l.

This was an action on a bill of exchange for 8l. 6s., dated on the 15th of September 1824, and drawn by the defendant on one Williams, payable to the defendant's order, and indorsed by him to the plaintiff.

At the trial, before the Lord Chief Justice, at Guildhall, at the Sittings after the last term, it appeared, that the bill in question was given to the plaintiff to secure the balance of an account due to him from the defendant, and which originally amounted to between 300l. and 400l., but that the only sum remaining due to the plaintiff upon the bill at the time of the action was 3l. 6s. The declaration contained a count on the bill, the usual money counts, and a count upon an account stated; and the plaintiff proved, that the transactions between him and the defendant, as to the account, were transacted in London; and, in order to prove his demand, he gave notice to the defendant to produce a letter, dated on the 5th of January 1825, in which he said, that he had a sum to receive in town shortly,

and that he would appropriate part of it to the payment of the sum remaining due on the bill. On the production of the letter, it was dated on the 5th of January 1824; but, in order to shew, that it was, in fact, written in 1825, the plaintiff relied on the post-mark, which was, January 7th 1825. It was then objected for the defendant, that the post-mark itself was not clear; and that, at all events, it could not be proved to be genuine, unless a clerk, or some one from the post-office could be called, to prove that it was so. On this, the Lord Chief Justice said, that he would send for a clerk from the post-office. But the jury were satisfied that the post-mark was genuine, and accordingly found a verdict for the plaintiff.

Mr. Serjeant Wilde, in the last term, obtained a rule nisi, that this verdict might be set aside, and a new trial granted, or that a suggestion might be entered under the Boston Court of Conscience Act, 47 Geo. 3. sess. 2. c. 1. sec. 18. (1) And in support

(1) By which, it is enacted, "that it shall and may be lawful to and for any person or persons (whether such person or persons shall reside within the jurisdiction of the said court or not) having any debt or debts upon any contract or agreement, or upon the balance of account, or for or in respect of wages, rent, or arrears of rent, or otherwise howsoever, (save and except as herein mentioned,) not exceeding the value of 5l., due or owing, or belonging to him, her, or them, in his, her, or their own right, or in the right of any other person or persons, or as executor, administrator, guardian, assignee, or trustee to any person or persons, or due and owing to him as clerk, treasurer, or other officer to any body corporate, or as clerk, treasurer, or other officer to any commissioners or trustees, or to any club or friendly society duly associated and constituted by the statutes in that case made and provided, or in any other manner whatsoever, which the said commissioners are by this act enabled to judge and determine, and not expressly prohibited by this act, by or from any other person or persons whomsoever, inhabiting, residing, or being within any or either of the said several sokes, wapentakes, parishes, and places herein mentioned, (except the parishes of *Hagnaby, Welton-in-the-Marsh, Steeping-Magna, and Firby*, and the wapentake of *Wraggess* aforesaid,) or keeping or using any house, coach-house, wharf, quay, lodging, shop, shed, stall, or stand, or using or frequenting any market or markets there, or seeking a livelihood, or in any way working, trading, or dealing within the same, to

of a new trial, he submitted, that the post-mark had been improperly received in evidence; and he relied on the case of *Fletcher v. Bradyll* (2), where it was held, that,

apply to any clerk or deputy clerk of the said court, &c., who shall immediately make out and deliver to one of the serjeants of the said court for the time being, a summons in writing, under the hand of the said clerk, directed to such debtor or debtors, expressing the sum demanded of him, her, or them, and stating the particulars of such demand or cause of action, together with the name of the party demanding the same, and requiring him, her, or them, to appear at a certain time and place to be mentioned in such summons, before the commissioners of the said court, to answer such demands, and such serjeant shall forthwith serve or cause such summons to be served on such debtor or debtors, either personally, or by leaving the same with his, her, or their servant, or other person belonging to him, her, or them, or at the dwelling-house, warehouse, wharf, quay, lodging, place of abode, shop, shed, stall, stand, or other place of dealing, trading, or working of such debtor or debtors, being within the jurisdiction of the said court: and by the 41st section, it is enacted, "that, if any action or suit for any debt recoverable by virtue of this act in the said court of requests, shall be commenced in any other court whatsoever, or elsewhere than in the said court of requests, then and in every such case, the plaintiff or plaintiffs in such action or suit shall not, by reason of a verdict for him, her, or them, otherwise have or be entitled to any costs whatsoever; and if the verdict shall be given for the defendant or defendants in such action or suit, and the Judge or Judges before whom the same shall be tried or heard shall think fit to certify, that such debt ought to have been recovered in the said court of requests, then and in every such case, such defendant or defendants shall have costs, and such remedy for recovering the same, as any defendant or defendants may have for his, her, or their costs in any cases by law; and no action or suit which shall be commenced or prosecuted in the said court of requests, in pursuance of this act, nor any proceedings therein, shall or may be removed into any superior court, except by the plaintiff or plaintiffs, in cases where the defendant or defendants shall have removed himself, herself, or themselves, or his, her, or their effects, out of the jurisdiction of the said court, after a decree or judgment, by *certiorari*, or any other writ or process whatsoever, but every such decree and judgment shall be final and conclusive between the parties to all intents and purposes whatsoever."

Vol. VII. C.P.

although the date in the post-mark upon a letter is *prima facie* evidence that the letter existed at the time of that date, yet that it should be proved that the letter bears the genuine post-mark used by the office whose stamp it purports to bear at the time; and as to the entering the suggestion, under the Court of Conscience Act, to deprive the plaintiff of his costs, an affidavit was produced, which stated, that the defendant resided within the jurisdiction of the Boston court, and that the debt was recoverable there within the 41st section of the statute.

Mr. Serjeant Jones now shewed cause.—The defendant's letter, which was produced in evidence, referred to the payment of the bill in question; and as it was written at the commencement of the year 1825, viz. on the 5th of January, the defendant mistook the date of the year, as is frequently done at the beginning of a new year; but that mistake was corrected by the post-mark, which the jury pronounced to be genuine, and which, as mercantile men, they were warranted in doing. Although, in the case of *The King v. Watson* (3), in an indictment for a libel, the post-mark of a particular place within the county in which the venue was laid, upon a letter containing the libel, was held by Lord Ellenborough not to be sufficient evidence of a publication there by the defendant, as the post-mark might have been forged; yet that was a criminal case, which required more strict proof: but, in *The King v. Johnson* (4), where the publisher of a public register, having received an anonymous letter, tendering certain political information on *Irish* affairs, and requiring to know to whom the letters should be directed, to which an answer was returned in the register; after which he received two letters in the same hand-writing, directed as mentioned, and having the *Irish* post-mark on the envelopes, which two letters were proved to be in the hand-writing of the defendant, the previous letter having been destroyed; this was held a sufficient ground for the Court to have the letters read. In *Fletcher v. Bradyll*, the post-mistress was examined, in order to

(2) 3 Stark. Rep. 64.

(3) 1 Campb. 215.

(4) 7 East, 65.

prove that the letter bore the stamp used by the post-office at *Wakefield* at the time of the date; but, unless the letter was stamped by herself, she could only know that it was genuine by its general appearance, a fact of which persons who are in the frequent habit of receiving letters by the post must have an equal knowledge. Here, however, every difficulty was obviated, as the Lord Chief Justice offered to send for a clerk from the post-office, if the jury should have any doubt as to the authenticity or genuineness of the post-mark. In the case of *Arcangelo v. Thompson* (5), where a policy, dated in 1797, was effected on goods, by a ship warranted Danish, at and from Trieste to Hamburg, and was in the name of S. Levi, who was averred by the declaration to have been the person residing in Great Britain, who received the order for and effected such policy; and, to prove the order, the plaintiff's counsel gave in evidence a letter from him, dated at *Trieste*, addressed to *Levy*, in *London*, and having upon it the *English* ship-letter post-mark, with the date of 1797; and it was held, by Lord Ellenborough, after argument, that this was sufficient evidence of the receipt of the order by *Levy*, before the effecting of the policy. There is no ground to enter a suggestion under the *Boston Act*; for, although the 14th section enacts, that it shall be lawful for the commissioners, and they are thereby enabled to decide and determine all disputes and differences between party and party, for any sum not exceeding 5*l.*, in all actions or causes of debt, whether such debt shall arise on any promissory note, or inland bill of exchange, and in all cases of *assumpsit* and *insimul computassent*; yet, by the 15th section, it is provided and enacted, that nothing in that act contained shall extend, or be construed to extend, so as to enable the said commissioners to determine the right or title to any debt, for any sum, being the balance of an account or demand originally exceeding 5*l.* Although, by the 18th section, debtors within the jurisdiction of the court may be summoned before the commissioners, who may make such orders between the parties as they may think fit; yet the commissioners have only jurisdiction to determine in cases not expressly

prohibited by the act; and the 15th section expressly enacts, that the commissioners shall not determine any cause for any debt being the balance of an account originally exceeding 5*l.* In *M'Collam v. Carr*, (6), the Court would not allow a suggestion to be entered for double costs, where the original debt, being above 40*s.*, had, by a balance of accounts, been reduced below that sum; and Lord Chief Justice Eyre said—"The action arises on a contract, part of which has been satisfied by money on account. Is there any case, where, the ultimate balance of an account only being under 40*s.*, the Court has allowed a suggestion? I should pause upon such a case; since the most intricate point in accounts between merchant and merchant might, by this means, come to be decided before a county court. It seems to me, that the original demand ought to be under 40*s.*"

Mr. Serjeant Wilde, in support of his rule.—If the genuineness of the post-mark had been proved, it would have been sufficient; but there was no evidence of that fact; and the Court cannot take notice of an official seal, or even the signature of an official person, without proof of its being his hand-writing. In *Arcangelo v. Thompson*, the letter containing the order corresponded with the date of the policy; and there were two modes of shewing that it came from *Trieste*, viz. by proving the hand-writing of the party, and that he was resident there,—or that it bore the regular ship-letter post-mark. Here, however, the date in the letter did not correspond with the post-mark; and the jury could not presume it to be genuine, unless it were proved to be so by the clerk who stamped it, who is a public officer appointed for the purpose. In *Fletcher v. Bradyll*, the letter, which was dated from *Wakefield*, bore the stamp used by the post-office there: and the post-mistress from the post-office at Lancaster was called to prove that the letter bore the stamp used by the post-office at *Wakefield* at the time of the date. No distinction can be drawn between civil and criminal cases in this respect. In *The King v. Watson*, Lord Ellenborough held, that the post-mark on a letter was not sufficient proof of the publication of a libel contained therein, as the post-

(5) 2 Campb. 680.

(6) 1 Bos. & Pul. 223.

mark might have been forged. But the defendant is entitled to have a suggestion entered on the roll, under the Boston Act. The 14th section expressly provides, that the commissioners may decide and determine all disputes and differences between party and party, for any sum not exceeding 5*l.*, in all actions of debt, whether it shall arise on any promissory note, or inland bill of exchange; and, although the 16th section provides, that the commissioners are not to determine any cause for a debt being the balance of an account or demand originally exceeding 5*l.*, yet it is vague and uncertain: and the 17th section (7) obviates every difficulty, as it directs, that actions shall not be split for the purpose of bringing them

(7) By which it is enacted, "that nothing therein contained shall extend, or be construed to extend, so as to enable any plaintiff to split or divide any cause or action for the recovery of any debt, when the whole sum that shall appear to be due and owing shall exceed the sum of 5*l.*, in order that the same may be made the ground of two or more causes or actions, for the purpose of bringing such causes or actions within the jurisdiction of the said court; and, in case it shall appear to the said commissioners, that any plaintiff shall have so split or divided his or her cause or action as aforesaid, then, and in every such case, the said commissioners shall, and they are hereby required to dismiss, with costs, every such cause or action so split and divided; but such dismissal shall not hinder or prevent such plaintiff from proceeding for the recovery of his or her debt in any of his Majesty's courts of record at Westminster, or in such other manner as he or she may lawfully proceed: provided always, that, in case any plaintiff who shall have so split or divided such his or her cause or action, shall be willing to accept such sum of money as the said court is, in and by this act, enabled to adjudge, decree, and pronounce, in full of the whole of his or her demand in such cause or action so split or divided, then, and in every such case, the said commissioners shall and may adjudge, decree, and pronounce (on such plaintiff proving his or her cause or case to the satisfaction of the said commissioners) such sum to the plaintiff, not exceeding the sum of 5*l.*, as to the said commissioners shall seem just and reasonable; and such sum shall, in the judgment or decree to be pronounced by the said commissioners, be declared to be, and shall be, in full discharge of all demands from the defendant to the plaintiff in such cause or case so split and divided."

before the court below; but that the Court may decree, if the plaintiff has done so, that he may receive such a sum, as to the commissioners shall seem just, in full of all demands.

By the Court.—Taking all the facts of this case together, we are of opinion, that the verdict ought not to be disturbed. The jury were satisfied that the post-mark on the letter in question was the regular and genuine post-mark. The question, then, is, whether it was necessary to call the person who stamped the letter. If there were a doubt, whether the mark were genuine or not, who ought to be called to prove that it was so? Not the post-master of another office; for he could have no more knowledge of the mark than a person residing at a distance from it. In *Fletcher v. Bradyll*, Mr. Justice Holroyd was of opinion, that the post-mark upon the letter was *prima facie* evidence of the existence of the letter at the time of the date. But the post-mistress at Lancaster could not positively prove that the letter bore the stamp used by the post-office at *Wakefield*, as she could have no more knowledge of that mark than another person;—and the jury might have been in the habit of seeing the *Wakefield* post-mark as well as the person who kept the office at *Lancaster*. Where, therefore, the genuineness of the post-mark is doubtful, the person who made it is the best, if not the only witness to prove it; and the knowledge of other persons on the subject is like the knowledge of the world at large. But the doctrine contended for ought not to prevail, as it would be necessary to call witnesses from post-offices in the most distant parts of the country, namely, from *Cornwall*, or *Northumberland*, to London, to prove the post-mark of every letter the date of which may be disputed. But it is not necessary to decide this point under the circumstances of this case, as the Lord Chief Justice would have stopped the cause in its progress until a clerk from the post-office had arrived; but as the counsel for the defendant did not require it to be done, he must be taken to have waived his objection; and the jury entertained no doubt whatever but that the post-mark was genuine. With respect to entering the suggestion under the Boston Act, if that sta-

tute had been confined to cases where the plaintiff and defendant both resided at Boston, we should have been inclined to give it full effect; but it is a great hardship, when the plaintiff's cause of action originally exceeded 5*l.*, that he should be deprived of an appeal to the courts; and we ought not to make Boston a place of refuge for debtors who may fly from their creditors in London, where the debt was contracted. By the terms of the act, although a defendant might live in London, yet, if he had a book-stall or shed at Boston, or even frequented the markets there, he must be sued there. But, in this case, the plaintiff was not bound to sue the defendant at Boston; for, the 15th section takes the case completely out of the operation of the statute, as the bill of exchange on which the action was brought was given to secure the balance of an account originally exceeding 5*l.* The 14th section applies only to bills of exchange not exceeding 5*l.*; and the 15th section provides expressly for a case of this description. This rule, therefore, must be

Discharged.

1829. } DE CRESPIGNY, BART., v. THE
Feb. 3. } HONOURABLE LONG WELLESLEY.

Libel—Justification of Republication.

It is no justification for the publishing of a libel, that, at the time of publishing it, the name of the person who communicated it to the defendant was also published.

This was an action for a libel, published, at the instance of the defendant, in the *Sunday Times* newspaper.

The declaration contained several counts. The ninth,—after the usual inducements of good name, fame, &c.—set out the following libel, with innuendoes.

"Mr. Editor,—You will oblige me by inserting in your paper next Sunday, the annexed memorandum, containing such extracts from those parts of Mr. De C.'s letter of last Sunday as I think require from me any reply; with my answers to each extract.

Your obedient servant,
W. L. Wellesley.

"*Extract.*—'It was the very day when I gave Mr. W. the affidavit in favour of his parental rights, that Mr. W. acquainted me with the story of my father (the plaintiff) and Miss E. L.'

"*Answer.*—'The day before Mr. De C. swore and made his affidavit, I saw him at my solicitor's office. After that day, I held no communication with him until the 17th of August 1827. His affidavit is dated the 19th of January 1827. On the 18th of January 1827, I mentioned to Mr. De C. [in the presence of my solicitor] (1) the story, as he terms it, of his father (the plaintiff) and Miss E. L. His reply was—What! do you know that too?'

"*Extract.*—'But I did not imagine the accusation to be an impossible one.'

"*Answer.*—'Mr. De C., on the 18th of January 1827, the day before he made his affidavit, acquainted me that he was come to town on a most distressing business, viz. a criminal intercourse having been carried on between his brother H. and a near relation, to whose children he was trustee and guardian, and as atrocious as that of his father (the plaintiff) and Miss E. L. (I will not mention the name of the lady, as I respect her family). He desired my advice, &c., to regulate his conduct, and he informed me, that Mr. H. De C. was companion of my sons, who, as he told me, was teaching my sons to execrate my name; as well as the fact of this young man's infamy being well known to the Misses L. A general conversation then ensued of the profligacy of his family, and of his father's (the plaintiff's) intimacy with Miss E. L.

"*Extract.*—'From which letter, Mr. W. grounds his belief of my father's (the plaintiff's) knowledge of the charge against him, and by which letter, my father (the plaintiff) enjoined me never to mention the names of Mr. W. or the Misses L. again.'

"*Answer.*—'This letter could not, by possibility, have reference to Mr. De C.'s affidavit, inasmuch as that affidavit does not apply to the Misses L. The letter contained the expression [of confession] "that so distressing a subject harrowed up his soul;" an expression in no way applicable to his affidavit, and submitted to me nearly a year after, in the month of December

(1) The words within brackets were alterations or interlineations by Mr. W.

1827. The subjoined minutes, together with Colonel P.'s letter, demonstrate the estimation in which the Rev. Gentleman held his father's (the plaintiff's) confession some *hours* before he called upon me to give him satisfaction.'

"The following minutes of conversations I had with the Rev. H. C. De C. were shewn to Captain De B., in the presence of Colonel F., Mr. S. L., M.P., and Colonel P., on Monday, the 16th of June 1828.

"Copy of minutes referred to, dated 5th of December 1827.

"Mr. De C. told Mr. W. he was wrong, in supposing he had spoken to his father, Sir W. De C. (the plaintiff). He had written a letter to him, and he had his answer, in which he admitted the fact; and that his wife, Mrs. De C., and himself, had the letter; that all the family knew of the *circumstance* [intimacy], that his poor brother William (who is dead) was extremely jealous of his father, and had been turned out of his house; *that his mother had told him, that a child had been born, and it had been her conclusion* (2) [my mother was dead], that his brother H. had spoken to his father (the plaintiff) upon the subject, who replied, that he (the plaintiff) entreated, that so distressing a subject might not be again mentioned to him. The Rev. Mr. De C. told Mr. W. he thought he was quite right not to allow his children to remain with people so infamously connected."

"Copy of a communication made by the Rev. H. C. De C. to the Honourable W. L. W., upon his return from the Miss L.'s, dated the 7th of December 1827.

"Mr. De C. informed Mr. W. he had seen the Misses L. yesterday, at their house in B., and that he had directly accused Miss E. L. with her intrigue, upon which she got so confused that she left the room in the greatest embarrassment; that he then stated to Miss D. L. that Miss E. L. had intrigued with his father (the plaintiff), and that Mr. W. intended to publish the whole story, unless they immediately gave up his children. Miss L. replied, she had nothing to do with her sister's intrigue, and she must be responsible for her own con-

(2) These words had previously been erased by Mr. De Crespigny.

duct; but that no one would believe what Mr. W. said. Mr. De C. assured Mr. W., that she never denied her sister's having committed the fault. Mr. De C. told her his father had [confessed it] not denied it, to which she made no reply, *but put herself into a violent passion*, and said she did not wish to see any of Mr. W.'s friends within her house. Notwithstanding such declaration, she invited Mr. De C. to dine with them, and to sleep at B. House."

"The above minutes were shewn to Captain De B., and, on the part of the Rev. H. C. De C., he admitted them *twice* to be correct, with the exception of one word, viz. that, for 'confessed it,' the words 'not denied it,' ought to be substituted.

"The above minutes, having been revised and corrected by Mr. De C., afford such adequate proof of his cousin's guilt, as to have made it an act of *courtesy* on my part to have given him the satisfaction he required."

The defendant pleaded, first—Not guilty. Secondly, as to the publishing, and causing and procuring to be published, the following parts of the said supposed libel of and concerning the plaintiff, in the said ninth count of the said declaration mentioned, with the intent and meaning therein mentioned, to wit, [here part of the libel, as set out in the declaration, was repeated, beginning with—"Mr. De C. told Mr. W. he was wrong, in supposing," &c., and ending with "the words *not denied* it ought to be substituted,"] the defendant said, *actionem non*, &c., because, he said, that, before the publishing of the said parts of the said supposed libel, in the said ninth count of the said declaration mentioned, to wit, on the 5th of December 1827, at, &c. [here part of the libel was again set out, beginning as above, and ending with—"to remain with people so infamously connected."] And the defendant further said, that the said H. C. De C. afterwards, and before publishing the said libel in the introductory part of this plea mentioned, to wit, on &c., at &c., further told the defendant [here the repetition of the libel was continued, down to—"and to sleep at B. House."] And the defendant further said, that, before the publishing the said parts of the said supposed libel in the introductory part of this

plea mentioned, to wit, on &c., at &c., certain minutes and statements, in writing, were made, as and for correct minutes and statements of the said communications and representations so made by the said H. C. De C. as aforesaid, and the same were then and there revised and corrected, by the said H. C. De C.; and, when so revised and corrected, contained, and still do contain, the words and matter following [here the minutes were again set out, as before, together with the communication alleged to have been made by the Rev. H. C. De C. to the defendant.] And the defendant further said, that, afterwards, and before the publishing of the said parts of the said supposed libel in the said ninth count mentioned, to wit, on &c., at &c., the said H. C. De C. caused the said minutes and statements, so revised and corrected by him as aforesaid, and containing the words and matter last aforesaid, to be delivered to him, the said defendant, as and for a true and correct statement of the conversations he the said H. C. De C. had had with the defendant as aforesaid; and the said minutes were heretofore, to wit, on &c., at &c., shewn to the said Captain De B., in the presence of the said Colonel F., Mr. S. L., and Colonel P. And the said defendant further said, that, at the time of publishing the said several parts of the said supposed libel in the said ninth count and in the introductory part of this plea mentioned, as therein mentioned, he, the defendant, also published, that the same had been so published to him by the same H. C. De C. therein mentioned as aforesaid; wherefore, he, the defendant, at the said several times when &c. in the said ninth count mentioned, did publish of and concerning the said plaintiff, the said several parts of the said supposed libel in that count mentioned, as he lawfully might, for the cause aforesaid; and this &c., wherefore &c.

There were two other pleas of justification, in rather more general terms.

The fourth was a justification—"as to the composing and publishing so much of the said supposed libel in the said declaration mentioned, as imputes to the plaintiff that he had intrigued with Miss E. L., and that he had not denied it; and also, as to the composing and publishing the words and figures following in the said ninth, eleventh, twelfth,

thirteenth, and fourteenth counts of the said declaration mentioned, and therein supposed to have been composed and published by the said defendant of and concerning the said plaintiff, to wit," &c. &c.

The plaintiff added a *similiter* to the first plea, and demurred specially to the second, assigning for causes, "that the defendant hath not, in or by that plea, stated or alleged, that such parts as in the introductory part of that plea are mentioned of the said libel therein also mentioned, were true, or that any of them was true, or that the said plaintiff had been, or was guilty of the offence or misconduct by the said last-mentioned parts of the said last-mentioned libel charged against and imputed to him; and also, for that the defendant, as a justification for the publication of the said last-mentioned parts of the said last-mentioned libel, hath, in and by his said second plea, stated and alleged, that the said H. C. De C. told him, the defendant, and assured him of such matters and things as in the said second plea are in that behalf respectively stated and alleged; and that the said minutes and statements in the said second-plea mentioned were made as in the said second plea is mentioned, and that the same were revised and corrected by the said H. C. De C., and by him caused to be delivered to the defendant, as in the said second plea is mentioned; and that the said minutes had been shewn to such persons as in the said second plea are in that behalf mentioned; and that the said defendant, at the time of publishing the said last-mentioned parts of the said last-mentioned libel, had also published that the same had been so published to him by the said H. C. De C., as in the said second plea is in that behalf mentioned; whereas such statements and allegations of the defendant as last aforesaid, if true and correct, in fact, are not, nor is any of them, any justification or excuse for the publication of the said last-mentioned parts of the said last-mentioned libel by the defendant, or any answer to this action, in respect of such publication; and also for that the defendant hath, in and by the said second plea, attempted and endeavoured to justify the publication of the said last-mentioned libel, upon the ground and because, that the said H. C. De C. had told the defendant, and assured him of such matters and things as

in the said second plea are in that behalf respectively stated and alleged, and that the said H. C. De C. had caused to be delivered to the defendant such minutes and statements as in the said second plea are in that behalf mentioned, and that the said defendant, at the time of publishing the said last-mentioned parts of the said last-mentioned libel, had also published that the same had been so published to him by the said H. C. De C.; as in the said second plea is in that behalf mentioned; whereas the previous publication of the said last-mentioned parts of the said last-mentioned libel by the said H. C. De C. to the defendant, whether in speaking or in writing, was not nor is any justification for the publication thereof by the defendant; and also for that the said second plea does not state or set forth any justification or excuse for the publication by the defendant of the said last-mentioned parts of the said last-mentioned libel; and also for that the said second plea is, in other respects, uncertain, insufficient, and informal," &c.

Mr. Serjeant Wilde, for the plaintiff.—The pleas in this case present for the judgment of the Court a doctrine, which, although it has often been broached, and has passed without the disapprobation of any Judge, still has not been expressly approved, viz. that, if a person who publishes a libel discloses, at the time, the name of a first publisher, that will be a justification of the second publication. That doctrine is perfectly fallacious. *Lord Northampton's case* (3), which seems to favour it, was the case of an information in the Star Chamber, by the Attorney-General, for slanderous words spoken of the Earl. The doctrine of that case will be found to apply to the statutes 3 Edw. 1. c. 34, "None shall report slanderous news whereby discord may arise;" and 2 Ric. 2. c. 5, "The penalty for telling slanderous lies of the great men of the realm." At the trial of that cause, "Gooderick (one of the defendants) being examined, confessed the words spoken; but, to extenuate his offence, said, that he was not the first founder; and he vouched the said Sir Richard Cox (another defendant), who confessed that he related to Gooderick the matter concerning the book

of the Earl, and his letter to Bellarmine, but not the words concerning the Cinque Ports; and that the Archbishop of Canterbury had informed the King of it, to the intent that the Earl of Northampton should not be Lord Treasurer; and, to extenuate his offence, he vouched the said Vernon (another defendant), who, upon examination, confessed that which Richard Cox had published, but that he was not the first author; but he cited the said Lake (another defendant), who did likewise confess what Vernon had said, but that he heard it from Serjeant Nicols (another defendant), who, being examined, confessed it, and withal that one Speaket related it to him, and that he had heard it from one James Ingram; and James Ingram (another defendant), being examined, confessed the words concerning the said book of the Earl, and of the letter to Bellarmine, and that, in the month of October, he heard the said words of two English fugitives at Lyons, and never did publish them until the death of the Earl of Salisbury, Treasurer, who died in May last: and all the said defendants confessed at the bar all that with which they were charged; and so it was resolved, that the publishing of false rumours, either concerning the King, or the high grandees of the realm, was in some cases punished by the common law; but of this were divers opinions." In the fourth resolution in that case, "It was resolved, that, if A. say to B., 'Did you hear that C. is guilty of treason?' &c., this is tantamount to a scandalous publication; and, in a private action for slander of a common person, if J. S. publish that he hath heard J. N. say, that J. G. was a traitor or thief, in an action on the case, if the truth be such, he may justify." That supposed resolution was not called for or warranted by the case. All the defendants, however, were subsequently punished. It must be remembered, that this part of *Coke* is posthumous, published on the nominal authority of the certificate of Mr. Justice Balstrode. There is only one case that can be found, which at all recognizes such a doctrine; and that is clearly bad law, and has been since often overruled. In *Crawford v. Middleton* (4), which was an action on the case for words, "for that the defendant,

carrying one Woodford to Lincoln gaol for felony, when he came to Lincoln, falsely and maliciously said of the plaintiff, that he met one upon the road, who said to him, 'What! are you carrying Woodford to gaol? I shall follow you shortly, and bring with me Heneage Crawford (the plaintiff), for stealing a mare.' A motion was made in arrest of judgment, because it was not averred in the declaration, that, in truth, nobody met the defendant upon the road, and so spoke to him. It was held, by Mr. Justice Twisden, "That, it being laid to be falsely and maliciously, and so found, it is a proof that nobody said so to him. But Foster, Wyndham, and Mallett were against this; and held the declaration ill, for want of the averment—that, in truth, nobody said so to him; for that had been traversable: and the defendant might have pleaded thereto, that another so told him; and so put the plaintiff to bring the action against such other:" and the plaintiff took nothing. The rule of law was held not to apply there, the name of the original slanderer not being given. In *Lewis v. Walter* (5), an action for the words "J. P. did say that John Lewis (the plaintiff) did say, that there is no Prince in England," the Court were satisfied that an action would lie for "the report of a speech of another, who never spake such words." It is evident, from the case in *Coke*, that the case in *Levinz* was an action on the statute of Richard. In *Gardiner v. Atwater* (6), the words were, "Thou art a sheep-stealing rogue, and farmer Parker told me so." On motion, in arrest of judgment, Lord Chief Justice Twisden said, "It has been said, that, although the Court shall be of opinion, that the words, 'thou art a sheep-stealing rogue,' are actionable; yet the plaintiff ought not to have judgment, because it is not averred, that farmer Parker did not tell the defendant so; but we are of opinion, that this averment is by no means necessary, it being quite immaterial whether farmer Parker did, or did not, tell the defendant so." In *Woolnoth v. Meadows* (7), the Court held an averment negating the speaking to be unnecessary. In *Davis v. Lewis* (8), the

words set out in the first count of the declaration were, "I heard you (the plaintiff) were run away;" and in the second, "A person has been here to tell me that you were run away." The defendant pleaded, in justification, that, before the speaking of the words, he, the defendant, had heard and been told by one D. Morris, that the plaintiff was a runaway, for which reason he spoke the words. To this, there was a general demurrer, because the author of the slander was, for the first time, named in the plea. Lord Kenyon said, "Whether this be considered on the authorities, or on the reason of the case, the justification cannot be supported. *The Earl of Northampton's case* is precisely in point: if a person say, that such a particular man (naming him) told him certain slander, and that man did, in fact, tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken; but, if he assert the slander generally, without adding who told it him, it is actionable. Then, it is said, that it is sufficient to repel such action, to disclose, by the defendant's plea, the person who told him the slander: but that is clearly no justification, after putting the plaintiff to the expense of bringing the action. The plaintiff can only impute the slander to the man who utters it, if the latter do not mention the person from whom he heard it. The justice of the case also falls in with the decisions on this subject. It is just, that, when a person repeats any slander against another, he should at the same time declare from whom he heard it, in order that the party injured may sue the author of the slander. I am, therefore, clearly of opinion, both on authority and the reason of the case, that the plaintiff is entitled to our judgment."

These are the principal authorities that seem to support *Lord Northampton's case*. Those that follow impugn it. In *Maitland v. Goldney*, (9) it was held, that written slander cannot be justified by oral slander. Lord Ellenborough there said, (10) "In order to justify the parties reviving the slander, by naming the original author of it, they must so disclose the matter, as to give the plaintiff a certain cause of action against the party named: now, here, they only state,

(5) Cro. Jac. 406.

(6) Bay. 265.

(7) 5 East, 463.

(8) 7 Term Rep. 17.

(9) 2 East, 426.

(10) Id. 437.

that the other uttered such words, *or to that effect*; and if the defendants, when called as witnesses to support the action against Guy, could only prove that he uttered words *to the effect* of those set forth, that would not be sufficient." And Mr. Justice Le Blanc said, "Without entering into the consideration of *Lord Northampton's case*, the rule is clearly established, that, in order to justify the repetition of slander, the defendant must state the name of the person by whom it was first uttered, so as to furnish the plaintiff with a cause of action against him. But this rule would be nugatory, if the defendant were merely to name the person, without also stating what he had uttered, with such precision as to enable the plaintiff to maintain his action against him. For this purpose, the defendant must state the very words themselves used, and not merely the effect of them." Both these learned Judges expressly declined entering on a consideration of *Lord Northampton's case*. In *Lewis v. Walter* (11), the plaintiff declared on a libel published in a newspaper. The defendant pleaded, that the libel was originally published in the *H. Journal*, by J. S.; and that, at the time of the publication by the defendant, it was stated in such publication, that it was copied from that newspaper; and that, pursuant to the statute 38 Geo. 3. c. 78, J. S. had made an affidavit that he was the publisher of the *H. Journal*, and still remained so at the time of publication of the libel. It was held, on demurrer, that this plea was bad, inasmuch as the publication by the defendant did not specify the name of J. S. as the original publisher of the libel, but only named the journal; and a doubt was thrown out, that, even if J. S. had been named by the defendant, when the latter published the libel, such publication, being of written slander, could not have been justified; and also that the repetition of oral slander, accompanied by a declaration of the name of the original author, cannot be justified, unless such repetition be made without malice, and upon a fair and justifiable occasion. Lord Chief Justice Abbott there said, "I am not prepared to assent to the proposition, that such a defence is applicable to cases of written slander, for that

would give great facility to such publications, which ought, if possible, to be prevented. Nor am I prepared to say, that this is matter of defence upon a plea in bar; for it cannot be an answer to the charge of malice, which may exist in the case of repetition as well as invention; and if we held it to be a bar, that question would be altogether withdrawn from the consideration of the jury. But if, instead of pleading it, it be given in evidence under the general issue, then the question whether it were repeated maliciously and from a design to slander, or not, would be left to the jury, who might then find their verdict upon the whole case." Mr. Justice Bayley said—"As to the first three special pleas, it does not appear that the defendant, at the time of publishing the libel, stated the name of the original author of the slander. It has been argued, however, that he did state sufficient to enable the plaintiff to find that out. But I am of opinion, that that is not sufficient. An individual slandered, is not to be put to the expense and trouble of ascertaining, by inquiry, who the original libeller is. If a defendant is to be allowed to rely upon a plea of this nature (supposing that there can be such a plea in bar, which may be doubtful), it can only be in a case where he has originally given up the author by name, and where the name is sufficient to identify the party. If that be not sufficient for that purpose, I think there ought to be an additional description." Mr. Justice Holroyd said—"In actions for slander, the truth may be pleaded as a legal defence. But that plea admits the malice, and, notwithstanding that, justifies the publication. It is, however, a very different thing to justify the repetition of slander, by alleging, as a bar, that some other person originally was the author of it. For it does not follow, that, because a defendant may justify slander if true, he may also justify the repetition of slanderous words which are not true, if he has heard them from another person. Unless we go the length of holding that such a repetition would be justifiable, even when spoken from a bad motive, we cannot support the present pleas. All the cases on this subject arise out of the case of *The Earl of Northampton*. They do not, however, confirm that decision, but all go on the ground of being distinguishable

(11) 4 Barn. & Ald. 603.

from it. The book in which that case is found, is not so accurate as the rest of the reports of Lord Coke, not having been published by him in his lifetime, but from his notes afterwards. The point there stated is in very general terms, and, as it seems to me, may be questionable. It is put thus:— 'In a private action for slander of a common person, if J. S. publish that he hath heard J. W. say, that J. G. was a traitor or thief, in an action on the case, if the truth be such, he may justify.' It is observable that Lord Coke does not say that it is lawful to repeat slander in all cases, and at all times, but only that the party may justify under certain circumstances. If, for instance, he repeats, not with intention to defame, that may be so; but it is not laid down, that a defendant may maliciously do so; and unless it goes that length, it will not support the present pleas. But, I think it is questionable whether, as stated, it must not have some qualification added; for, in the third resolution, cases are put in which it is held to be unlawful to repeat slander. Taking, therefore, the whole together, it seems to me, that the proper way is, to take the passage with this qualification,—that, if J. S. publish, *on a fair and justifiable occasion*, that he hath heard J. W. say, that J. G. was a traitor or thief, he may, if the truth be such, justify. It must not, therefore, be taken as a general rule, even in oral slander, that the malicious repetition of it may be justified, if the name of the author be given up at the time. If it could, it would be productive of mischief; for the person slandered could bring no action against the malicious repeater; and, if he did discover who the person was, and brought an action against him, he might only be able to support it by the testimony of the very person who had so maliciously repeated it. Perhaps, therefore, the rule has been laid down too largely in *The Earl of Northampton's case*, and ought to be qualified, by confining it to cases where there is a fair and just reason for the repetition of the slander." And Mr. Justice Best said, "The attempt here is, to justify this libel, under the authority of *The Earl of Northampton's case*. If this precise point had been there determined, I should doubt the propriety of that decision; and I think that the reasons given by my Brother Holroyd

shew that the fourth resolution in that case requires some qualification. For it cannot be justifiable to repeat slander under all circumstances; but only in those cases where it is done, not for the purpose of merely circulating the slander, but for some fair and reasonable cause. And, besides, I am not prepared to say that that case extends to written slander, in which the repetition, by producing a greater dispersion, increases in a tenfold degree the injury to the individual. I think, therefore, that the first three special pleas are bad." Thus *Lord Northampton's case* was fully considered, and its propriety somewhat questioned by the Court. In *M'Gregor v. Thwaites and another* (12), an action for publishing in a newspaper, a libel purporting to be a report of a proceeding which had taken place before a magistrate, respecting a matter in which he was merely asked for advice, and not called upon to act in his magisterial capacity, it was held, that it was no justification that the defendants, when they published the libel, mentioned the names of the persons who stated the matter of the libel to the magistrate, because, as to part of the slanderous matter, no action would lie against the party who stated it to the magistrate; it had become actionable merely from its having been published by the defendants in print, and therefore, by stating the names of the persons from whom they heard it, they gave the plaintiff no right of action against them. It was also held, that, in order to justify the repeating of slander, it was necessary that the party repeating it should, at the time of repeating it, offer himself as a witness to prove the uttering of the slander; and therefore, that, as the defendants did not state that they themselves heard the slander uttered by A. B. and C. D., but merely stated that A. B. and C. D. had said so and so, the plea was bad. The case of *Flint v. Pike* (13) tends to shew the rule established by the Court of King's Bench to be, that, to justify the republication of slanderous matter, it must be shewn to have been published for the purpose of giving the public information which it was fit and proper for them to receive, and that it was warranted by the cir-

(12) 3 B. & C. 24; s. c. 2 Law Journ. K.B. 277.

(13) 4 B. & C. 473; s. c. 3 Law Journ. K.B. 272.

cumstances. It therefore clearly appears, that the defendant is not entitled, on authority, to support his pleas. No part of them negatives malice. If to give an action against the original slanderer, be one of the qualifications required by the rule laid down in *Lord Northampton's case*, that rule has not been complied with here. These pleas do not give a remedy over; they merely state the delivery of minutes by Mr. H. C. De Crespigny. There is a material distinction between delivery and publication. It is not averred that Mr. De Crespigny was the first author. On the contrary, it sufficiently appears, on the face of the libel, that he first had the libellous matter from the defendant. The very circumstance of the evidence of the slanderer being not receivable to fix the slander on another person, for the purpose of saving himself from its consequences, shews that the justification is bad. *Lord Northampton's case* applies only to cases of oral slander; it has never been attempted to be extended to written slander. It is only argumentatively stated in the pleas that Mr. H. C. De Crespigny first published the slander. The fourth plea professes to justify in a most extraordinary manner the libels contained in several counts; it is a sweeping justification, "as to so much as it might hereafter be found to cover." The rule is, that a party who justifies slander, must justify the express words: here, the express words are not even set out.

Mr. Serjeant Spankie, contra.—Pleas of justification may either shew the truth of the slander, or a reasonable occasion of publishing it. It is not necessary, in such a plea, to negative both falsehood and malice. The cases of *Lewis v. Walter* and *Dame Morrison v. Cade* (14), shew, that, had the slander been spoken by the parties by whom it had been said to have been uttered, the repetition might have been justified. The cases of *Cramford v. Middleton*, and *Gardiner v. Atwater* do not come within the principle of *Lord Northampton's case*. In the report of *Dame Morrison's case* in *Rolle* (15), it is said, that, "if a man say that J. S. said that J. D. said a certain scandalous thing (which is actionable), although it be false, yet, if J. S. said that J. D. said

those words, no action lies against him, for he has named his author, viz. J. S., and therefore, if the party seek a remedy, he must sue J. S." In *Davis v. Lewis*, Lord Kenyon said,—"*The Earl of Northampton's case* is precisely in point. If a person say, that such a particular man (naming him) told him certain slander, and that man did in fact tell him so, it is a good defence to an action to be brought by the person of whom the slander was spoken; but, if he assert the slander generally, without adding who told it to him, it is actionable." That is an express recognition of the principle laid down by *Lord Northampton's case*. The case of *Maitland v. Gouldney* is in principle the same as that of *Gardiner v. Atwater*; there the slander was false within the knowledge of the defendant; the party who had first spoken the slander having afterwards denied it, was the same as if the slander had not been spoken by him at all. In *Cromwell's case* (16), which was an action for slander, on the statute 2 Richard 2. c. 5, it was resolved by the whole Court, that, "in case of slander by words, the sense of the words ought to be taken, and the sense of them appears by the cause and occasion of speaking them;" and they held the defendant's plea of justification good. The pleas in this case are clearly good on general demurrer. As to the objections to the fourth plea, in *Stiles v. Nokes* (17), Mr. Justice Le Blanc, said, "A plea of justification may be good with a general reference to certain parts of the libel set forth in the declaration, if the Court can see with certainty what parts are referred to; as, if the reference be to so much of the libel as imputes to the plaintiff such a crime (e.g. perjury), that would be sufficient, without repeating all those parts again, which would lead to prolixity of pleading, and ought to be avoided." The distinction between oral and written slander is but imaginary.

Mr. Serjeant Wilde, in reply.—It is said, that either falsehood or malice must be negated, but that it is not necessary to negative both. I admit that; but here, neither the one nor the other is negated. There is a material distinction between written and

(14) Cro. Jac. 169.

(15) 1 Roll. Abr. 64.

(16) 4 Co. 12, b.

(17) 7 East, 507.

oral slander; this distinction has been expressly recognized.

Cur. adv. vult.

The Lord Chief Justice now delivered the judgment of the Court as follows:—Great industry has been bestowed on this case by my learned Brothers by whom it was argued; but no case has been cited, in which the principle, extrajudicially applied by the fourth resolution in *Lord Northampton's case* to oral slander, has been extended to libels. We might relieve ourselves from the difficulty of deciding this question, by saying, that the technical objections taken to the pleas by the demurrer are sufficient to entitle the plaintiff to judgment. But we think it more proper for us to pronounce our judgment on the principal question raised by these pleadings,—namely, whether a man who receives from the hands of another a libel on any person, is justified in publishing that libel, provided that in his publication the name of the person from whom he received it, is mentioned. We do not hesitate to say, that, even if we were to admit (what we beg not to be considered as admitting), that, in oral slander, when a man, at the time of his speaking the words, names the person who told him what he relates, he may plead, to an action brought against him, that the person whom he names did tell him what he related. Such a justification cannot be pleaded to an action for the republication of the libel. If the person receiving a libel may publish it at all, he may publish it in whatever manner he pleases; he may insert it in all the journals, and thus circulate the calumny through every part of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons, and, if the statement be untrue, the imputation cast upon any one may be got rid of; the report is not heard of, beyond the circle in which all the parties are known; and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But, if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind (which would not receive the least credit when the authors are known) would make an impression which it would require

much time and trouble to erase, and which it might be difficult, if not impossible, completely to remove. The reason which Lord Coke gives, why, in the case of oral slander, you should name the author, proves that you must not be allowed to publish written calumny. He says, that, unless you mention the name of the author, it might be a great slander of the innocent; “for, if one who has *læsam phantasiam*, or is a drunkard, or of no estimation, speak scandalous words, if it should be lawful for a man of credit to report generally that he had heard scandalous words, without mentioning his author, that would give greater colour and probability that the words were true, in respect of the credit of the reporter, than if the author were mentioned; for the reputation of every good man is dear and precious to him.” Of what use is it to send the name of the author with a libel that is to pass into countries where he is entirely unknown? The name of the author of a statement will not inform those who do not know his character, whether he is a person entitled to credit for veracity, or not; whether his statement was made in earnest, or by way of jest; whether it contains a charge made by a man of sound mind, or the delusion of a lunatic. There is no allegation, in this case, that the defendant believed this statement; on the contrary, it is to be observed, that Mr. De Crespigny struck out a very material part of the statement, and yet the defendant published it, although he must have known that it was not correct. I allude to that part in which the defendant makes Mr. De Crespigny say, “that his mother had told him that a child had been born.” Although he tells you in his plea that De Crespigny had erased those words, yet he justifies the publishing them. The declarations of a son and dying wife are made the means of blasting the reputation of a father and husband. If, without any allegation that its contents were true, or that the publisher had any reason to believe them to be true, we were to hold that these pleas were a justification, we should establish a mode in which men might indulge themselves in ruining the characters of any persons whom they might be disposed to calumniate. There will be no difficulty in getting wretches, who would be better off within the walls of a prison, than they are

without, to furnish those who will pay for them, with any statements they may desire respecting the character of any person whatever.

Written communications are often made for the information of those to whom they are given, and for their information only. Such communications contain facts necessary to be known by those to whom they are made, but not fit to be divulged to the whole world. It may be important to the members of a family, to know of things which have taken place in their family, and which have been disclosed with a due regard to the interest of the persons to whom the disclosure is made. Such disclosures, although injurious to some other persons' characters, would not be libels. Can it be permitted, that persons possessing such communications should publish them to the world, if they will only give the names of those by whom they are made? Such a doctrine might furnish amusement to the lovers of scandal, but it would cause much misery in many families. It is a principle of our law, that, whoever wilfully assists in committing an unlawful act, becomes answerable for all the consequences of such act. What reason is there to except the circulation of slander out of this rule? He who prints and publishes what was given to him in manuscript, has to answer for by far the greatest part of the mischief that the statement has occasioned. But it has been said at the bar, that these pleas are *prima facie* answers; and that the circumstances which are to shew that the publication was not honestly made, are to come from the plaintiff in his replication, or to be proved under the general replication of *de injuria*. The defendant ought to know the state of the author, and the circumstances in which he wrote the libel. The plaintiff may be ignorant of these circumstances; the law requires that facts should be proved by him who ought to have the means of knowing them, and not by him who must be presumed ignorant of them. But the pleas do not present a *prima facie* defence. They offer nothing that requires an answer. Because one man does an unlawful act to any person, another is not permitted to do a similar act to the same person; wrong is not to be justified or excused by wrong. If a man receive a letter with authority

from the author to publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in the newspaper. No authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publishes it without authority, he is, from his own motion, the wilful circulator of slander. This seems to be a case of the latter description; but if published, either with or without the authority of the writer, it can never be a justification, nor can the previous publication be set up in mitigation of damages, without proof that the author believed it true, and had some reasonable cause for publishing it. We are not to endure a reproach against our neighbour; what then is our moral duty, if we hear anything injurious to the character of another? If what we have been told does not concern the public, or the administration of justice, we are to lock it up for ever in our own breasts; we are on no account to report it to gratify our enmity to any particular person, or, for that more common course of slander, to gratify the malice that exists by a desire to raise ourselves above, or keep ourselves upon an equality with, our neighbours, by injuring their characters. The statements published relative to the plaintiff do not concern the public; they are not disclosed in the course of the administration of justice; nor does it appear from the pleadings, that the defendant, in making this virulent attack on the plaintiff, has the excuse that he published this paper in his own defence. But, before he used this statement in any manner, he was bound to satisfy himself that it was true, and he does not even say that he believed it. Before he gave it general notoriety, by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff without being able to prove the truth of the charge that he had made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, as compared with that occasioned by loss of property, we must feel that the amount of the former injury far exceeds that of the latter. We are war-

ranted in saying, that the defendant has made a very serious charge against the character of the plaintiff, without being prepared to make it good; for, if he could have proved, that what he has published is true, he might have put the truth of his statement on the record, as his justification.

Judgment for the plaintiff.

1829. { DILLON AND OTHERS, ASSIGNEES
Jan. 28. { OF HENNELL, A BANKRUPT,
v. EDWARDS AND SEAMER.

Warrant of Attorney—when and how filed.

The statute 3 Geo. 4. c. 59. s. 1. enacts, that within twenty-one days after the execution of every warrant of attorney to confess judgment in a personal action, such warrant must be filed, together with an affidavit of the time of the execution thereof, with the clerk of the dockets and judgments. An affidavit, filed with the warrant of attorney, stating, that the defendant was present, and saw the warrant of attorney, dated the 25th of April 1827, signed, sealed, and delivered by the party in the warrant named and delivered, as and for his act and deed, is not sufficient, inasmuch as it did not set forth the time of the signing, sealing and delivery, within the terms of the statute.

This was an action of trover, brought by the plaintiffs, assignees of Frederick Hennell, under a commission of bankrupt, bearing date the 9th of August 1827, against the defendants, George Nigel Edwards, esq. sheriff of Bedfordshire, and James Seamer, a creditor claiming under a judgment and execution against the goods and chattels of the said Frederick Hennell. The action was brought to recover from the defendants the sum of 342l. 14s. 4d., being the amount of a levy made under a writ of *fiéri facias*, sued out by the defendant Seamer, and levied by the sheriff upon the goods and chattels of the said bankrupt before the commission issued under which the plaintiffs were chosen assignees.

The cause was tried, at the Sittings after the last Hilary term, at Westminster, before Mr. Justice Park, and the following facts which appeared upon the trial, were directed by the learned Judge, with the

consent of the respective parties, to be turned into a special case for the opinion of the Court; and the jury found a verdict for the plaintiffs, damages 342l. 14s. 4d. subject to such opinion.

The commission issued on the 9th August 1827, and the plaintiffs were chosen assignees on the 24th. The bankrupt Hennell carried on the business of a linen-draper, at Potton, in the county of Bedford. On the 27th of April 1827, a warrant of attorney, under which the said James Seamer claimed, was filed at the warrant of attorney office, which warrant of attorney was as follows:—

“To John Gilman, and Isaac Piggott, gentlemen attorneys of his Majesty’s Court of King’s Bench, at Westminster, jointly and severally, or to any other attorney of the same Court of King’s Bench.

“These are to desire and authorize you, the attorneys above named, or any one of you, or any other attorney of the Court of King’s Bench aforesaid, to appear for me, Frederick Hennell, of Potton, in the county of Bedford, draper, as of Hilary term last, Easter term next, or any other subsequent term, and then and there to receive a declaration for me in an action of debt for the sum of 600l. for money lent and advanced to me by James Seamer, of Potton aforesaid, carpenter, at the suit of the said James Seamer, and thereupon to confess the same action, or else to suffer judgment by *nil dicit*, or otherwise, to pass against me in the same action, and to be thereupon entered up against me of record of the said court, of the said sum of 600l. and costs of suit. And I, the said Frederick Hennell, do hereby further authorize and empower you the said attorneys, or any one of you, after the said judgment shall be entered up as aforesaid, for me and in my name, and as my act and deed, to sign, seal, and execute a good and sufficient release in the law to the said James Seamer, his heirs, executors, and administrators, of all, and all manner of error and errors, writ and writs of error, and all benefit and advantage thereof, and all misprisions of error and errors, defects and imperfections whatsoever, had, made, committed, done, or suffered in, about, touching, or concerning the aforesaid judgment, or in anywise relating thereto, or in, about, touching, or concerning any writ, war-

rant, process, declaration, plea, entry, or other proceedings whatsoever, or any way concerning the same. And what you, the said attornies, or any one of you, shall do, or cause to be done in the premises, or any of them, this shall be to you and every of you, a sufficient warrant and authority: in witness whereof, I, the said Frederick Hennell, have hereto set my hand and seal, the 25th day of April 1827.

“Frederick Hennell.

“Signed, sealed and delivered in the presence of Robert Haynes, clerk to Mr. King, solicitor, Potton.

“*Memorandum*—That the before-written warrant of attorney is given and executed by me, the before-named Frederick Hennell, for securing to the before-named James Seamer, the sum of 300*l.* with interest for the same, at and after the rate of 5*l.* per cent. per annum, from the day of the date thereof. Witness my hand, the 25th day of April 1827.”

With the above warrant of attorney, and at the time of filing thereof, to wit, on the 27th of April 1827, the following affidavit was also filed in the King's Bench:—

“Robert Haynes, of Potton, in the county of Bedford, clerk to George King of the same place, attorney-at-law, maketh oath, and saith, that he was present, and did see a certain warrant of attorney (a true copy whereof is hereunto annexed), bearing date the 25th of April 1827, duly signed, sealed, and delivered by the said Frederick Hennell, in the said warrant of attorney named, as and for his act and deed delivered; and that the name set and subscribed thereto, is of the proper handwriting of the said Frederick Hennell; and that the name ‘Robert Haynes’ thereunto also set and subscribed, is of the proper handwriting of him, this deponent, Robert Haynes. Sworn at Biggleswade, in the said county of Bedford, this 26th of April 1827, before me, Robert Lindsell, a commissioner of the Court of King's Bench at Westminster.”

On the 14th of July 1827, judgment by *nil dicat* was entered up upon the said warrant of attorney; and on the same day, the defendant, James Seamer, sued out a

writ of execution from his Majesty's Court of King's Bench, indorsed to levy the sum of 307*l.* 10*s.* 9*d.* besides sheriff's poundage, officer's fees, and all incidental expenses; and the defendant, George Nigel Edwards, as sheriff, to whom the said writ of execution was directed, levied thereunder the sum of 307*l.* 10*s.* 9*d.* upon the goods and chattels of the said bankrupt Hennell, which said goods and chattels, the said George Nigel Edwards had in his possession undisposed of at the time of, and after the issuing of the commission against the said Frederick Hennell; and also, on the 22nd of September 1827, and previously to the commencement of the action, a demand was duly made upon each of the defendants by the plaintiffs, for the delivery to them of the said goods and chattels so seized and undisposed of as aforesaid, under the said last-mentioned judgment, and writ of execution; but the same were refused to be given up by the defendants to the plaintiffs, and were afterwards sold by the defendants under the levy as aforesaid.

For the plaintiff, it was contended,—first, that the warrant of attorney, and affidavit of the execution thereof, were not conformable with the directions of the statute, 3 Geo. 4. c. 39, inasmuch as the time of the signing, sealing, and delivering of the said warrant of attorney, was not set forth in the affidavit filed, upon the filing of the same; and that such warrant of attorney was not therefore available against the title of the plaintiffs, as assignees of the bankrupt Hennell. Secondly, that the execution in question was invalid under the 108th section of 6 Geo. 4. c. 16. The defendant, on the contrary, contended, that the provisions of the warrant of attorney act were properly and substantially complied with; and that the 108th section of 6 Geo. 4. c. 16. did not apply to the execution in question. If the Court should be of opinion, that the verdict ought to stand for the plaintiffs, it was to be entered for the sum of 342*l.* 14*s.* 4*d.* with costs. But if the Court should be of a contrary opinion, a nonsuit was to be entered.

This case now came on for argument, when *Mr. Serjeant Wilde*, for the plaintiff,

premised, that, as there had been a recent decision on the 108th section of the statute 6 Geo. 4. c. 16, the principles of which must govern the present, it was sufficient to shew, that the execution in question was invalid under that statute. In *Notley v. Buck* (1), where A. obtained a judgment by confession, or by *nil dicit*, against B., and issued a *fi. fa.*, under which B.'s goods were seized; and, whilst the goods remained unsold in the sheriff's hands, B. committed an act of bankruptcy, on which a commission was issued, the sheriff, after notice of the commission, sold the goods, and paid over the proceeds to A.,—it was held, that the amount might be recovered from the sheriff by the assignees of B. as money had and received to their use. But the Court raised a doubt, whether the sale by the sheriff, after such notice, was wrongful, and would support an action of trover; and Lord Chief Justice Tenterden there said, that, "the seizure being prior to the act of bankruptcy, it was unnecessary to say, whether the sale was lawful or not. The sale might be lawful, and yet the proceeds might belong to the assignees; or, if the sale were not lawful, the tort might be waived. The sheriff might certainly, in some cases, be placed in a situation of very considerable difficulty; but this difficulty is of the same kind as in the case of an alleged prior act of bankruptcy, and he has the same means of redress. The only distinction between that case and the present is, that there the form of action was for money had and received; whilst here, the plaintiffs seek to recover in trover. It may, however, be said, that the case of *Wymer v. Kemble* (2) is applicable to the present, where A., having a debt from B. secured to him by warrant of attorney, entered judgment by *non sum informatus*, issued a *fi. fa.*, and took from the sheriff a bill of sale of the goods seized; and B. having soon afterwards become bankrupt, his assignees took possession of, and sold the goods so transferred to A., who brought an action of trover for them,—it was held, that he was not a creditor having security for his debt within the 6 Geo. 4. c. 16. s. 108, and that he was entitled to recover. Yet that case is distin-

guishable; as there, the plaintiff was a satisfied creditor; and the Court held the action to be well brought, as the goods seized were his; and he was not, therefore, in fact, a creditor at the time of the act of bankruptcy. In *Taylor v. Taylor* (3), the Court refused to set aside an execution issued upon a judgment obtained by default, confession, or *nil dicit*, and served and levied by seizure upon the property of a bankrupt before his bankruptcy, the statute 6 Geo. 4. c. 16. s. 108. not rendering the execution in such case void, but merely enacting, that the plaintiff in such execution shall share rateably with the other creditors. That, however, was a summary application to the Court to set aside a judgment, which was refused; but, in *Notley v. Buck*, the goods were sold before the commission, as in this case, and the execution creditor had no interest in the proceeds; and consequently, the plaintiffs, as assignees, were alone entitled to recover. The main question is, whether the sheriff was, under the circumstances, authorized in selling the goods. The 108th section of the statute is in the nature of a statutable *supersedes*, and the sheriff had no right to do anything, except to work out satisfaction, and thereby afford a remedy to the plaintiff in the execution. Although, by the enacting part of the 108th section, no execution creditor is to receive more than a rateable part of his debt, yet the proviso operates as a distinct enactment, by which he is to be paid rateably with the other fair creditors; and the 108th section of the 6 Geo. 4. is introduced in lieu of the 9th section of the statute 21 Jac. 1. c. 19, and a rateable distribution could not be made until the final dividend had been ascertained and fixed. Here, the demand was made on the sheriff by the assignees, and he was aware that Hennell had become bankrupt; and, after the demand, he was not obliged to proceed further; but it was his duty to apply to the Court for protection. The object and language of the late statute is, that an execution is not to be used to the prejudice of the creditors at large; and as the execution creditor is to be paid rateably with such creditors, the sheriff was bound to hold his hand, and not proceed to

(1) 1 M. & R. 68; s. c. 8 B. & C. 160; s. c. 8 Law Journ. K.B. 271.

(2) 6 B. & C. 479; s. c. 6 Law Journ. K.B. 232.

(3) 5 Barn. & Cress. 592.

a sale after he had knowledge that Hennell had committed an act of bankruptcy. But, as he did so, he is clearly a wrong-doer, and liable to the plaintiffs, the sale being invalid under the 108th section of the statute. With respect to the warrant of attorney, it is clear that it was not conformable with the terms of the statute 3 Geo. 4. c. 39, as the time of the execution was not set forth in the affidavit made upon the filing of the warrant of attorney. The time that a warrant of attorney is given and executed, is the only material thing to be looked at, and not the day it is filed; and in *Hurst v. Jennings* (4), where A. gave certain creditors a bond, in the common form, conditioned for the payment of a sum certain; and, at the same time, executed a deed of the same date, reciting the bond, and declaring that it should be lawful for the obligees to commence an action thereon, and proceed to judgment, whenever they should think fit; and that, upon judgment being obtained, they should be at liberty, at their will and pleasure, at any time, to sue out execution thereon; and that it was further agreed, that any judgment obtained on the bond should stand as a security for the payment to the obligees, on demand, of all such sums of money as then were or might thereafter become due to them from the obligor—it was held, that this was a contrivance to defeat the provisions of the Warrant of Attorney Act, 3 Geo. 4. c. 39; and, therefore, void as against the other creditors of the obligor, who had become bankrupt. The rights and liabilities of the parties attach at the moment of execution; and it is not for the Court to inquire into that fact, but it is the duty of the party to express it in the affidavit at the time the warrant of attorney is filed.

Mr. Serjeant Taddy, contra.—First, it is quite clear, that, under the circumstances, an action of trover is not maintainable against the defendants. The object of the 108th section of the 6 Geo. 4. was to preserve the security a creditor might have for his debt; and it cannot be denied for a moment, that an execution creditor falls within the class of creditors mentioned in that clause. In *Wymer v. Kemble*, Lord Tenterden said, "The statute is certainly

obscure; but I think that a reasonable construction has been given to it by the plaintiff's counsel; for, it seems to me that the plaintiff is not within the class of persons therein mentioned. He was not, at the time of the bankruptcy, 'a creditor having security;' for he had been paid by means of the execution before the bankruptcy occurred. The section in question first provides, that 'no creditor having security for his debt, &c. shall receive upon any such security more than a rateable part of such debt;' then follows an exception of certain cases, 'except in reason of any execution or extent served and levied by seizure upon, or any mortgage of, or lien upon any part of the property of the bankrupt before the bankruptcy.' That applies to creditors having security; for a person who has levied by seizure is such a creditor: he has a security by his right to have the goods sold. Then comes the proviso, that 'no creditor, though for a valuable consideration, who shall sue out execution upon any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution to the prejudice of other fair creditors, but shall be paid rateably with such creditors.' Now, that only limits the exception, and the exception applies only to cases falling within the first part of the section, viz. those of creditors having security. The present plaintiff was not, at the time of the bankruptcy, a creditor at all; and, therefore, cannot be within the operation of the statute." And, in *Taylor v. Taylor*, Mr. Justice Holroyd said, "The act does not say, that the execution should be void, or that the creditor shall not avail himself of it; but merely, that he shall not avail himself of it to the prejudice of other fair creditors, but shall be paid rateably with them. If the true construction of the act be that contended for on the part of the assignee of the bankrupt, he is not without a remedy; he may bring an action of trover against the sheriff, if the goods be removed, or he may petition the Lord Chancellor. The question upon the act of parliament is of very general importance. It is, therefore, fit that the parties should have an opportunity of raising the question upon record, if, indeed, it be a question to be determined in a court of law; of which, however, I entertain considerable doubt."

(4) 8 Dow. & Ry. 424.

In *Notley v. Buck*, no one but the execution creditor proved; and he was, therefore, entitled to all the proceeds of the sale. There, too, the sheriff was obliged to sell, and although the proceeds might have been paid into court, the execution creditor would not be deprived of his remedy, as he might still claim and be paid rateably with the other *bond fide* creditors of the bankrupt. Here, the execution creditor could not obtain the fruits of his execution, unless the sheriff had sold, as he was commanded to do by the writ. Although it has been said that the 108th section is in the nature of a statutable *supersedes*, yet the legislature has not so expressed it; and, although an execution creditor may have no interest in the whole of the goods, he certainly has a right to a part, or an interest in the proceeds to be acquired by, or derived from, the sale. The goods were in the hands of the sheriff from the moment the writ was delivered to him; and if the assignees be held entitled to recover them, the security of the execution creditor is gone: and it was impossible for him to know how the assignees might ultimately dispose of them.—With respect to the warrant of attorney, it is found as a fact, that it was filed on the 27th of April; and that an affidavit was also filed on that day, in which it was sworn that the warrant, dated on the 25th, was duly signed, sealed, and delivered, by Hennell. It must, therefore, be assumed, that it was either executed on the day it bore date, or on the following day; or, at all events, previously to its being filed, which is sufficient to satisfy the terms of the statute.

By the Court.—Two points have been raised in this case—the first, on the statute 3 Geo. 4. c. 39; the second, on the 6 Geo. 4. c. 16. s. 108. It is unnecessary to consider the latter point, for we are of opinion that the plaintiffs are entitled to recover, as the affidavit of the execution of the warrant of attorney was not in conformity with the directions of the statute 3 Geo. 4; and, therefore, that the warrant of attorney was not unavailable against the plaintiffs, as assignees of the bankrupt Hennell. The only difficulty we felt was, whether the sheriff could be made responsible, as he could not know whether the judgment had

been entered on an unavailable security or not. Generally speaking, although a judgment be void, if the writ be good, the sheriff is protected by virtue of the writ; yet, if both the judgment and execution be void, as in this case, both the parties are liable. The statute declares, that, within twenty-one days after the execution of every warrant of attorney to confess judgment in a personal action, such warrant must be filed, together with an affidavit of the *time of the execution thereof*; and that, in case of bankruptcy, unless such warrant shall not have been filed as aforesaid, such warrant, and the *judgment and execution thereon*, shall be deemed fraudulent and void against the assignees. The legislature required a full and perfect affidavit of the precise time when the warrant of attorney was executed; and here, the time of the execution is not sufficiently expressed. The object of the statute was to prevent frauds, and its spirit and letter must be strictly attended to; and if the affidavit does not state the day of the execution, the statute is not complied with. Here, the sheriff must be considered as standing in the same situation as the plaintiff in the execution; and, although the word *void* has sometimes been construed as *voidable*, yet, as the terms of the statute are clear, we are bound by them, and must decide accordingly.

Postea to the plaintiffs.

1829. } CAREW, DEMANDANT.
Feb. 3. } WHITE, TENANT.

Recovery—when and how passed.

Although the notarial seal affixed to the acknowledgment of a warrant of attorney taken abroad, was broken to pieces and destroyed, the Court allowed the recovery to pass, on an affidavit, that the seal was duly affixed at the time the oath was administered.

Mr. Serjeant Edward Lanes moved that this recovery might pass, although there was no notarial seal affixed to the affidavit of the commissioner who took the acknowledgment of the warrant of attorney. The learned Serjeant produced an affidavit, which stated, that the acknowledgment was taken

in Upper Canada; and that the notarial certificate of the oath administered to the commissioner had been duly sealed; that, when it arrived in this country, the seal was broken in two or three pieces; and that when it was sent to the cursor, a small part of the wax remained, which had since become detached, and was lost, and that the officer would not allow the recovery to pass, for want of a seal.

The Court ordered the facts, as to the disuniting and loss of the seal, to be engrossed on parchment, and filed with the other documents relating to the recovery; which having been done, it was allowed to pass.

ance; and that the question to be tried was, whether the defendants were justified in putting the plaintiff's luggage in a swing under the coach; and, as they refused to put it on the roof, the plaintiff declined going his journey.

The Court observed, that, as the practice with regard to variance between the declaration and proof had increased to an alarming degree, all the counts might stand; and they trusted that it would shortly be remedied, and that the best mode would be of adapting the proof to the declaration in this cause, by an arrangement between the parties at *Nisi Prius*.

Rule discharged.

1829. }
Feb. 3. } ANONYMOUS.

Practice—Unnecessary Counts, where struck out.

In an action against coach proprietors, for not conveying the plaintiff and his luggage, the declaration contained several counts, laying the breach of contract in various ways, but not materially altering the one from the other,—the Court would not order any of the counts to be struck out, as the plaintiff might be defeated at the trial, on the ground of a variance between the declaration and proof.

Mr. Serjeant Spankie, on a former day in this term, obtained a rule *nisi*, that the second and third counts of the declaration in this cause might be struck out. The action was brought against the defendants, who were coach proprietors, for not conveying the plaintiff from London to Liverpool by their coach. The first count stated, that the plaintiff took a seat or place in the defendant's coach to be conveyed, with his luggage, from London to Liverpool. The second count stated, that the plaintiff took a place on the defendant's coach to be conveyed from London to Liverpool; and the third, that it was the duty of the defendants to provide the plaintiff with a proper, safe, and convenient place, for himself and his luggage, in or upon the defendant's coach.

Mr. Serjeant Wilde now shewed cause; and submitted that all those counts were necessary, in order to guard against a vari-

1829. }
Feb. 4. } BUSHNELL v. LEVI.

Costs—Plaintiff's right to, where restrained by Court of Conscience Act.

Where an officer of the Sheriff of Middlesex resided and carried on his business in that county, but kept an office or counting-house in the city of London, in partnership with his son:—Held, that he must be taken to be a person seeking his livelihood in London, within the meaning of the London Court of Requests Act, 39 & 40 Geo. 3. c. 104, s. 5.

This was an action of assumpsit for work and labour in repairing the defendant's gig.

At the trial, before Lord Chief Justice Best, at Guildhall, at the Sittings after the last term, the plaintiff obtained a verdict for 4*l.* 8*s.*

Mr. Serjeant Andrews, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why the defendant should not be at liberty to enter a suggestion on the roll, under the statute 39 & 40 Geo 3. c. 104. s. 5 (1), in order to deprive the plaintiff

(1) By which it is enacted, "that it shall be lawful for any person or persons, whether residing within the city of London, or elsewhere, also bodies politic or corporate, and fraternities or brotherhoods, whether corporate or not corporate, who now have, or hereafter shall have, any such debt as is hereinbefore specified or mentioned, or any other debt or debts, owing or due to, or claimed or demanded by such person or persons, bodies politic or corporate, and fraternities or bro-

of his costs—that he was resident in the city of London, and seeking his livelihood there. He founded his motion on an affidavit, which stated, that the defendant resided in New-man-street, Oxford-street, and that, previous to, and at the time of this action, and ever since, he had carried on the business of a sheriff's officer in Fetter-lane, in the city of London, under the firm of William Levi & Son, and had rented an office, or a counting-house, jointly with his son and partner, in Fetter-lane, and had sought and endeavoured to get his livelihood within the said city of London by his aforesaid business of sheriff's officer, in partnership with his son.—In *Tidd's Practice* (2), all the cases relating to a party's residence under this statute are collected; and from thence it appears, that, where a defendant resided in Middlesex, and kept a warehouse in the city of London, jointly with another person, but told the plaintiff, that he did not keep the warehouse, and the plaintiff, upon inquiry in the neighbourhood where it was, could obtain no intelligence respecting him, this Court would not, under the above act of parliament, exempt the defendant from paying costs, on the ground of the verdict being under *five pounds*, and that he ought to have been summoned to the court of requests: *Jefferies v. Walls* (3). But, where a person rented a counting-house in the city of London, jointly with another person, and received orders there for his business, the Court held that he was within the jurisdiction of the court of requests for the city of London, though he

therhoods, whether corporate or not corporate, not exceeding the sum of 5*l.*, from any person or persons whomsoever residing or inhabiting within the city of London, or the liberties thereof, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing, within the same city or liberties, to cause such debtor or debtors, person or persons from whom such debt or debts shall be owing or due, or claimed or demanded, and so resident, inhabiting, or keeping any house, warehouse, shop, shed, stall, or stand, or seeking a livelihood, or trading or dealing as aforesaid, to be warned or summoned, &c., and that no orders, decrees, judgments, or proceedings shall be removed or removable into any other court by *certiorari*, or otherwise howsoever."

(2) 9th edit. 955, 6.

(3) 1 New Rep. 153.

slept and resided in Southwark: *Croft v. Pitman* (4). That case is expressly in point, and must govern the present; and, although in *Gray v. Cook* (5), a market-gardener, who rented a stand, with a shed over it, in Fleet-market, at an annual rent, which he occupied three times a week, on market-days, till ten o'clock in the morning; after which, and on all other days, it was occupied by others, was held not to keep a stand, within the meaning of the London Court of Requests Act, so as to be privileged to be sued there for a debt under 5*l.*:—and in *Skinner v. Davis* (6), a person plying as a porter in the city of London, and resorting to a house of call there, but not lodging in the city, was helden not to be a person "seeking his livelihood in London," within the meaning of the above act:—and in *Miller v. Williams* (7), that a person's occasionally under-writing a policy at Lloyd's Coffee-house, where he had a seat, was not seeking his livelihood within the city, so as to subject him to the jurisdiction of the court. So, in *Kemsett v. West* (8), where a coal-merchant resided and carried on his business at Lambeth, in Surrey, but kept a counting-house in the city of London, for the purpose of receiving orders, the Court held, that he was not entitled to the privilege of being sued only in the London Court of Requests, as a person seeking his livelihood in the city.—In neither of these cases did the defendant occupy any place of business constantly within the city, or seek his livelihood there, but only went there occasionally. Here, however, it is sworn that the defendant carried on his business and rented premises in the city of London, and sought to obtain his living there; so that it must be inferred, that his office in Fetter-lane was a place to which he frequently and permanently resorted: and the occupation by him and his son, must, on the authority of *Croft v. Pitman*, be considered as an occupation by the defendant himself.

Mr. Serjeant Wilde now shewed cause on affidavits which stated, that the defendant carried on the business of a sheriff's officer in partnership with his son, at a lock-up-

(4) 1 Marsh. 269; s. c. 5 Taunt. 648.

(5) 8 East, 336.

(6) 2 Taunt. 196.

(7) 5 Esp. Rep. 19.

(8) 5 Dow. & Ryd. 686.

house in Newman-street, Oxford-street, where he slept and lived, and that he was rated as an occupier there; that process in London could only be executed by a serjeant-at-mace; and that the defendant was not a person of that description, but merely an officer of the sheriff of Middlesex. It was also sworn, that the whole of the work for which the present action was brought, was performed in that county, and that the plaintiff did not know that the defendant had an office in London, and that Lawrence Levi, the defendant's son, was rated as the occupier of the premises in Fetter-lane. It was submitted, that this case was distinguishable from *Croft v. Pitman*; as there, the debt was contracted in the city of London; whilst here, the work was done in Middlesex, where the defendant actually resided and was rated. But—

The Court held, that, as the statute applied to any person seeking a livelihood within the city of London, the case of *Croft v. Pitman* must govern the present; and that the affidavit in support of the application was sufficient to bring the defendant within the protection of the act.

Rule absolute.

1829. }
Feb. 5. } GOULD v. SHIRLEY.

Limitations, Statute of—*What acknowledgment sufficient to take a case out of.*

On the defendant's being applied to for payment of a debt, barred by the Statute of Limitations, he said, that "he would help the plaintiff to 5*l.* if he could":—Held, that this was a conditional promise only; and that it was incumbent on the plaintiff to shew that the defendant was of ability to pay.

This was an action of assumpsit for goods sold and delivered. The defendant pleaded, first, the general issue; and, secondly, *actio non accrevit infra sex annos*; on which issues were joined. The defendant paid 3*l.* 5*s.* into court.

At the trial, before Mr. Justice Gaselee, at the last Assizes at Stafford, it appeared that the whole of the goods, the value of which the plaintiff sought to recover, were

delivered to the defendant in the year 1820, with the exception of some furnished in 1826, amounting to 3*l.* 5*s.*, which the defendant had paid into court. In order to take the case out of the operation of the statute, a person who assisted in the plaintiff's shop, and who proved the delivery of the goods, said, that he called on the defendant in the year 1826, at the request of the plaintiff, for payment of the goods; that the witness told the defendant, that he wanted money on account, but that he said he had got none; that he went a second time, and could not see him; that he went a third time, and said, that, as the account was more than 20*l.*, if the defendant would help him to 5*l.*, as the plaintiff was busy in building, he would be obliged: on which the defendant said, that "he was going to Hanley, in the course of a week, and that he would help the plaintiff to that money, if he could." The learned Judge left it to the jury to say, whether this was an acknowledgment, that the whole debt of 20*l.* was due to the plaintiff, or 5*l.* only, or whether it amounted to a promise to pay part only. The jury thought that it amounted to an acknowledgment of the whole; and found a verdict for the plaintiff, for 18*l.*, the sum proved to be due; leave, however, was reserved the defendant to move to enter a nonsuit, or that the verdict might be reduced to 5*l.*, if the Court should be of opinion, that the plaintiff had a right to recover that sum only.

Mr. Serjeant Wilde, in the last term, accordingly obtained a rule nisi, and submitted, that this was not a sufficient acknowledgment to take the case out of the statute; and that, even if it were, the promise was conditional; and it was incumbent on the plaintiff to shew that the defendant was of ability to pay.

Mr. Serjeant Peake now shewed cause.—The direction to the jury was proper, and their verdict is conclusive. Although, in *Scales v. Jacob* (1), where, to a plea of the Statute of Limitations, the plaintiff replied a promise within six years, and proved a promise to pay *when of ability*, made three years after the original cause of action accrued, and within six years of the commencement of the action—it was held that he must also prove the defendant's ability: yet, there, the Court were equally divided

(1) 3 Bing. 658; 4 Law Journ. C.P. 209.

in opinion. So, in *Tanner v. Smart* (2), in assumpsit, brought to recover a sum of money, the defendant pleaded the Statute of Limitations, upon which issue was joined; and at the trial, the plaintiff proved the following acknowledgment by the defendant within six years:—"I cannot pay the debt at present; but I will pay it as soon as I can:"—it was held, that this was not sufficient to entitle the plaintiff to a verdict; no proof being given of the defendant's ability to pay: but here, the defendant did not say that he was not able to pay, but that he would help the plaintiff to 5*l.* if he could, which amounted to an acknowledgment of the whole debt, and that he would pay 5*l.* in part, then, if he could; and, although the meaning of these words may be equivocal, yet, it was properly left to the jury to say, whether it was an acknowledgment of the whole debt, or a promise to pay part only. In *A'Court v. Cross* (3), the defendant, on being arrested for a debt more than six years old, said, "I know that I owe the money; but the bill I gave is on a three-penny receipt stamp, and I will never pay it,"—it was held not to be such an acknowledgment as would revive the debt against a plea of the Statute of Limitations:—and, although, in *Ayton v. Bolt* (4), on the defendant being applied to, to pay a debt barred by the Statute of Limitations, he said, "he should be happy to pay, if he could,"—it was held that the plaintiff must shew the defendant's ability to pay: yet, here, the defendant merely said, that he would then help the plaintiff to 5*l.* if he could, which is evidence of a compliance with his original demand.

Mr. Serjeant Wilde, in support of his rule.—The only question is, whether there was a sufficient acknowledgment by the defendant to raise a presumption of a general promise to pay. The case of *Tanner v. Smart* is conclusive to shew, that the plaintiff should have proved that the defendant was able to pay the debt, when he said that he would help the plaintiff to 5*l.* if he could. Lord Chief Justice Tenterden, in delivering the judgment of the Court in that case, said, "Under the ordinary issue,

under the Statute of Limitations, an acknowledgment is only evidence of a promise to pay; and, unless it is conformable to, and maintains the promises in the declaration, though it may shew to demonstration that the debt has never been paid, and is still subsisting, it has no effect." Here, the promise to pay the 5*l.* was only conditional, and cannot be construed to amount to an absolute promise; as, if the defendant had not been able to obtain money on his return from Hanley, the non-payment would not have been a violation of his promise.

By the Court.—Where the terms of an acknowledgment of a debt, barred by the Statute of Limitations, are ambiguous, their effect must be left to the jury; but here, what was said by the defendant does not amount to a promise to pay; and, even if it did, it is clearly a mere conditional promise. He only said, he would help the plaintiff to 5*l.* if he could: it was, therefore, incumbent on the plaintiff to prove that he was of ability to pay that sum; for the words "if he could," must be taken to mean the same thing as if he had said, "I will help the plaintiff to 5*l.* when of ability:" this case, therefore, must be governed by that of *Tanner v. Smart*, where the defendant said, "I cannot pay the debt at present, but I will pay it as soon as I can." There, the Court took time to consider; and Lord Tenterden, in delivering his judgment, after reviewing all the cases, came to the conclusion, that it was not such an acknowledgment as, without proof of any ability on the part of the defendant to pay, took the case out of the operation of the statute. The rule to enter a nonsuit must, therefore, be made

Absolute.

1829. { TAYLOR AND ANOTHER, ADMIN-
Feb. 5. { NISTRATRIKES OF FOLDER,
DECEASED, v. LYON.

Amendment in Declaration—*where allowed.*

The plaintiffs having sued the defendant as administratrixes, they being also the surviving partners of the intestate—the Court allowed the writ and declaration to be amended by describing them as such partners only.

(2) 6 B. & C. 603.

(3) 3 Bing. 329; s. c. 4 Law Journ. C.P. 79.

(4) 4 Id. 105; s. c. *nomine* *Ayton v. Bowles*, 5 Law Journ. C.P. 109.

Mr. Serjeant Wilde, on a former day in this term, obtained a rule calling upon the defendant to shew cause why the plaintiffs should not be at liberty to amend the writ and declaration in this cause, by changing the description of the plaintiffs from administratrixes to surviving partners; and that, in the meantime, all further proceedings might be stayed. He founded his motion on affidavits, which stated, that the action was commenced on the 17th of September 1827, by the plaintiffs, as the administratrixes of one Sarah Folder, deceased, against the defendant, as the acceptor of a bill of exchange, drawn by and payable to the deceased; but that the letters of administration were not taken out until the 4th of December in that year; that the declaration was entitled generally of Michaelmas term 1827; and that the plaintiffs were the surviving partners as well as the administratrixes of the deceased. The attorney who sued out the writ swore, that he believed that the letters of administration had been granted previously to the commencement of the action. The defendant pleaded—first, the general issue; secondly, the Statute of Limitations; and lastly, that the plaintiffs were not administratrixes of Sarah Folder, deceased, at the time of the commencement of this suit. The learned Serjeant submitted, that, as the plaintiffs' attorney sued out the writ in ignorance of the letters of administration not having been granted, the plaintiffs were entitled to sue as surviving partners, instead of in their representative character: and he relied on the case of *The Executors of the Duke of Marlborough v. Widmore* (1), where the plaintiffs declared as executors on a promise to their testator, and issue was joined on a plea of the Statute of Limitations; and the plaintiffs were allowed to amend, by laying a promise to have been made to themselves, on the terms of payment of costs, and the defendant having leave to plead *de novo*.

Mr. Serjeant Taddy and *Mr. Serjeant Spankie* now shewed cause.—There is no ground for this amendment; and if it were allowed, it would be, in point of fact, to commence a new action by the plaintiffs in their own character, to which, if now began in the ordinary way, the Statute

of Limitations would be a bar. In the case of *The Duke of Marlborough v. Widmore*, the amendment was allowed on the authority of the case of *Bearcroft v. the Hundred of Burnham* (2), where, in an action upon the Statute of Hue and Cry, the plaintiff was allowed to amend the allegation of an oath in his declaration, it having been laid to have been made by the servant, instead of by the master. Besides, in the case in *Strange*, the plaintiffs only moved to amend, by laying the promise to have been made to themselves, as executors, instead of to their testator, and not in their own right, as here; and in *Doe d. Hardman v. Pilkington* (3), Mr. Justice Yates and Mr. Justice Aston cited the case of *The Duke of Marlborough v. Widmore*, and said, it was reported more at large, and rightly taken, in *Fitzgibbon*, 193, where the declaration was amended by laying the promise as made to the executors, instead of the testator; because the plaintiffs' action would otherwise have been lost, by the Statute of Limitations having run upon the promise made to the testator. A count on a promise to the plaintiffs, as surviving partners, cannot be joined with one alleging a promise to them as administratrixes, or to the intestate: and, although the declaration might be amended by laying promises to the intestate, yet the Court has no jurisdiction to make the amendment in the terms prayed. Besides, there is nothing to amend by, which, as Mr. Justice Buller said in *Green v. Rennet* (4), "is a circumstance by which the Court have always been guided:" and there is a distinction between amending mistakes which are occasioned by the act of the party, and those which are produced by the mere act of the clerk; and here, as the defendant has pleaded, that the plaintiffs were not administratrixes at the time of the commencement of this suit, it is an answer to the action; and it is too late for the plaintiffs to turn round, and abandon the character in which they originally sued.

By the Court.—We are not bound to inquire whether there is anything to amend by or not; but we are authorized in allowing writs and declarations to be amended

(2) 3 Lev. 347.

(3) 4 Burr. 2449.

(4) 1 Term Rep. 783.

(1) 2 Strange, 890.

when we see that the justice of the case will be advanced by so doing. The plaintiffs' cause of action is founded on a stale demand; and the defendant has not sworn that he has been deprived of the testimony of any of his witnesses, by death or otherwise; and, if he has a good defence to the action, the amendment will be beneficial to him, for if he succeeds, he will be entitled to costs, which he would not have been, if the plaintiffs had continued the suit in their character of administrators.

Rule absolute, on payment of costs; the defendant having liberty to plead de novo.

1829. { ARNOLD, CLERK, AND OTHERS v.
Feb. 3. { THE BISHOP OF BATH AND
 { WELLS, LEAVES, AND DAVIES.

An entry in a book deposited in the registry of a bishop, is evidence of the admission of a curate at the bishop's visitation; and the admission having been stated to have taken place in 1591, juxta consuetudinem:—Held, that it should have been left to the jury to say, whether it was an ecclesiastical or common law custom; and, as it was not done, the Court directed a new trial.

This was a quare impedit.

The first count of the declaration stated, that, from time whereof the memory of man is not to the contrary, there had been and was a certain chapel, with the cure of souls, which, during all that time, when full had been, and of right ought to have been, and still of right ought to be, served by a curate thereof, that is to say, the chapel of Burrington, situate, lying, and being in the county of Somerset, and which, during all the time aforesaid, had been and still is annexed to the parish of Wrington, in the same county; that, from time whereof the memory of man is not to the contrary, there had been, and now is, and still of right ought to be, a certain ancient and laudable custom used and approved of within the said chapel, that is to say, that, when and so often as the said chapel had become and been, or should become and be, vacant; and, upon every such vacancy happening, it had been, and should and might be lawful for the several persons being then, respectively

parishioners of the same chapel, or the majority of them in vestry assembled, due notice having been publicly given in the said chapel during or immediately after the performance of divine service there, of the day and time appointed for holding and assembling such vestry, to elect and nominate a clerk in holy orders, to be curate of and for the said chapel of Burrington, and to present him to the person, who, for the time being, should or might be rector of the said parish of Wrington, for his approbation, in order that the said rector, if he found or finds the said clerk so elected and nominated a proper person to have and serve the said cure, might and should approve, and (after he should have taken an oath of obedience to him, the said rector for the time being, and his successors,) admit the said clerk to the said cure, and present him to the bishop of the diocese within which the said chapel was situate, for him (if found by the said bishop to be a fit and proper person to have and serve the said cure,) to be licensed by him, the said bishop, to serve the same:—that, in pursuance of the said custom, theretofore, and on the said chapel becoming and being void, by the death of one George Inman, clerk, then formerly incumbent thereof, to wit, on the 24th of March, in the year of our Lord 1795, to wit, at the chapel aforesaid, in the county aforesaid, certain persons then respectively being parishioners of, and being then and there the majority of the parishioners of the said chapel, and then and there in vestry duly assembled, pursuant to such notice as in that behalf aforesaid, before that time, to wit, on &c., at &c., duly given, did then and there elect and nominate one Sydenham Teast Wyld, then and there being a clerk in holy orders, and a proper person to have and serve the said cure, to be curate of and for the said chapel, and did then and there present to him, the defendant, Wm. Leaves, who then and there was and still is rector of the said parish of Wrington, for the purposes in that behalf mentioned, according to the said custom; and that the defendant, Wm. Leaves, did then and there approve the said Sydenham Teast Wyld, and did, after the said Sydenham Teast Wyld had taken such oath in that behalf as aforesaid, then and there admit the said Sydenham Teast Wyld to the said

chapel, and did then and there present and nominate the said Sydenham Teast Wylde to the then Bishop of Bath and Wells (the said chapel being then and there within the diocese of the said Bishop), to be by him licensed to serve the said cure, and the said Sydenham Teast Wylde was afterwards, to wit, on &c., at &c., duly licensed by the said bishop to serve the same accordingly; that, afterwards, to wit, on the 12th of May, in the year 1826, the said chapel of Burrington became void, by the death of the said Sydenham Teast Wylde, and yet was void; whereby, and by virtue of the premises, and of the said custom, it then and there belonged to the then parishioners of the said chapel so in vestry assembled, such notice having been given in that behalf as aforesaid, or the majority of them, to elect and nominate a clerk in holy orders, being a proper person to have and serve the said cure, as curate of the said chapel; that, afterwards, to wit, on the 19th of June, in the year 1826, to wit, at the chapel aforesaid, in the county aforesaid, the plaintiffs, being then and there the majority of the parishioners of the said chapel duly assembled in vestry, due notice having been previously, to wit, on the day and year last aforesaid, at the chapel aforesaid, publicly given in the said chapel, during or immediately after the performance of divine service there, of the day and time appointed for holding and assembling such vestry, to elect and appoint a clerk in holy orders curate of the said chapel: whereupon, the plaintiffs, being and constituting the majority of the then parishioners of the said chapel so assembled in vestry as aforesaid, then and there elected and nominated James William Arnold to be curate of the said chapel, he, the said James William Arnold, being then and there a clerk in holy orders, and then and there a fit and proper person to have and serve the said cure: whereupon, and by virtue of such election and nomination at such vestry so assembled as aforesaid, it belonged to the plaintiffs to present the said James William Arnold to the defendant, William Leaves, so being such rector as aforesaid, for the approbation of him, the said defendant, William Leaves, as a fit and proper person to have and serve the said cure, so that he should and might, after he should have

taken such oath as aforesaid, be, by the said defendant, William Leaves, admitted to the said cure, and presented to the said bishop of the said diocese, in order that he, the said James William Arnold, if he should be found by the said bishop to be a fit and proper person to have and serve the said cure, might be licensed by the said bishop to serve the same; but the defendants unjustly hindered them, the plaintiffs.

The second count stated, that the parishioners of the chapel had a right to elect and nominate a curate to serve the said chapel, under and by virtue of an act of parliament, passed in the eleventh year of the reign of Henry the 7th, 1495; and which act had been lost or destroyed by time or accident. The bishop pleaded a plea of disclaimer in the usual form, alleging that he had not any thing in the chapel, except a right to license the ministers.

The two other defendants pleaded, to the first count, that the chapel was part and parcel of the rectory of Wrington; that it belonged to the rector to appoint the curate; that the defendant Leaves, in right of his rectory, appointed Sydenham Teast Wylde, in 1795; and that, on the 12th of May 1826, Leaves, in the same right, appointed the defendant Davies, and presented him to the bishop accordingly; and concluded by traversing the custom set out by the plaintiffs.

The defendants pleaded, to the second count, that Leaves, in right of his rectory, appointed Wylde; and that he appointed Davies, and presented him to the bishop, and concluded by traversing the statute; and, in a third plea to both counts, the defendants traversed the election of Arnold by the plaintiffs. Issues were joined on the traverses as to the custom and election.

At the trial, before Mr. Justice Littledale, at Wells, at the last Assizes for the county of Somerset, the plaintiffs proved the death of Wylde, and that the majority of the parishioners, in 1826, elected the plaintiff Arnold to be curate of the chapel, and that he had since done duty there; and, in support of the plaintiffs' claim to elect, they produced in evidence the following entry in a book taken from the registry of the Bishop of Bath and Wells, which was entitled, "*Registrum instrumentorum clericorum exhibit. in visitacōe trienniali Ep̄ali Bathon. et Wellen.*"

in anno 1606. Burrington, Johannes Tristram clericus ordinat. presbiter per Dūm Wilum Cestren Epum, 8 Aprilis 1576, admiss. ad curā. animarū. in ecclīā per Dūm Ricardum Forster clericū nup. rectorem de Wrington juxta consuetud. &c. 27 Septembris 1591. Licentiat. ad concionand. per Dūm Thomā nup. Bathon. et Wellen. Epum, 7 Januar. 1588." The plaintiffs then gave in evidence the following extract from the Parliamentary Survey of 1649:—"Parish of Burrington. There is in it a church or chapel, being, as we conceive, a donative worth *per annum* about three and forty pounds. The minister there hath usually been *elected* by the parishioners of Burrington, and *approved of* by the rector of Wrington. The tithes of corn, hay, wood, and teazles, payable out of the parish of Burrington to the parish of Wrington, are worth *per annum* 22*l.*" The plaintiffs then produced the approval and admission of Mr. Inman, dated the 12th of July 1744, by which one Henry Waterland, the then rector of Wrington, after reciting the election and nomination of Inman, by the parishioners of Burrington, and their presentation of him to the rector for his approbation, for the purpose of admitting him, according to the tenor of a certain statute relating to the said chapel, he, the said rector, approved of, admitted, and presented Inman to be licensed to the said chapel. The plaintiffs then produced the approval and admission of Wylde, by the defendant Leaves, which was in the same form as the approval and admission of Inman by Waterland. Both these instruments were sent from the bishop's registry. The plaintiffs then proved, that, a few days before the election of Arnold, a church rate was made; and that it was agreed at the election to go by that rate; that every one who was at the election, and whose name was on the rate, voted; that the proxy of an absent person was refused for the defendants, because his principal's name was not on the rate; and that the vote of one present, who was not on the rate, was admitted for the plaintiffs.

The defendants produced the following extract from the Ecclesiastical Survey of the 26th Henry 8, on which their claim

to present mainly depended:—"Wrington, with the chapel of Burrington annexed. The rectory there is worth, by the year, in demesne lands, 40*s.*; prædial tithes, 28*l.*; tithe of wool and lambs, 7*s.*; oblations, with personal tithes, 14*l.* 14*s.* 8*d.*: from thence, in pence paid to the Archdeacon of Wells, as of synodals, 7*s.* 6*d.*; to the bishop, as of procurations, 16*d.*; to the Abbot of Glastonbury, as a pension, 40*s.*; and to a certain priest celebrating in the said chapel annexed, for his stipend annually, by composition, 66*s.* 8*d.*" An entry in the parish book of Burrington was as follows:—"April 30th, 1744. At a general meeting of the inhabitants of the parish of Burrington, notice being given on the Sunday before, in the parish church, the Rev. Mr. George Inman was unanimously elected chaplain of the said church of Burrington, vacant by the death of Mr. Wilks, by us whose names are herunto subscribed, having a right to elect, upon the account of paying 4*l.* to the said chaplain, over and above his tithes." There was a similar entry on the election of Mr. Wylde as curate, on the 9th of March 1795, with the exception of names and date, and limiting the right to elect upon the account of the inhabitants paying 4*l.* to the chaplain, over and above his tithes.

For the defendants, it was submitted, that the register of visitations in the year 1606, was not admissible in evidence, as it only contained a *statement* of the admission of Tristram; but the learned Judge allowed it to be received; and he left it to the jury to say, whether the election of the plaintiff Arnold, in June 1826, was a valid election. They found in the affirmative; and, accordingly gave a verdict for the plaintiffs.

Mr. Serjeant Merewether, in the course of the last term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, or that the judgment might be arrested; and, in support of a new trial, he submitted, that the register of 1606 had been improperly received in evidence, as it did not contain the original admission of the person therein named, which was the best evidence; that it did not appear by whom the entry was made; and that the admission was stated to have taken place fifteen years before the entry was made in the register; that the custom or agreement at the election to go by the

church-rate, or to confine the right to vote to those persons who contributed to that rate, did not support the general custom for the parishioners, or the majority of them, in vestry assembled, as alleged in the declaration: and, in support of the objection, in arrest of judgment, the learned Serjeant insisted, that the plaintiffs ought to have shewn a seisin, either in themselves, or in those under whom they claimed; and that, as the parishioners assembled in vestry were not a body corporate, or members of a permanent body, they could not have a right of seisin, so as to maintain this suit; and he referred to *Buller's Nisi Prius* (1), where, it is said, that a *Quare Impedit* is a possessory action; for which reason, the plaintiff must shew an actual seisin, which, in general, must be by alleging a presentation in himself, or in some person under whom he claims. So, in *Comyns's Digest* (2), it is said, that a plaintiff in *Quare Impedit* must allege a title to the advowson in some one from whom he claims by descent: *Hob. 102*. For, a presentment, without a title to present, is not sufficient: *Vau. 57*. In the case of *The King v. the Marquis of Stafford* (3), where, on a commission of charitable uses, it was agreed between the lord of the manor of A. and the inhabitants of W., within the manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the chapel of W., to be nominated by a majority of the inhabitants, and to be allowed by the lord, and by him presented to the ordinary for a licence to preach; the usage of nomination, &c., had been pursuant to the agreement; and now, the lord having refused to allow and present the nominee of the majority of the inhabitants, the latter prayed a *mandamus*, which the Court refused. In *Russell v. the Men of Devon* (4), it was held, that an action would not lie by an individual against the inhabitants of a county, for an injury sustained in consequence of a county bridge being out of repair; and in *Farnworth v. the Bishop of Chester* (5), in a declaration in *Quare Impedit*, the right of presentation to a perpetual curacy, was stated

to be "in all the householders and heads of families in a township, and the heirs male of A. M.'s body, and such other of his kindred or blood as should have any lands in the township, or the greater number of them;" and it was averred, that, the chapel being vacant, one B. was duly nominated and elected minister by the plaintiffs, being the greater number of the householders and heads of families in the township, to whom the nomination and election of the minister then belonged—it was held, that the declaration was bad, inasmuch as it did not state that the heirs male of A. M.'s body, and such other of his kindred or blood as had lands in the township, concurred in the nomination, or that they were in the minority, or that there were no such persons: and Mr. Justice Holroyd said, "It is perfectly clear, that the mere allegation, that the right belonged to the plaintiffs, at the time when they made this nomination, is not sufficient. The parties must shew the facts and particular circumstances out of which the right which they allege to exist in the persons making the nomination arises; they must state the facts, from which it shall appear whether they have or have not that right."

Mr. Serjeant Wilde and Mr. Serjeant E. Laves now shewed cause; and submitted, that the entry in the register of the visitations was properly received in evidence, as it was produced from the registry of the bishop, where it was deposited for the purpose of recording the proceedings of different visitations and admissions within his diocese; and, as the election of the plaintiff Arnold depended on custom, evidence of reputation was admissible; and the book in question shewed what churches the different clergy in the diocese filled, as well as the time of their admission, and by whom they were admitted. Besides, the entry was not of a private nature, and was adduced in evidence not for the purpose of proving a particular custom; but to shew that a party had been admitted according to custom. There can be no doubt that the book in question was brought from the proper custody; and that it is evidence of the facts therein contained; for, in *Bullen v. Michel* (6), it was held, that ancient entries, made by the monks of an abbey, relating to an endowment by

(1) 7th edit. 122 c.

(2) Tit. "Pleader," 3. I. 4.

(3) 3 Term Rep. 646.

(4) 2 Term Rep. 667.

(5) 4 B. & C. 555; 4 Law Journ. K.B. 14.

(6) 2 Price, 399.

them, of a vicarage (whether perfect or not), were good evidence (*quantum valeant*) of their subject-matter; although such entries were mixed with extraneous memoranda, and the book was not confined or appropriated to subjects *ejusdem generis*; and that, being admitted, they might be read throughout, for the purpose of proving any thing which was material to the issue, provided it were relevant, although it went to affect third persons who were not privy to it, and could have had no cognizance of the matters to which it related; and such a book was held to have been found in the proper custody to make it evidence, where it was in the possession of an owner, who was so far connected with the abbey as to be possessed of some part of the former estates of the monastery, although no part of such estate was situated in the parish in which the question between the parties to the suit arose. In *Buller's Nisi Prius* (7), it is said, that, where a person in ejectment would prove the relation of a father and son, by his father's will, he must have the original will, and not the probate only; for, when the original is in being, the copy is no evidence; besides, the seal of the court does not prove it a true copy, unless the suit only related to personal estate: *Dike v. Polhill* (8). But the ledger book is evidence in such case, because this is not considered merely as a copy, but is a roll of the court: and in *The Bishop of Meath v. Lord Belfield* (9), it was held, that a register is evidence of an institution or collation, where a blank was left in it for the patron's name; and parol evidence of common report to prove who was the patron, was deemed to be admissible. Although it has been said, that the custom in this case was not proved as laid in the declaration, as it did not state the conditional or qualified custom to elect, by those inhabitants of the parish who paid 4*l.* to the chaplain, beyond his tithes; yet the Parliamentary Survey of 1649 is the best evidence of the custom to elect a minister, and that is altogether silent as to any qualification or condition. That survey is not only most accurate in terms, but has always been received as the highest authority in Courts of law. The parishioners had, there-

fore, clearly a right to elect; and the limitation of such right to those who paid a certain sum to the chaplain, is nowhere adverted to previously to the year 1744; and the condition to pay 4*l.* a year, might be either precedent or subsequent to the election: but the right to elect does not depend on such payment; and if one of the parishioners were a defaulter, he would still have a right to vote. The inhabitants of the parish might meet previously to the election, to ascertain who were parishioners, and the payment of rates might afford the best test of that fact; and the jury might find a general right for all the parishioners to vote in electing a chaplain, independently of those who paid him a certain sum beyond his tithes.

Mr. Serjeant Meremether, in support of his rule.—With respect to the entry found in the registry of the bishop, if it had been an entry of an exhibit at the triennial visitation, it might have been received; but it did not contain the original admission of the party named, but merely a parol declaration as to a particular fact, which took place previously to the entry; and, as it related to a by-gone transaction, namely, that the admission was made by the *late rector* of Wrington, the party making the entry could have no knowledge of the fact, but by general reputation. It must be inferred that he was not present at the time of the admission; and general reputation is not admissible to prove a particular fact. In the case of *The King v. the Inhabitants of Eriswell*, Lord Kenyon, in commenting on the case of *The Bishop of Meath*, said (10), "It has been said, that, in that case, in a *Quare Impedit*, the plaintiff gave in evidence an entry in the register of the diocese, of the institution of one Knight, in which there was a blank in the place where the patron's name is usually inserted; upon which, parol evidence of the general reputation of the country, that Knight was in by the presentation of one under whom Lord Belfield claimed, was offered; and that, upon a bill of exceptions, it was held, that the evidence was admissible: that, it was said, that a presentation may be by parol, and what commences by parol may be transmitted to posterity by parol. I

(7) Page 246 a.

(8) 1 Lord Raym. 744.

(9) 1 Wils. 215.

(10) 3 Term Rep. 723.

have not seen the report of that case : but this I admit, that a presentation may be by parol, and that may be proved by parol, that is, by a witness who was present, and heard it ; but, that common reputation might be given in evidence, I must deny." The custom proved at the trial, was at variance with that laid in the declaration ; and, although it has been said that the Parliamentary Survey is the best evidence to establish the custom to elect the chaplain, yet there was no documentary or parol evidence of any common law custom, to deprive the rector of his right to nominate or present. In *Gape v. Handley* (11), there was an issue to try whether the presentation to the rectory of St. Albans belonged to the Mayor and Aldermen, or to the Mayor, Aldermen, and Burgesses, of St. Albans at large ; and Lord Mansfield said, "The restriction of the presentation at large to the select body, is the most reasonable restriction that can exist : a popular election of a minister raises fumes and heats among the parishioners, and tends much to destroy christian charity." The ecclesiastical survey of the 26 Henry 8, and the entries in the parish books of Burrington of 1744 and 1795 were the only documentary evidence offered for the defendants ; and the survey made no mention whatever as to the custom to elect, but merely that the sum of 66s. 8d. was paid to a priest celebrating in the chapel for his annual stipend by composition. The words *juxta consuetudinem*, in the entry in the register, is the only expression which could be found, or was adduced at the trial, to shew any thing like a custom ; and as those words were introduced in an ecclesiastical document, it must be taken to apply to an ecclesiastical custom, which may exist after forty years, and need not be proved to be from time immemorial. Although the Parliamentary Survey must be taken to be a most accurate document, yet, it is not only silent as to the custom, but states, that the minister hath *usually* been elected by the parishioners of Burrington, and approved of by the rector of Wrington. The word "usually," therefore, is consistent with the custom referred to in the register, as *juxta consuetudinem* cannot imply an immemorial custom. In *Ratcliffe and Chaplin's case*

(12), the Court agreed, that customs shall be taken strictly ; and Mr. Justice Foster said, that "it was so adjudged in *Totnam's case*:" and Chief Justice Cooke said, "There are two pillars of custom : one the common law usage ; the other, that it be time out of mind." A custom must be proved as laid ; for, in *Wilson v. Page* (13), where, in trespass for digging gravel on a waste, the defendant justified under a usage for the tenant of a particular copyhold tenement to dig gravel, he was not allowed to give evidence of a general usage to that effect in all the copyholders ; and Lord Kenyon said, that "the defendant, having pleaded a custom confined to a particular tenement, should be bound by his plea, and confined to evidence of it only." Here, there are two instances of the election of a curate or chaplain, which were wholly inconsistent with the custom alleged in the declaration, viz. for the parishioners at large to elect and present the curate to the rector. The entries of 1744 and 1795 are conclusive to shew, that the right of election was confined to those parishioners who paid 4l. to the chaplain, beyond his tithes : that shews that even those parishioners who paid church rates had not a right to elect ; but those only who contributed to the support and maintenance of the chaplain or curate. In the Ecclesiastical Survey, it is stated, that an annual stipend was paid to the priest by composition, amounting to 66s. 8d. ; and the 4l., in respect of which the parishioners are stated to have been qualified to vote, may be in lieu of the composition mentioned in the survey ; and in the Parliamentary Survey of 1649, the chapel of Burrington is stated to be worth only 43l. a year.

By the Court.—We are of opinion, that there must be a new trial, which we much regret, as the preferment is of so trifling a nature. The first ground which has been raised against the verdict found for the plaintiffs is, that the entry in the bishop's register was improperly received in evidence ; but, we are of opinion, that it was admissible ; yet, as we doubt whether sufficient attention was paid at the trial, to whether the custom was an ecclesias-

(11) 3 Term Rep. 288 a.

(12) 4 Leon. 242.

(13) 4 Esp. Rep. 70.

tical or a common law custom, and, as the attention of the jury was not called to that point, the cause must be re-tried. It appears to us to be rather an ecclesiastical than a common law custom; and, if so, it need not be proved to have existed from time immemorial; as, by the ecclesiastical law, forty years is sufficient to establish such a custom. The register was admissible, as it was evidence of the proceedings, which took place at the bishop's visitations. It was his duty then to inquire, how the different parishes within his diocese were served, viz. by rectors, by vicars, or by curates, and how the clergymen were appointed; and that would lead the bishop to require further explanation as to the mode of the election of a clergyman, and whether he were appointed under a custom or not; and here, it is not shewn, whether the custom were a common law, or an ecclesiastical custom. We must, therefore, endeavour to collect that fact from usage. There are only two instances of elections of chaplains or curates—one in 1744, and the other in 1795; and these do not agree with the custom set forth in the declaration, which is alleged to be a general custom; and, by the entries in the parish books, it appears to be confined to parishioners paying 4*l.* to the chaplain, over and above his tithes. It appears, that, within two hundred years, the curacy was only worth from 40*l.* to 50*l.* a year, which was made up, in part, by the payment of certain tithes. It therefore cannot be supposed, for a moment, that the parishioners have paid 4*l.* a year from time immemorial, or beyond the period of legal memory. Another ground for presuming that the custom is an ecclesiastical, and not a common law custom, is, that, in the Ecclesiastical Survey of the 26 Henry 8, the payment to the priest is stated to have been made by the rector; but it did not appear at the trial, whether that payment still continues to be made. The right to nominate a curate is, by common law, in the rector; and, in a custom of this nature, we ought to see that it be most satisfactorily proved; for, as was said by Lord Mansfield in *Gape v. Handley*, "a popular election of a clergyman engenders feuds among the parishioners, and tends to destroy christian charity." It is far better that the rector should nominate his curate, and that he should not

be deprived of his common law right to present; for he is the best judge of his principles and acquirements, and is best able to know the nature of the doctrine he might preach. As, therefore, the nature of the custom on which the plaintiffs rely, requires further investigation, and more particularly so, as the phrase *juxta consuetudinem*, in the entry of visitations, is, of itself, doubtful and ambiguous, the rule for a new trial must be made—

Absolute.

1829. } ALCOCK v. COOKE AND
Feb. 6. } ANOTHER.

Grant of the King—*where void.*

King—*Prerogative of, as Duke of Lancaster.*

Parol Evidence of Prescription—*where admissible.*

1. *If the King make a grant which cannot take effect according to its terms, it must be taken that he is deceived in his grant, and, consequently, the grant is void. Where, therefore, an estate has been previously conveyed by lease, if the lease be not recited in the grant, the King has granted that which he cannot carry into effect.*

2. *Although the King holds lands as Duke of Lancaster, he holds them as King also; and all his prerogatives belong to him with reference to such lands, as they do with regard to lands which belong to him immediately in right of his Crown.*

3. *Parol evidence cannot be resorted to, to support a prescriptive right to wreck, where it appears that the property where wreck was claimed was in the Crown in the reign of Charles 1; for the jury could not infer that it was in those under whom the party claims, from time of legal memory.*

This was an action of trover for a bowsprit.

Plea—The general issue.

At the trial, before Lord Chief Justice Best, at the last Assizes at Lincoln, the plaintiff claimed the bowsprit, by virtue of a right to take wreck of vessels cast ashore in the parish of Sutton-in-le-Marsh, in the county of Lincoln, under a grant, or letters patent, by Charles the First, dated the 4th of

October 1631, which was under the seal of the duchy of Lancaster, and by which there was granted to Charles Harbard, Christian Favell, and Thomas Young, and their heirs (under whom the plaintiff claimed), of (among other manors, lordships, castles, hundreds, tenements and hereditaments, &c.) the manor of Greetham, in the county of Lincoln, with all its rights, members and appurtenances, the reeveship of Greetham, and the bailiwick of Greetham, and all lands, tenements, rents, and hereditaments whatsoever in Greetham, and various other places (omitting the parish of Sutton), or in any or either of them, or elsewhere in the said county of Lincoln, called or known by the name of the lordship or manor of Greetham aforesaid, or to the said lordship or manor, reeveship or bailiwick of Greetham, in anywise belonging or appertaining, or as member, part, or parcel of them, or any of them, being heretofore had, known, accepted, occupied, used, or reputed, with all and every of their appurtenances (which said lordship or manor of Greetham, and other the premises before granted, were, by a particular thereof, mentioned to be altogether parcel of the ancient lands and possessions of the duchy of Lancaster, in the county of Lincoln), and all and singular the granges, farms, &c., and all rents, revenues, and services, rents-charge, rents-seck, &c., &c., yearly rents, increased rents, fee-farm-rents, courts-leet, &c., and all that to courts-leet did in anywise belong or appertain, immunities, acquittances, and hereditaments whatsoever, with all and singular their rights, members, and appurtenances, of what kind or nature soever they be, or by what name soever they are known, deemed, called, or acknowledged, situate, lying, and being, issuing, growing, renewing, happening, or arising in or within the lordships, manors, hundreds, towns, places, fields, parishes, or hamlets aforesaid, or in or within any or either of them, or elsewhere, or wheresoever, to the aforesaid castles, lordships, manors, hundreds, messuages, lands, tenements, and hereditaments, and other the premises by those presents before granted, or mentioned so to be, to any or either of them, or to any part or parcel thereof, in anywise belonging, appertaining, incident, appendant, or incumbent, or as member, part, or parcel of the same,

being, at any time theretofore, had, known, accepted, occupied, and demised; leased, or reputed; and the reversion or reversions, &c., dependent or expectant of, in, or upon any gift or gifts in fee-tail, or any demise or grants for the term or terms of life or lives, or years, and also all rents reserved upon any demise or grant, demises or grants. And by the same letters patent, the said King did also grant unto the said Charles Harbard, Christian Favell, and Thomas Young, their heirs and assigns, that they, their heirs and assigns, should, from thenceforth, for ever, have, hold, and enjoy, within the aforesaid castles, lordships, manors, hundreds, lands, tenements, and hereditaments, and all and singular other the premises thereby granted, as many, as great, such, the same, and the like courts-leet, views of frank-pledge, hundred-courts, law-days, assize and assay of bread, wine, and beer, goods and chattels waived, estrays, deodands, escheats, reliefs, heriots, free-warrens, hawkings, huntings, and all other rights, jurisdictions, and franchises, liberties, privileges, customs, immunities, acquittances, profits, commodities, advantages, emoluments, and hereditaments whatsoever, as fully, freely, and wholly, and in as ample manner and form, as any abbot or prior of any late monastery, abbey, or priory, or any Duke of Lancaster, or any other person or persons at any time, having, possessing, or being seised of the aforesaid castles, lordships, manors, messuages, lands, tenements, and hereditaments, and other premises thereinbefore granted, by reason or pretext of any act or acts of parliament, or of any charter of gift, grant, or confirmation, or by reason of any letters patent by the said King, or any of his progenitors or ancestors, then late Kings or Queens of England, theretofore had, made, granted, or confirmed, or by reason or pretext of any lawful prescription, use, or custom theretofore had or used, or by any other lawful means, right, or title whatsoever; and as fully, freely, and wholly, and in as ample manner and form as the said King, or any of his progenitors or ancestors, then late Kings or Queens of England, had had or enjoyed in the premises therein before granted or mentioned so to be, or in any part or parcel thereof, or by reason or pretext of the premises, or of

any parcel thereof: except always, nevertheless, and out of that grant altogether reserved, all knight's fees, wards, and marriages, of the premises, and all services for or in respect thereof, and all advowsons, donations, free dispositions, and right of patronage of all and singular rectories, churches, vicarages, chapels, and all other ecclesiastical benefices whatsoever to the premises, or any or either of them, in anywise belonging, appertaining, incident, appendant, or incumbent; and also, except all royal mines of gold and silver, being or to be found within or upon the premises, and all prerogatives to the same mines belonging."

The plaintiff then produced an extract from Domesday Book, to shew that the parish of Sutton was part of the manor of Greetham, and also an abstract of indentures of lease of the 12 James I, made between that King of the first part, and one John Livingstone of the other part; whereby the King granted and to farm let to Livingstone (among other things,) all and singular the profits and commodities happening within the honour of Bolingbroke, parcel of the duchy of Lancaster, in the county of Lincoln, of the goods and chattels, and debts and credits whatsoever of felons, felons of themselves, and fugitives, clerks convicted, persons outlawed, deodands, waifs, estrays, and *wrecks of the sea*, as well in the accounts of the bailiffs and ministers of the said honour of Bolingbroke aforesaid, accountable, or otherwise, within the said honour, to the said Lord the King, answered or to be answered:—to hold the same unto the said John Livingstone, from Michaelmas then last, for the term of thirty-one years, at the yearly rent of 6*l.* and a moiety of all profits, amounting in themselves to 50*l.* and upwards. It was then proved that the honour of Bolingbroke comprised the manor of Greetham. The plaintiff then gave in evidence certain proceedings in a suit instituted in the duchy court of Lancaster, in the eighth year of Charles I, relative to the right of wreck within the manor of Sutton, which was alleged to be within the honour of Bolingbroke, and which was a prayer for process by the Attorney General of the duchy, on the relation of one Charles Harford, the surveyor-general, and one of the grantees named in the grant by Charles the First,

against one Rogers; and, in the information, the lease to Livingstone was recited, and Sutton was mentioned as being within the manor of Greetham, and the honour of Bolingbroke; but the defendant Rogers, in his answer, did not justify or lay claim to any property within Sutton. The plaintiff then gave in evidence, deeds of 1703 and 1707, by which it appeared that the right of the grantees in the grant of Charles the First had been regularly conveyed down to him, the plaintiff. Several witnesses were then called to shew that all those persons under whom the plaintiff claimed had exercised an unlimited and undisputed right to take wreck in the parish of Sutton, until the year 1760. The defendant Cooke, in support of his title, put in an answer to a bill in Chancery in 1763, and proved by parol, that, from that time, he and those from whom he took the estate, had not only claimed wreck in the parish of Sutton, but had exercised their right in taking it: and it was objected for the defendants, that, as wreck was a royal prerogative, it could not pass by the general words contained in the grant of Charles the First; and that, even if it could, as Sutton was not mentioned in that grant, the plaintiff had no right to claim wreck in that parish, particularly, as in point of fact it was not within the manor of Greetham. The jury, however, found a verdict for the plaintiff—the Lord Chief Justice reserving the defendants leave to move to set it aside, if the Court should be of opinion, that wreck was not conveyed under the deed of Charles the First, and, if it were not, that the plaintiff had not adduced sufficient parol testimony of the exercise of the right from the time of the grant to 1760, to support a claim by prescription to such wreck.

Mr. Serjeant Adams, in the last term, accordingly obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, or a new trial granted; and submitted that the plaintiff could only recover on the strength of his own title, and that as he had not proved Sutton to be within the manor of Greetham, he could not be entitled to recover, particularly as the defendant Cooke had proved, from the time of the memory of all living witnesses, an exercise of a right to take wreck, *viz.* from 1763 to the present day. It is quite

clear, that the grant of Charles the First conveyed no right of wreck to those under whom the plaintiffs claimed, neither did the proceedings in the Duchy Court of Lancaster; the grant merely gave to the grantees all the rights, jurisdictions, and franchises, in as ample manner and form as any abbot or prior, or any Duke of Lancaster had in the premises so granted, and it was impossible for a court or a jury to know what would pass under those words. In *Comyns's Digest* (1), it is said, that general words in the King's grant never extend to a grant of things which belong to the King by virtue of his prerogative, for such ought to be expressly mentioned. And again it is said (2), that, if liberties, franchises, &c., which were appendant to a manor, as wrecks, waifs, estrays, &c., come with the manor to the King, the appendancy is extinct, and the King is seised of them, as before, *in jure coronæ*.

Mr. Serjeant Wilde, on a former day in this term, shewed cause.—It cannot be disputed, but that wreck is a prerogative right of the Crown; but the grant on which the plaintiff relies, was made and executed under the seal of the Duchy Court of Lancaster. Although the duchy of Lancaster came to the Crown in the reign of Henry 4, and so remained in the reign of Henry 6, yet, by the statute 1 Edward 4. c. 1. s. 18,—after reciting, that Henry 6, in deed, and not of right, King of this realm, by his charter indented under the seal of the duchy of Lancaster, did give and grant the manor of Kilbourn to the abbot of Biland—it was enacted, that the same charter should be thereafter to the said abbot and his successors;—and in an appendix to *Pickering's Statutes* (3), containing a roll of parliament of the 1st of Henry 7, concerning the annexation of the duchy of Lancaster to the Crown, the duchy of Lancaster is stated to be held by the King distinct from the Crown. Lord Coke, in his *Fourth Institute* (4), says, "that it was to secure a retreat to the King, in case he should be deprived of his Crown; and, from that time to the present, all grants

of duchy lands are made under the duchy seal, and not the seal of the Crown." Although it has been said, that the parish of Sutton is not part of the manor of Greetham, it is quite clear that it is part of the honour of Bolingbroke; and although Sutton is not mentioned in the grant of the 6th of Charles the First, yet the proceedings in the Duchy Court of Lancaster, in the 8th of Charles the First, related to the right of wreck in Sutton; and the lease of James 1. is decisive to shew that the reversion of the right to wreck was vested in Charles 1. at the time of the original grant, by which all rights, jurisdictions, and franchises, liberties, privileges, customs, immunities, acquittances, profits, commodities, emoluments, and hereditaments whatsoever, were granted, excepting only knight's fees and services, ecclesiastical benefices, and gold and silver mines. It was therefore intended, that every thing was to pass by the grant, but those which were expressly excepted. The plaintiff's right is not disputed, either by the Crown or the duchy of Lancaster, but by a mere individual; and as the plaintiff claims under a grant from the Crown, and the defendant Cooke has admitted that he has a right to wreck, except within a certain district in the parish of Sutton, and as the plaintiff's ancestors had exercised a right there until the year 1760, it ought not now to be disturbed.

Mr. Serjeant Adams, in support of his rule.—The honour of Bolingbroke, and the manor of Greetham, are altogether distinct, and are not co-extensive with each other, as the honour is composed of many manors. The statute 17 Edward 2. c. 11. is decisive to shew that the prerogative in the wreck of the sea throughout the realm is in the King; and, as wreck was not mentioned in the deed or letters patent of Charles 1, no right to it was conveyed thereby. In *Comyns's Digest*, it is said, that, if franchises and liberties are granted by the King, which were before *in esse*, as flowers of his Crown, and afterwards by escheat, surrender, or otherwise, come back to the Crown, they are re-united to the Crown, and the King has them *in jure coronæ*, as before. In *Heddy v. Wheelhouse* (5), it was held, that

(1) Tit. "Grant," G. 7.

(2) Tit. "Franchises," G. 1.

(3) Vol. 23, p. 340.

(4) Chap. 36, p. 205.

Vol. VII. C.P.

(5) Cro. Eliz. 591.

liberties which the King would have himself throughout England, if not granted to or prescribed for by a common person, are merged in the Crown, and that, if a common person that had them by grant or prescription, commits a forfeiture of them, or they come otherwise to the King, and the King has them by his prerogative, they cannot afterwards be granted but by a new creation, as waif, stray, wreck, &c. That was considered an authority in the case of *The Abbott of Strata Mercella* (6), where it is said,—that, when the King grants any privileges, liberties, or franchises, which were in his own hands, as wreck of the sea, if they come again to the King they are merged in the Crown. In *Comyns's Digest* (7), it is said, that the King shall have the same prerogative where he is seised in right of the duchy of Lancaster, as where he is seised in right of the Crown: and the case of *The Queen v. the Archbishop of York* (8), is referred to as an authority establishing that position. That case is more fully reported in *Plowden* (9), in which the statute of 3 Henry 5, concerning the seal of the duchy of Lancaster, and the statute 1 Edw. 4, by which the duchy is confiscated to the Crown, are treated of; and where it is said, that, by the latter statute, all possessions which Henry 6. had, were vested in and annexed to the Crown, and were created to the duchy of Lancaster, and that the King should have a seal-chancellor, and other officers for the duchy, and that they should be managed separately from other possessions of the King. It therefore follows, that a grant of property within the duchy, is subject to the same incidents as a grant from the Crown. At all events it cannot be inferred that wrecks were intended to pass by the grant in question, for the express words of the deed must be looked at, and those only. In *Comyns's Digest* (10), it is said, that the King's grant cannot enure to a double intent, and that, if he be deceived in his grant it will be void, though made *ex certâ scientiâ*.

Again (11), it is said, that, if the King's grant can enure to two intents, it shall be taken to the intent that makes most for the King's benefit. And, therefore, it shall be construed strictly; as, if the King grant a manor purchased by him, with all franchises belonging, &c., the franchises in the hands of the feoffor do not pass; for, by the purchase of the King, they are re-annexed to the Crown. Here it would enure to the King's benefit, that the wreck should not pass. Besides, the grant is void, as it is the grant of an estate in possession, whereas the King had but a reversion; and in *Allon Wood's case* (12) it is said, "If the King make a lease for years, or for life, and afterwards grants the land to another in fee, or in tail, without reciting the lease, the last grant is void; first, because the King grants an estate in possession, where he hath but a reversion, and so is deceived in his grant; and the subject had a way to come to the knowledge of the said lease, for every patent ought to be enrolled in the Chancery, to which all subjects may have access." [Here the lease to Livingstone was produced, in order to shew that the reversion of the right to wreck was vested in the King, as it was not recited in the grant.] Lastly, although Sutton might be within the honour of Bolingbroke, it does not follow that it was in the manor of Greetham; and Domesday-book does not refer to that parish, but only contains a return of lands of Earl Hugh in the parish of Lindsay, in which thirty-four sokes are mentioned, of which Grendham or Grantham is one.

Cur. adv. vult.

Lord Chief Justice Best now delivered the judgment of the Court as follows:—

This was an action brought by the plaintiff, who claimed a right to take wreck in the parish of Sutton in the Marsh, in the county of Lincoln; a number of deeds were put in at the trial, which I had no opportunity of seeing. If I had, it might have saved the parties the expense of this application to the Court, as the original grant is not sufficient to support the plaintiff's claim. I reserved

(6) 9 Rep. 25 b.

(7) Tit. "Franchise," D. 3.

(8) Vol. 1, p. 219.

(9) Cro. Eliz. 240.

(10) Tit. "Grant," G. 11.

(11) Com. Dig. tit. "Grant," G. 12.

(12) 1 Rep. 45 a.

two questions for the opinion of the Court: first, whether, supposing Sutton to be within the manor of Greetham, wreck was conveyed by the grant of Charles 1. to the grantees named in that deed, and through whom the plaintiff claims; and secondly, if not, whether the parol evidence adduced by the plaintiff was sufficient to establish a right by prescription. That, however, would only be a ground for a new trial; but we are of opinion, that, as the original grant is void, the plaintiff had no good ground of action, and therefore, that a nonsuit must be entered. It was taken for granted, at the trial, that the parish of Sutton was part of the manor of Greetham, and an extract from Domesday-book was produced for that purpose, which was headed, The Manor of Greetham. But it now appears that that book refers only to the lands of Earl Hugh, which were within the sokes of Greetham: we are therefore clearly of opinion that the parish of Sutton is not within that manor. But the parol testimony adduced by the plaintiff, cannot support a right to wreck by prescription, because it appears, from the proceedings in the Duchy Court of Lancaster, that the right to wreck in Sutton was disputed in the eighth year of the reign of Charles 1, and that it was then vested in the Crown; if so, the plaintiff could not adduce parol evidence to support a title by prescription, inasmuch, as the jury could not infer that the estate was in those from whom the plaintiff claims, from the time of legal memory. That brings me to the main question in the cause, viz. whether or not the grant by letters patent of Charles 1. conveyed wreck to the grantees therein named. Two points have been raised on that deed:—first, that wreck would not pass under the general words therein contained; and secondly, that the grant is void, as it was a grant in possession, whereas the Crown was only seized in reversion. As there is some confusion in the cases, it is not necessary to decide on the first point. It was taken for granted at the trial, and indeed there can be no doubt of it, that Sutton was a parish or district, the wreck in which was leased by indenture in the 13th of James 1. to Livingstone. That indenture is a lease from the King, and it is most material to observe,

that every lease from the King must be enrolled. The title of the enrolment is, "From the 9th to the 13th of James 1, folio 140." The lease is made between our Lord King James, &c. of the one part, and John Livingstone, esq. one of the grooms of the chamber of the King, of the other part. It grants wreck in different places, and also all and singular the profits and commodities happening and arising within the whole honour of Bolingbroke (and it is taken for granted, that Greetham is a part of the honour of Bolingbroke), parcel of the duchy of Lancaster, in the county of Lincoln, to Livingstone, for thirty-one years. In the decree in the Duchy Court of Lancaster, this lease to Livingstone is recited as an existing lease. Now, at the time that decree was pronounced, the grant of the 6 Car. 1. had been executed: the lease, therefore, was an existing lease at the time of the 6 Car. 1. This brings me to the question, whether, as the King had granted a lease of this property, and had not recited that lease in the grant of the fee in perpetuity, the latter grant was not, by the common law of England, altogether void. We are of opinion, that it was so. We take it to be a principle of the common law of this country, that, if the King makes a grant which cannot take effect in the manner in which it ought to take effect according to its terms, it must be concluded that the King has been deceived in that grant; and, therefore, that the grant is void. The grant, indeed, does not contain the word Sutton; but I am taking it now, that Sutton is a part of Greetham, and that the conveyance applies to Greetham in all its parts. If Sutton be not a part of Greetham, the plaintiff must be considered as a perfect stranger, and cannot have the least pretence to maintain this action. Assuming, however, that Sutton is within Greetham, and the right to wreck could be well conveyed, our opinion is, that it was not well conveyed; because, having been before granted by lease, and that lease not being recited, the King proposed a grant which he could not carry into effect. Having already leased the right of wreck in possession for a term of years, he proposed, by the grant, to convey the same right of possession to another person. It would be inconsistent with the King's

honour, that he should grant the right of possession in the same thing to two persons ; and, therefore, the latter grant is altogether void. It is unnecessary to refer to cases ; for it is an established principle, that, if the King is deceived in his grant, the grant is altogether void. It cannot be supposed, unless he is deceived in his grant, that he would grant to A. that which he has already granted to B. ; that would be giving encouragement to litigation, which it is always the object of the King to prevent. I must, however, guard the observation I am now making, by stating that this is a lease from the King, which must be enrolled ; and the doctrine which I am now laying down is applicable only to grants so enrolled, because, if an individual grants a lease, and the estate of which that individual grants a lease, afterwards comes to the King, if the King re-grants it, as the subject could not know with certainty that there was a previously existing lease, the position I have been laying down would not apply. But the present doctrine is applicable to a case where the subject cannot be deceived, and he must be deceiving the King ; for, if the King's prior lease be enrolled, the subject has the means of knowing of the existence of that lease, and it is his duty to inform the King of its existence. The lease granted to Livingstone by James I, was a lease enrolled ; and the grantees under whom the plaintiff claims, when they accepted the grant of the 6 Car. 1, had the means of knowing of the existence of the lease. In the case of *The Earl of Rutland* (13), it was decided, that where one is an officer for life, if the King, without reciting that such a one was an officer for life, grants the office to another for life, the second grant is void for want of such recital ; but no book says, that, if the King recites the first grant, and also recites that the officer is alive, this last grant shall be void for want of certainty. It will be seen, that the present case turns on precisely the same principle. If the King grants an office for life, and grants the same office to another, it might be argued that the two estates might co-exist, because the second grant might give an interest after the first life is determined. But still, it is

void altogether, because it professes to give an immediate interest, and that immediate interest the King cannot give, because the office is full, and there is a possibility that he has been deceived. But, if there had been a recital of the former grant, and also a statement of the fact that the former grantee was still alive, it is then clear that the King could not have been deceived, and the grant will have the effect of giving to the person in whose favour it is made, the estate ;—the office, after the life of the first grantee. Apply that principle to the present case. If the King had recited the lease, although he had granted the fee simple to Livingstone during the existence of that lease, it would have been clear from the recital that he knew of the lease ; but he does not recite the lease, and therefore it must be taken, when he makes another grant which cannot be immediately carried into effect, although according to its terms it is immediately to be carried into effect, that the King is deceived, and that therefore the second grant is void. The next case, that of *Alton Woods* (13), is entitled to the greatest consideration, because it came on, on a writ of error, before eight Judges, that is, all the Judges of England, except the Barons of the Exchequer. The opinion of those Judges has also the confirmation of my Lord Chancellor Egerton, afterwards my Lord Ellesmere, a most eminent lawyer. The Judges in that case say, when the King makes a lease for life or years, and afterwards, without reciting this lease, grants the land in fee or in tail, although the King is stated to make this grant *ex certâ scientiâ et mero motu*, the said grant, without recital, is void by reason of the common law, because the King is deceived in his grant when he intends to grant that in possession which cannot take immediate effect, which the King doth propose and intend. Afterwards, Lord Keeper Egerton says, "The opinions of the Judges are perfectly satisfactory to me." My Lord Treasurer expressed the same opinion ; and the Lord Keeper says, "The King ought to be informed of his own estate, whether it be in possession or reversion." So that my Lord Keeper distinctly states the principle on which we are now putting this case : viz.

You, the subject, who knew of the lease, ought to inform the King of the lease, and then you will see whether he will make a grant which he cannot completely carry into effect during the existence of that lease. In *Comyns's Digest*, tit. "Grant," G. 10., and in *Roll's Abridgment*, tit. "Prerogative of the King," 9, a great number of cases are collected, in which the distinction is taken, that, if a lease from the King be enrolled, a subsequent grant of the same estate, not reciting the lease, is void. So that the doctrine of these two cases, which has been confirmed by several others, has become the settled law of the land, and has been adopted by the most valuable text writers. But it has been said, that these lands belonged to the Duke of Lancaster, and that the statute of Henry the Fourth, separates the lands of the Duke from the lands of the King. That is true; but, although the lands are separate, by whom are they held? Are they held by a mere Duke of Lancaster? or, when the King, as Duke of Lancaster, is the identical person, are they held by the King? Does the King descend from his high estate, to hold lands in any part of the kingdom upon different terms from those on which he holds all his estates? It would be inconsistent with the dignity of the monarch that he should do so; and therefore it has been decided, that, although he holds lands as Duke of Lancaster, he holds them as King also; and that all the prerogatives and privileges of the King belong to him with reference to those lands, the same as they do with reference to lands which belong to him immediately in right of his Crown. In the case of *The Queen v. the Archbishop of York* (14), the question was, whether a double and treble usurpation of an advowson on the record, put Queen Elizabeth out of possession of an advowson, which she had in the right of the duchy of Lancaster; and it was adjudged that it did not, as she had her privilege in this, as if it had been in her in right of the Crown. Here, there is an express opinion of the whole court, that the King or Queen, as reigning monarch, has the same privilege with respect to the duchy lands, as with respect to those lands which

belong to the Crown. In *Plowden's Commentaries*, vol. 1, p. 217 (which is called the great case of the duchy of Lancaster), a question was referred to all the Judges for their opinion, with respect to certain leases that had been granted by King Edward 6. during his minority; and the Judges used the words, "And so it seemed to them, that the intent of Henry 4, and the charter and act of parliament, were only to separate the lands, &c., of the duchy of Lancaster from the hereditaments of the Crown, in order that they might remain in the person of the King, so long as God granted that the Crown and the duchy do continue together in the blood of the Duke of Lancaster, and the mother of Henry 4; and if the crown should be taken from the blood of the duke, that the duchy should remain his: and thus the charter and act are satisfied, without derogation to the person of the King, or the destruction of the dignity or pre-eminence which the law attributes to the King." Nothing can be more express than this; he has separate estates, viz. A. belonging to his Crown estate, and B. belonging to his duchy of Lancaster. Although he holds B. as belonging to his duchy, he holds it also as King, and he has the same privileges and immunities as he has with respect to his other property; and so the Judges determined in that case. Although Edward 6. had granted a lease of the estate before he was twenty-one, that lease, which would have been bad in case he had been mere Duke of Lancaster, yet, as he was also King of England at the same time, it was good. Lord Coke puts this very strongly in his *Fourth Institute*, p. 209. "All this appeareth by that great and grave resolution of the case of the duchy of Lancaster, reported by Mr. Plowden, that no statute now in force doth separate the duchy from the person of the King, nor to have the person of the King separate from the duchy, nor to make the King duke of Lancaster, having regard to the possessions of the duchy, nor to alter the quality of the person of King Henry 7; but only that the King should have to him and his heirs, the said duchy, separate from his other possessions. In which case, the duchy at least was joined to the person of Henry 7, and to his heirs, and the person of the King

remains as it did before; for, nothing is said to the quality of the person of the King, nor to the alteration of his name, and the person of the King shall not be enfeebled, because the duchy is given to the King and his heirs, but remains always of full age, as well as to gifts as to grants by him made, as to administration of justice; whereupon it was resolved, that leases made by Edward 6, being within age, of lands, either within the county of Lancaster, or without, parcel of the duchy (the royal and politic capacity of the King being not altered), were not voidable by his not being of age. That is a just resolution, as tending to the safety and quiet of purchasers and farmers, and proveth directly that the royal and politic capacity of the King being not altered (as to these possessions), the letters patent of the King of these possessions under the duchy seal are of record: and we find no opinion in our books, or any thing in any record, that we remember, against this." This is sufficient to shew that there is no distinction between the privileges of the King as Duke of Lancaster, and the prerogatives of the King as King of England. If that be so, then, reverting to what I have already stated, viz. that, by the prerogative of the King, if the King is deceived in his grant, the grant is altogether void; and it appearing by decided cases, that it must be taken that the King is deceived in his grant, when he grants that which he cannot give according to the terms of his grant; it appearing also, that, at the time the letters patent of 6 Car. 1. were executed, the property granted was already in the possession of Livingstone, under a lease for years, and that that lease had several years then to run; the grant of 6 Car. 1. is altogether void; and the rule for entering a nonsuit must be made—

Absolute.

1829. } DOE ON THE DEMISE OF FISHER
Feb. 12. } V. GILES AND OTHERS.

Ejectment.—Mortgagor—where he may be ejected, without demand of possession by the mortgagee.

By a mortgage deed, the mortgagor covenanted, that, if the principal sum advanced was not repaid, with interest, on a given day, the mortgagee might enter and sell the premises without the assent or concurrence of the mortgagor; the mortgagor having remained in possession, and the principal sum not having been repaid on the day mentioned in the deed:—Held, that the mortgagee might maintain ejectment without a notice to quit, or a previous demand of possession.

This was an action of ejectment, brought by the lessor of the plaintiff, as mortgagee, against the defendant Giles, the mortgagor.

At the trial, before Mr. Baron Vaughan, at the last Summer Assizes for Shropshire, it appeared, that, by a mortgage deed, bearing date on the 19th of February 1827, and made between the lessor of the plaintiff, as mortgagee, of the one part, and the defendant, Giles, as mortgagor, of the other part, the latter conveyed the estate sought to be recovered in this action, to the former, to secure the sum of 6,200*l.* advanced by Fisher to Giles. The deed contained a covenant, that, if that sum should not be paid, with interest, on the 19th of August following the date of the indenture, Fisher, the mortgagee, might enter on the premises, and proceed to a sale, without the concurrence or assent of Giles, the mortgagor. The above sum of 6,200*l.* not having been paid on the day stipulated, viz. on the 19th of August, the lessor of the plaintiff commenced this action on the 21st; and no interest having been paid from the date of the mortgage deed to the 24th of September following, the demise in the declaration was laid on the latter day. No notice to quit was given to the mortgagor, nor did the lessor of the plaintiff prove that he had ever demanded possession of the premises, or required them to be delivered up, previously to the commencement of this action. It was insisted, for the defendants, that ejectment could not be maintained, as the mortgagor must be considered as tenant to the mortgagee, and consequently, that the latter could not be entitled to sue, without a previous demand of possession, or a notice to quit. A verdict, however, was taken for the plaintiff, leave being re-

served to the defendants to move to set it aside, and that a nonsuit might be entered, in case the Court should be of opinion that the demand of possession was requisite previously to the commencement of this suit.

Mr. Serjeant Cross, in the last term, accordingly obtained a rule *nisi*, and relied on the case of *Partridge v. Bere* (1), where it was held, that a mortgagor in possession of the premises mortgaged, is tenant to the mortgagee, and the Court there said, that as the mortgagor was in actual possession of the mortgaged premises, by sufferance of the mortgagee, who had the legal estate vested in him, the former was consequently a tenant within the strictest definition of that word. So, if a mortgagor be considered as a tenant at will, he is entitled to a notice to quit, or at all events, is not liable to be ejected by the mortgagee, without a previous formal demand of possession.

Mr. Serjeant Russell, on a former day in this term, shewed cause. By the terms of the mortgage deed, the mortgagor covenanted, that, if the principal sum advanced to him by the mortgagee, was not paid, with interest, on or before a given day, the latter might enter upon the mortgaged premises, and proceed to an absolute sale, without the assent or concurrence of the mortgagor. If, therefore, the money were not re-paid on that day, the mortgagee had a right to enter and take possession, as the right of possession was in him the instant the day had expired; and, if so, the mortgagor could not be entitled to a notice to quit, nor was the mortgagee bound to make a formal demand of possession, as the mortgagor himself had been guilty of an absolute breach of covenant by non-payment of the principal sum on the day on which it was stipulated to be paid. The mortgagor, therefore, may be considered in the same situation as a tenant for years, who holds under a lease. On the expiration of such lease, the lessor is entitled to enter on the premises, without demanding possession, or giving a notice to quit. In *Keech d. Worne v. Hall* (2), it was held, that a mortgagee might recover in ejectment, without giving a notice to quit, against a tenant who claimed under a lease

from a mortgagor, granted after the mortgage; and Lord Mansfield there said, "The question turns upon the agreement between the mortgagor and mortgagee; when the mortgagor is left in possession, the true inference to be drawn, is, an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt; on payment of which, the mortgagee's title ceases." So, in *Moss v. Gallimore* (3), his Lordship said, "A mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him rent. He is so only *quodam modo*. Nothing is more apt to confound than a *simile*. When the Court, or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is *like* a tenant at will. The mortgagee receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases: he has the legal title to the rent."

Again, in *Birch v. Wright*, Mr. Justice Buller said (4), "That a mortgagor has often been called a tenant at will to the mortgagee, in courts of law and equity, is undoubtedly true, but I think inaccurately so; and the expression has been used when it was not very material to ascertain what his powers or interest were, or to settle with any great precision in what respects he did, and in what respects he did not, resemble a tenant at will. In old cases, he is sometimes called tenant at will, and sometimes tenant at sufferance. In *Keech v. Hall*, Wallace called him the agent of the mortgagee; and Lord Mansfield stated him to be tenant at will to some purposes, but not to others." In *Moss v. Gallimore*, Lord Mansfield said, "A mortgagor is not in reality a tenant to the mortgagee; if he were, he must pay rent, but that is not so. To many purposes he is *like a tenant at will*; but he does not pay rent: he *must pay interest only*." Mr. Justice Ashurst said, "In some respects, a mortgagor is strictly tenant at will, but that is not so here; for the mortgagor is not in possession, and

(1) 5 Barn. & Ald. 604.

(2) 1 Doug. 81.

(3) 1 Doug. 282.

(4) 1 Term Rep. 282.

there cannot be a tenant to a tenant at will. If a tenant at will lease, it determines the will; but, if a likeness must be found, I think, as it was put by Mr. Justice Ashhurst in *Moss v. Gallimore*, a mortgagor is so much, if not more, like a receiver than a tenant at will. In truth he is not either; he is not a tenant at will, because he is not entitled to the growing crops after the will is determined. He is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee; I mean in ejectments brought for the recovery of the mortgaged lands. If he were tenant at will, the demise could not be laid on a day antecedent to the determination of the will. But, it is every day's practice to lay the demise on a day long before there has been any actual determination of the will; sometimes back to the time when the mortgage became forfeited, and no objection has ever been made on that account."

Mr. Justice Buller also said, in *Moss v. Gallimore* (5), that expressions used in particular cases are to be understood with relation to the subject-matter then before the Court; and the case of *Partridge v. Bere* turned on its own peculiar circumstances. There the declaration contained an account that a certain close was in the possession and occupation of one John Turner, as tenant thereof to the plaintiff, the reversion thereof belonging to the plaintiff; and, at the trial, it appeared that Turner being tenant for life of the close mentioned in the declaration, he had mortgaged it to the plaintiff for a certain sum, for a term of years, provided Turner so long lived; and that Turner had since that time continued in possession, and paid no interest; therefore the Court held that the mortgagor was in actual possession of the mortgaged premises, by sufferance of the mortgagee, who had the legal title vested in him.

Mr. Serjeant Cross, in support of his rule.

As the mortgagee in this case allowed the mortgagor to remain in possession, he must be considered as standing in the situation of tenant at will, and was consequently entitled to a demand of possession previously to the commencement of this action, as before such

demand he could derive no information of the mortgagee's determination. In *Coke Littleton* (6) it is said, "It is regularly true, that every lease at will must in law be at the will of both parties, and therefore, when the lease is made, to have and to hold at the will of the lessor, the law implieth it to be at the will of the lessee also, for it cannot be only at the will of the lessor, but it must be at the will of the lessee also." Again (7), "The lessor may, by actual entry into the ground, determine his will in the absence of the lessee; but by words spoken from the ground, the will is not determined, until the lessee hath notice." In *Keach d. Warne v. Hall*, the mortgagor was not in possession, but a tenant who claimed under a lease from him. So, in *Thunder d. Weaver v. Belcher* (8), it was held, that ejectment might be maintained by a mortgagee, without giving any notice to quit, against one who was let into possession as tenant from year to year by the mortgagor, after the mortgage made to the original mortgagee, but before the assignment of it to the lessor; on the ground that the defendant never had any possession under the mortgagee from whence any tenancy could be inferred, and therefore was not entitled to any notice; for he could not be said to have any possession under the mortgagee, as the mortgagor had no authority to let. In *Ponseley v. Blackman* (9), it was decided, in terms, that, if a mortgagor continue in possession for the term given for the re-payment of the mortgage money, he is then tenant for years to the mortgagee; and in *Smartle v. Williams* (10), Lord Chief Justice Holt says, "Upon executing a deed of mortgage, the mortgagor, by the covenant to enjoy till default of payment, is tenant at will, and the assignment of the mortgagee could only make the mortgagor tenant at sufferance;" and in *Moss v. Gallimore*, Mr. Justice Ashhurst said, "When the mortgagor is himself the occupier of the estate, he may be considered as tenant at will;" and in *Birch v. Wright*, Mr. Justice Buller drew the distinction, and said, that, in *Moss v. Gallimore*, Mr. Justice Ashhurst

(6) Page 55 a.

(7) Page 55 b.

(8) 3 East, 449.

(9) Cro. Jac. 659.

(10) 1 Salk. 245.

(5) 1 Dougl. 283.

said, "In some respects a mortgagor is strictly tenant at will," but that is not so here, for the mortgagor is not in possession; and in *Goodtitle d. Galloway v. Herbert* (11), it was held, that a tenant at will was not a trespasser, and that if such a tenancy be not determined before the day of demise laid in a declaration of ejectment, the lessor of the plaintiff cannot be entitled to recover; but the case of *Partridge v. Bere* is decisive to shew, that a mortgagor who continues in possession of mortgaged premises, is a tenant to the mortgagee, and whether he be a tenant by sufferance or at will, the tenancy must be legally determined, either by a legal demand of possession or a regular notice to quit.

Cur. adv. vult.

Lord Chief Justice Best now delivered the judgment of the Court as follows:—This was an action of ejectment by a mortgagee against a mortgagor. By the mortgage deed, if the principal sum remained unpaid on a given day, it was covenanted that the mortgagee might enter, and if not paid within thirty days from the day fixed for its payment, he was at liberty to proceed to a sale of the estate, without the concurrence of the mortgagor. This action was brought two days after the day on which the mortgagee had a right to re-enter for non-payment, and before any interest had been paid on the money lent. It was insisted, at the trial, that an ejectment could not be brought, until the mortgagee had required the mortgagor to deliver up possession of the estate. The learned Judge, who tried the cause, reserved, for the consideration of the Court, the question, whether this action could be maintained without a demand of the possession of the estate, previous to the service of an ejectment. It has never yet been decided, that it is incumbent on a mortgagee to make such a demand previous to the commencement of an action of ejectment against the mortgagor. In *Partridge v. Bere*, which was an action brought by the plaintiff for an injury to his reversion, the Court thought, that a mortgagee might describe himself as a reversioner, the mortgagor being in possession of the estate,—and said, that he was a

tenant within the strictest definition of the word. This case comes nearer to the present than any I have been able to find; but this was not a case between the mortgagee and the mortgagor, in which the Court was called upon to decide what are the rights of the one against the other. The defendant, in that case, was a wrong-doer, and had, therefore, no right to object to the plaintiff calling himself a reversioner, as long as he permitted the mortgagor to be in possession of the land. It has been argued, that the mortgagor is tenant at will to the mortgagee; and, therefore, the latter can maintain no action against the former till that tenancy is determined. Lord Mansfield, in the case of *Moss v. Gallimore*, said, "that a mortgagor was not properly a tenant at will to the mortgagee, for he is not to pay him rent." In *Birch v. Wright*, Mr. Justice Buller said, "A mortgagor is not considered as a tenant at will in those proceedings which are in daily use between a mortgagor and a mortgagee; I mean in ejectments brought for the recovery of mortgaged lands." This opinion of Mr. Justice Buller is directly to the point in question. The words of Lord Mansfield, "he is not to pay him rent," are very important. The payment of rent countenances a right to the possession of the land; the payment of interest does not; it relates to the debt, and not to the property pledged. A landlord is not, by taking rent, to induce a man to sow the land, and then turn him out before he can take the crop; and, therefore, a tenant at will has emblements, or may take the crop for his own use (12). Lord Mansfield says, in *Keech v. Hall*, a mortgagor is not entitled to reap the crop, as other tenants at will are, because all is liable to the debt." A mortgagor resembles a person who has executed a statute or recognizance. Whatever these persons do to give value to the property under pledge, is done for the benefit of the creditor. In *Bardens and Wiltington's case* (13), A. is bound in the statute to B. and sows the land; B. extends the lands, which are delivered to him in execution. It was adjudged, that the conusee shall have the corn sown. The same law, in the case of a recognizance. If the mortgagor is not

(11) 4 Term Rep. 680.

VOL. VII. C.P.

(12) Co. Lit. 55, b.

(13) 2 Leon. 54.

a tenant at will, then the law relative to tenants at will has no application to this case. We must look at the covenant he has made with the mortgagee, to ascertain what his real situation is. We find, from the deed between the parties, that the possession of his estate is secured to him until a certain day; that if he does not redeem his pledge by that day, the mortgagee has a right to enter and take possession; from that day the possession belongs to the mortgagee; and there is no more occasion for his requiring that the estate should be delivered up to him before he brings an ejectment, than for a lessor to demand possession on the determination of a term. The situation of a lessee, on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same. If this situation exposes mortgagors to any hardship, they must guard against it by an alteration in the terms of the mortgage deeds. Mortgagees, however, do not find it to their advantage to enter upon the estates if they can get their interest regularly paid; for, from the time that they get possession, their situation is far from desirable, from the constant state of preparation that they must be in to account to the mortgagor, whenever he shall be ready to discharge the mortgage debt. This circumstance has rendered any security for the mortgagor, against any hasty actions of ejectment, unnecessary. The rule for a nonsuit, therefore, must be

Discharged.

1829. { DOE *d.* J. CHEESE AND DAVIES
Feb. 7. { *v.* CREED.
DOE *d.* DAVIES, E. W. CHEESE,
AND J. CHEESE *v.* CREED.

Practice—On Execution by Elegit.

Where two elegits are issued on two several judgments of the same term, though by different plaintiffs, and inquisitions are taken thereon at the same time, the sheriff must deliver under each writ, a moiety of the whole lands, whereof the defendant was seised at the time of the issuing of the elegits.

Ejectment—Notice to quit.

In a case of adverse possession, notice to quit is unnecessary.

Ejectment, by judgment-creditors, on inquisitions taken on two writs of elegit. The cause was tried at the last Assizes at Hereford, before Mr. Justice Gaselee.

The respective lessors of the plaintiff, in Easter term, 6 Geo. 4, obtained two several judgments, in actions of debt on bond, against one Edward Chinn. On the 14th of May, in the same term, they sued out two elegits, which were delivered to the sheriff of Herefordshire on the same day. Inquisitions were taken upon both writs on the 31st of May, each inquisition finding the debtor to be, on the day of taking the inquisition, seised of the *same* lands: and lands to the yearly value of 76*l.*, stated in the first inquisition to be a moiety of the *whole*, were delivered to the plaintiffs under the first elegit; and lands to the yearly value of 18*l.*, stated in the second inquisition to be also a *moiety of the whole* of Chinn's lands, were also delivered, under the second elegit, to the plaintiffs in the second action.

The defendant Creed, claiming under a conveyance from Chinn, was admitted to defend as landlord, upon the usual terms. The tenants not defending, judgment was signed against them.

In the first action, it was objected, on the part of the defendant, that the lessors of the plaintiff were not entitled to recover, no notice to quit having been served upon the tenants. The learned Judge thereupon directed a nonsuit.

In the second action, it appeared, that, before the judgments were obtained in the original actions, notice had been given by Chinn to the tenants, that he had sold the premises to the defendant, and desiring them to attorn to him; which they did, by payment of rent to his agent. This, it was contended, was evidence of a disclaimer by the tenants, and dispensed with notice. It was then submitted, for the defendant, that the inquisition on the second elegit was void, the sheriff having extended the whole moiety of the lands of the debtor remaining after the execution of the first writ; whereas he should only have delivered a moiety of the remaining moiety. The learned Judge expressed no opinion upon this point, but allowed the cause to proceed. The defendant then attempted to prove the conveyance by Chinn to him:

but, this appearing to have been a fraudulent transaction, entered into with a view to defeat the judgment-creditors, the jury found a verdict for the lessors of the plaintiff.

Mr. Serjeant Andrews, in the course of the last term, on behalf of the lessors of the plaintiff in the first action, obtained a rule *nisi*, to set aside the nonsuit. He submitted that a notice to quit was not necessary.

Mr. Serjeant Ludlow, on the same day, applied for a rule *nisi*, that the verdict in the second action might be set aside, and a nonsuit entered, on three grounds—

First—That, under the second elegit, the sheriff had extended less than a moiety of the whole yearly value of Chinn's lands.

Secondly—That the inquisition did not ascertain by metes and bounds the particular lands delivered to the lessors of the plaintiff; as to which was cited a note by *Mr. Serjeant Williams*, to the case of *Underhill v. Devereux* (1), where it is said, that "the inquisition ought to find the lands with convenient certainty; for, to find no certain estate, will be insufficient; and, after the inquisition is taken, the sheriff must deliver a moiety by metes and bounds; and, if he do not, the inquisition is bad, and may be quashed for uncertainty."

Lastly—That the inquisition taken upon the second elegit was void, on the ground urged at the trial. The learned Serjeant referred to *Tidd's Practice* (2), *Archbold's Pr. K.B.* (3) and also to the cases of *Burnham v. Bayne* (4), *Huyt v. Cogan* (5), and *Morris v. Jones* (6).

The Court thought that there was nothing in the first objection; and, as to the second point, they said that the lands extended were described with *sufficient certainty* in the inquisition. The rule, therefore, was granted on the last point only.

Mr. Serjeant Andrews, in support of the rule for setting aside the nonsuit in the first action.—It was not necessary for the lessors of the plaintiff to prove the service

upon the tenants of notice to quit. The tenants themselves, having suffered judgment by default, were not in a situation to take the objection; still less was the defendant Creed. The action was brought for the mere purpose of trying his title under the supposed conveyance by Chinn. Having, by the terms of the rule, admitted himself to be in the actual possession of the premises, he was bound to rely on his own title alone. The possession of Creed was adverse, and, in such case, no notice is necessary. In *Doe d. Foster v. Williams* (7), the plaintiff claimed as nephew and heir-at-law of the person last seised; the defendant, the landlord, was set up to defend instead of the tenant; it was objected, for the defendant, that, to entitle the plaintiff to maintain ejectment, he ought to have given the tenant notice to quit. Lord Mansfield said, "I am clearly of opinion, that there was no occasion for a notice: for, the possession of the tenant was connected with that of the landlord, which was adverse."

The learned Serjeant shewed cause against the rule for setting aside the verdict in the second action.—The inquisitions on the two elegits were properly taken together, both the judgments on which they were founded having been obtained in the *same term*, and both writs having been tested and issued on the *same day*, and delivered to the sheriff together. The case of *Burnham v. Bayne* is not applicable to the present. There, the writs were executed at different times: and, for any thing that appears, the judgments might have been of different terms. The same observation applies to *Huyt v. Cogan*. There, the second elegit was not sued out until after the first had been executed. In *The Attorney General v. Andrew* (8), a creditor, having obtained two judgments in the *same term*, sued out two elegits thereon; on the one elegit, the sheriff extended one moiety of the land of the debtor; on the other, the other moiety: it was contended, that a moiety of the remaining moiety only should have been extended under the second writ. The Court, however, held, the execution to be good. Lord Chief Baron Comyns, com-

(1) 1 Wms. Saund. 69, a, n. (2).

(2) 9th Edit. vol. 2, p. 1035.

(3) Vol. 1. p. 300.

(4) 2 Brownl. 97.

(5) Cro. Eliz. 432.

(6) 2 B. & C. 242, s. c. 3 D. & R. 603.

(7) Cowp. 621.

(8) Hardres, 25.

menting upon these cases, says (9): "If two have judgments, and one sues an elegit, and has a moiety, and afterwards the other sues an elegit, the sheriff shall deliver but a moiety of the residue; yet, if both judgments are of the same term, which is but one day in law, each may take a moiety of the whole." In accordance with the terms of the writ of elegit, the sheriff is bound to deliver to the party suing it out, the moiety of the whole lands whereof the debtor was seised at the time of taking the inquisition. Here, as both inquisitions were held on the same day, each of the plaintiffs was clearly entitled to a moiety of the whole of the lands of the defendant Chinn.

Mr. Serjeant Ludlow, contra.—The lessors of the plaintiff in the first action were properly nonsuited for want of notice. As they claimed through Chinn, they could only have the same rights that he had; and he could not have ejected his tenants without giving them due notice. The payment of rent by the tenants to Creed, at the request of Chinn, does not amount to a disclaimer.

The inquisition taken on the second elegit was clearly void. The only authority at all contradicting that of *Huyt v. Cogan* is a case doubtfully cited in *Fitzherbert's Abridgment* (10). In *Morris v. Jones*, a moiety of the defendant's land was taken under one elegit, and the remainder under a second—it was held, that the second writ was a nullity. In *The Attorney General v. Andrew*, the judgments were not only of the same term, but obtained by the same party. In *Viner's Abridgment* is a dictum of Lord Chief Justice Holt (11), who says—"If there be two judgments, and the defendant is seised of twenty acres, and a moiety of them is extended upon one, and an extent goes upon the other, and inquisition thereupon finds him seised of twenty acres, without any notice of the former extent, and hereupon the other moiety is extended, this is well; though, in truth, a moiety of the remaining moiety ought to be extended." *Pullen v. Purbeck* (12). The inquisition, however, in the present case, taken upon

the second elegit, recited the inquisition taken upon the first. This was an admission by the sheriff, that he had notice of the first extent.

By the Court.—The motion by the defendant, to set aside the verdict for the plaintiff in the second action, rests upon the objection that the inquisition taken upon the second elegit is void, the sheriff having delivered to the plaintiffs in the action in which that writ issued, the whole of the moiety of the defendant's lands remaining after the execution of the first writ. We are of opinion, that there is no ground for the objection. The statute, Westminster, 2nd, c. 18. by which the writ of elegit is given, is accurately set out by Lord Chief Baron Comyns, who, treating of execution by elegit, says (13): "Upon judgment or recognizance, sit in election (of the plaintiff) *quod vicecomes fieri faciet de terris et catallis, vel quod tiberet omnia catalla (exceptis bobus et aseris carucae) et medietatem terrae, quousque debitum fuerit levatum, per rationabile pretium et extentum.* By the writ, the sheriff is commanded to deliver to the plaintiff, all the goods of the defendant in his bailiwick, and also a moiety of all his lands and tenements whereof, on the day judgment was given, or ever afterwards, the defendant was seised. Now, here, at the time of the issuing of the two writs, the defendant was seised of the whole of the lands mentioned in the inquisitions. The sheriff would have been guilty of a neglect of duty, if he had not extended the whole. Each plaintiff was entitled to a moiety of the whole lands whereof the defendant was seised at the time the writ of execution issued. The cases cited to the contrary do not apply. They only go the length of deciding, that a moiety of the remaining moiety only may be taken on a second elegit issued after the execution of the first elegit, or of a subsequent term. He does not appear to make any difference, whether the writs be sued out at the instance of the same or a different plaintiff, provided both are of the same term. Lord Chief Baron Comyns refers to *Huyt v. Cogan*, *Burnham v. Bayne*, and *The Attorney General v. Andrew*. The principle he deduces from them is this—

(9) Com. Dig. tit. "Execution," (C. 14.)

(10) Tit. "Execution," pl. 137.

(11) Vin. Abr. tit. "Execution," (M. a. 4) pl.

23.

(12) 12 Mod. 361.

(13) Tit. "Execution," (C. 14.)

that, "if two persons have judgment, and one sues an elegit, and has a moiety, and afterwards the other sues an elegit, the sheriff shall deliver but a moiety of the residue; yet, that, if both judgments are of the same term, which is but one day in law, each may take a moiety of the whole." In *Tidd's Practice*, it is said (14), that, "if A. and B. recover several judgments against C., of different terms, and A. sue out an elegit, and have a moiety of C's lands delivered to him, and then B. sue out an elegit, the sheriff, it seems, can only extend a moiety of the remaining lands:" (15)—but that, "if A. have two judgments against C. of the same term, and take out two elegits; on the one, he may have a moiety of the whole, and, on the other, the other moiety, and is not restrained on the latter to a moiety of the moiety: for, in judgment of law, the whole term is as but one day" (16). In *Impey's Office of Sheriffs, the Attorney General v. Andrew* is cited to the same effect. We, therefore, think that the rule for setting aside the verdict found for the lessors of the plaintiff, in the second action, must be

Discharged.

The Court thinking the point raised in the first action, viz. as to whether or not the tenants should have had notice to quit, embraced a point of practice of some difficulty, took time to consider. The rule for setting aside the nonsuit was subsequently made absolute; thus, in effect, deciding that notice to quit was not necessary.

Rule absolute.

1829. } CARTER v. CARTER AND
Feb. 10. } ANOTHER.

Landlord and Tenant—*Voluntary payments.*

Payments by a tenant, of ground-rent due to the superior landlord, or of land-tax, for which, in default of payment, he is liable to be distrained upon, are not voluntary pay-

(14) 9th Edit. vol. 2, 986.

(15) For which the learned author cites, Cro. Elix. 483; Hardres, 23, 27; Bac. Abr. vol. 2, 350; Gilbert on Executions, 55, 56; Patch on Mortgages, 293, 294.

(16) Hardres, 23.

ments, but are such as the tenant is entitled to deduct from the rent paid to his immediate landlord; and a distress by the latter, after notice of such payments, is wrongful, and the subject of the action.

This was an action on the case for a wrongful distress.

The first count of the declaration stated, that, before the time of committing the grievances therein mentioned, the plaintiff held a certain dwelling-house and premises as tenant thereof to the defendant Carter, at the yearly rent of 50*l.*; and that, on the 20th of November, 1827, the defendants, seized the goods of the plaintiff being in the said dwelling-house, of the value of 100*l.*, and sold them, for rent alleged to be due and in arrear from the plaintiff to the defendant; whereas, in fact, no rent was due or in arrear.

The second count stated, that the defendants wrongfully and unjustly took and distrained the plaintiff's goods for 25*l.*, alleged to be due from him to the defendant Carter for rent, when, in fact, 5*l.* 10*s.* only were due. The third count alleged that the plaintiff tendered to the defendant Carter, a sufficient sum to satisfy the rent due, before and at the time of making the distress. The fourth count was for not removing the goods from the premises within five days. The fifth, for not selling them for the best price that could be obtained for them. The sixth, for not returning the surplus after the sale. The seventh, trover.

The defendants pleaded the general issue.

The cause was tried at Westminster, at the Sittings after last term, before the Lord Chief Justice, when the following facts appeared in evidence.

The plaintiff rented of the defendant a house and shop for 50*l.* a year. Shortly after Lady-day 1827, up to which time the plaintiff had paid his rent to the defendant, the agent of the Duke of Bedford, who was the superior landlord, called on the premises for 17*l.*, a year's ground-rent, due at the preceding Christmas, the defendant Carter having refused to pay it. The agent agreed to allow the plaintiff six weeks to make the payment; at the end of which time, the plaintiff paid 8*l.* 10*s.*, and the remainder in September following. In October, the plaintiff was again called upon

and forced to pay 2*l.* 10*s.* for three quarters' land-tax, the last quarter of which was due at Michaelmas then past. In November, the defendant Carter demanded 25*l.* for the one half-year's rent due at Michaelmas. The plaintiff tendered the receipts for the ground-rent and land-tax, and the difference, 5*l.* 10*s.*, in cash. These the defendant refused to accept, and distrained for the whole. The receipts and cash were afterwards again tendered to the broker, together with 2*l.* for the expenses of the distress, and were again rejected. The broker remained on the premises eighteen days, and then removed and sold the goods.

On the part of the defendants, it was contended, that the payment of ground-rent, not being made under the pressure of a threat of immediate distress, was a mere voluntary payment.

His Lordship left it to the jury to say, whether the sum tendered, together with the receipts, was sufficient to satisfy the rent due to the defendant Carter. The jury found in the affirmative. Verdict for the plaintiff—damages 50*l.*

Mr. Serjeant Wilde, on a former day obtained a rule *nisi*, that this verdict might be set aside, and a new trial had.—The payments of ground-rent and land-tax merely gave the plaintiff a right of set-off. The plaintiff should have alleged them in his replication. In *Andrew v. Hancock* (1), to an avowry, in replevin, for rent in arrear, the plaintiff pleaded in bar, payments for land-tax, and paving-rates, for several years successively, and that the sums so paid by him exceeded the amount of the rent distrained for—it was held, that the plea was bad, in substance amounting to a set-off, which, according to *Sapsford v. Fletcher* (2), cannot be pleaded to an avowry for rent. The payments alleged to have been made by the plaintiff, afford no answer to the defendant's right of distress. No one count of the declaration is adapted to meet the plaintiff's case; that count which alleges a tender, is not borne out by evidence of the tender of the receipts. The ground-rent was paid before the rent which was the subject of the distress was due; such payment could not, therefore, operate as satisfaction of rent then growing due.

(1) 3 B. Moore, 278; s. c. 1 Brod. & Bing. 37.
(2) 4 Term Rep. 511.

Mr. Serjeant Andrews shewed cause.—The payments made by the plaintiff were clearly not voluntary, being made for the purpose of avoiding a distress. In *Taylor v. Zamira* (3), it was held, that the plaintiff in replevin might plead, to an avowry for rent, payment of an annuity secured out of the lands demised previously to the demise to him, for the arrears of which the grantee of the annuity had threatened to distrain. Mr. Justice Dallas, there said, that the payment was a compulsory payment. So, this was a compulsory payment, the plaintiff being liable to be distrained on if he had refused to pay. The payment of ground-rent, or of land-tax, may operate in satisfaction of rent growing due, as well as of that already due. In *Stubbs v. Parsons*, Mr. Justice Bayley said (4), "The law considers the payment of the land-tax as a payment of so much of the rent then due, or growing due, to the landlord." The second count clearly was supported by the evidence.

Mr. Serjeant Bompas in support of the rule.—The rent from which the payments in question are sought to be deducted, was not due at the time they were made, neither were they made otherwise than voluntarily: not even a threat was proved, as was the case in *Taylor v. Zamira*. Something, at all events, was due for rent, and therefore, the landlord had a right to distrain.

By the Court.—The payments in question were not voluntary payments. Ground-rent was due to the superior landlord. The plaintiff was called upon to pay it. If he had refused, he might have been distrained on. To avoid this, he paid the ground-rent. The principle established and acted upon in the cases of *Sapsford v. Fletcher*, and *Taylor v. Zamira*, is, that payment of ground-rent by the occupier does not give him a right of set-off, but amounts to payment of rent, *pro tanto*, to his immediate landlord. It therefore is not necessary to plead it. The balance is all that remains due. The same reasoning applies to payments made on account of land-tax. Now, here, the rent due, in the first instance, to the defendant Carter, was 25*l.*; of this, 19*l.* 10*s.* were paid on account of ground-

(3) 2 Marsh. 220; s. c. 6 Taunt. 504.
(4) 3 Barn. & Ald. 520.

rent and land-tax. The sum then remaining due was, consequently, only 5*l.* 10*s.* This sum was tendered before the distress was levied; the distress, therefore, was wrongful, and the defendants are liable. The substantial question is, whether more than 5*l.* 10*s.* was due to the defendant Carter. The second count was clearly established by the evidence. In *Andrew v. Hancock*, the tenant made payments for land-tax and paving-rates, for six successive years, without deducting them from the rent paid to his landlord in the current year in which such payments were made. This case is different.

Rule discharged.

1829. }
Feb. 11. } BRIDGES v. SMYTH.

Landlord and Tenant—*Relation of, how destroyed.*

H. S. demised premises to the plaintiff for a term of years, and died. The property descended to his heir-at-law, who devised it to the defendant, for life, and died. The defendant, conceiving she had a claim, as heir-at-law of H. S., declined to take as devisee. The real heir-at-law then brought ejectment, obtained judgment by default, and sued out a writ of possession. To defeat his claim, the defendant then brought ejectment against the tenant (the plaintiff), laying the demise on the 2nd March 1814. The plaintiff continued to occupy after the expiration of the demise to her by H. S.; but she had never paid rent to the defendant:—Held, that, as the defendant, by bringing ejectment, had treated the tenant as a trespasser, she could not afterwards distrain for rent.

This was an action of replevin.

The declaration stated, that the defendant, on the 10th August 1827, at &c., took the cattle, goods, and chattels of the plaintiff, and unjustly detained the same, until &c.

The defendant, in her first avowry, alleged that the plaintiff, for thirteen years and one half of a year, ending at Lady-day 1827, and from thence until &c., held and enjoyed a certain messuage, farm and lands, in which &c. as tenant thereof to the plain-

tiff, at the yearly rent of 382*l.*, payable half yearly; and that, because the sum of 5,157*l.* for the space aforesaid, was due and in arrear to the defendant, she well avowed the taking &c. as a distress for the said rent.

There was a second avowry for two years' arrear of the same rent, ending at Michaelmas 1815; a third, for thirteen years, ending at Michaelmas 1815; and a fourth, for two years, ending also at Michaelmas 1815.

To the first avowry, the defendant pleaded in bar—First, that she did not hold the premises in which &c. as tenant thereof to the defendant, under the supposed demise in the avowry mentioned—Secondly, that no part of the supposed rent in the avowry mentioned, was or is in arrear from the plaintiff to the defendant—Thirdly, that, after the making of the supposed demise, and before any part of the rent in the said avowry became due, to wit, on the 1st September 1823, the defendant, with force and arms &c., entered into the said premises, and ejected and amoved the plaintiff, and kept her so ejected &c., from thence, until &c.

There were similar pleas in bar to the other avowries; on all of which, issue was joined.

At the trial, before Mr. Justice Holroyd, at the last assizes for Suffolk, the facts appearing in evidence were, in substance, as follows:—

In the year 1807, the premises in question, which consisted of certain freehold and copyhold lands, were demised to the plaintiff by Sir Harvey Smyth, for the term of ten years, from Michaelmas in that year, at the yearly rent of 382*l.*, payable half-yearly, at Lady-day and Michaelmas. Sir Harvey died in 1811, when the property descended to his sister, Mrs. Brand, who, in 1812, was admitted to the copyhold, which she surrendered to the use of her will. She died in 1814, having devised the premises to the defendant, for life. The defendant refused to take the property as devisee, thinking herself entitled to it as heir-at-law of Sir Harvey; and, in consequence of her neglecting to be admitted to the copyhold part, the lady of the manor seized it, and afterwards brought ejectments against the plaintiff and other tenants (laying the demise on the 2nd March

1814), in which she obtained judgments in February 1816. The lady of the manor received the rents of the copyhold premises mentioned in the lease, from Christmas 1815.

In Trinity term, 1823, Sir George Henry Smyth, the real heir-at-law of Sir Harvey Smyth, commenced an action of ejectment against the plaintiff, in which he obtained judgment by default, and sued out a writ of *habere facias possessionem* thereon, in January 1824. The plaintiff was allowed to remain on the premises.

In February 1824, the defendant, in order to defeat the claim of Sir George Henry Smyth, brought ejectment against the plaintiff, laying the demise on the 2nd March 1814, the day of the death of Mrs. Bland. By the consent rule, Sir George Henry Smyth was admitted to defend, as landlord; and the defendant having recovered in that action, as devisee (1), a writ of possession was made out for her early in 1827, but not executed, she refusing to pay the sheriff's poundage. On the 7th May, 1825, the defendant had been admitted to the copyhold. There was no proof of any admission by the plaintiff, that she held under a demise at 382l. a year. The plaintiff was now out of possession.

It was contended, on the part of the plaintiff, that, for a portion of the rent, viz. that due up to Michaelmas, 1817, the distress was too late, as the lease under which it accrued had then expired; and that the distress should have been made before the determination of that demise, or within six months after, according to the statute (2); that the holding over after the expiration of that lease, did not create a fresh demise at the rent stated in the avowries, particularly as the defendant had treated the plaintiff as a trespasser; and, therefore, that, though the defendant might be entitled to sue for mesne profits, she had no right to distrain.

The learned Judge was of opinion that these objections were well founded. The jury returned a verdict for the plaintiff; leave, however, was reserved to the defendant to move to enter a verdict for such sum as the Court should think her entitled

to, in case they should be of opinion that the distress was legal.

Mr. Serjeant Wilde having accordingly obtained a rule nisi—

Mr. Serjeant Storks now shewed cause. —At the time of the distress, there was no subsisting demise, the lease under which the plaintiff had previously held having expired at Michaelmas 1817. The defendant had treated the plaintiff as a trespasser by bringing an action of ejectment against her; the latter could not, therefore, be said to be occupying under a tenancy continuing from that demise. It was incumbent on the defendant to shew that the plaintiff was her tenant at the time of the distress, under the demise stated in the avowries; and that the rent accrued to her during that demise. The defendant had notice of the adverse proceedings by Sir George Henry Smyth, and by the lady of the manor, and yet she took no steps. By not being admitted, after due proclamation, the copyhold became forfeited to the lady of the manor.

Mr. Serjeant Wilde, in support of his rule. —The plaintiff never having been turned out of possession, there was no determination of her tenancy; and, as she never objected to the terms of the lease, which expired in 1817, it must be assumed that she continued to hold the premises under the same terms. The ejectment by Sir G. H. Smyth, being a proceeding by a wrong-doer, without title, for which the defendant was in no way responsible, did not affect her right. In the ejectment by the defendant, the name of the plaintiff was only inserted for form, Sir G. H. Smyth being the real defendant in that action. It was not an adverse proceeding against the plaintiff, as appeared by the defendant's refusing to execute the writ of possession. The pleas of *non tenuit*, and eviction, were, therefore, clearly not supported by the evidence. The proceeding by the lady of the manor was never carried to the length of an ouster. It did not appear that the plaintiff had ever communicated it to the defendant. Besides, the defendant was subsequently (in 1815) admitted to the copyhold premises; so that, at the time of the distress, the plaintiff was tenant to her of the whole of the premises which she had held. The terms under which she held

(1) See *Doe d. Smyth v. Smyth*, 6 B. & C. 112; a. c. 5 Law Journ. K.B. 13.

(2) 8 Anne, c. 14, ss. 6, 7.

them from 1807 never having been objected to, must be presumed to have continued the same, with her assent.

By the Court.—We are of opinion, that, upon the facts of the case, which were properly left to the jury, nothing appears whence the existence of a tenancy under the defendant can be presumed. The defendant treated the plaintiff as a trespasser from the 2nd March 1814, the day on which she laid the demise in her action of ejectment. It is impossible, therefore, to say that the plaintiff afterwards became her tenant, so as to give her a right of distress. It is unnecessary to consider the effect of the statute of Anne, the original lease having expired in 1817, and no distress having been made within six months. Although the object of the ejectment brought by the defendant, was merely to defeat the adverse claim of Sir George Henry Smyth, still that makes no difference; for, the lessor of the plaintiff being entitled to sign judgment against the casual ejector, such judgment would be conclusive against the plaintiff, as tenant. The defendant had, therefore, clearly no right to distrain, whatever other remedy she might have, she having expressly negatived the existence of a contract of tenancy, by treating the plaintiff as a trespasser.

Rule discharged.

1829. }
Feb. 7. } HUDSON v. REVETT.

Evidence—Interested Witness.

On an issue directed by the Court to try the validity of certain deeds of lease and release, and an accompanying trust-deed, the Court held, that the attorney who prepared them was a competent witness to prove the circumstances under which they were executed; notwithstanding his claim for costs, which, it was contended, gave him an interest in supporting them; and notwithstanding he was a party to the trust-deed, under which he was appointed receiver, in which character he had defended an action of trespass brought against him by the present defendant, for breaking and entering a chapel on the estate.

Vol. VII. C.P.

Stamps—On Conveyances for the benefit of creditors.

Where, by deeds of lease and release, and an accompanying deed of trust, property is conveyed for the benefit of creditors exceeding five, the whole forming but one assurance, an ad valorem stamp is not requisite, as they fall within the exception in the 55 Geo. 3, c. 184, schedule, part 1, title "Mortgage."

Deed—Where blanks filled up after execution.

The defendant, by deeds of lease and release, and an accompanying deed of trust, conveyed his property to the plaintiff, in trust for the benefit of his creditors; the deeds of lease and release containing a covenant for the defendant and his wife to levy a fine to enure to the uses of the trust-deed. At the time of the execution of the deeds, blanks were left in the trust-deed for the amount of a debt due to one of the creditors, which was not then ascertained. These blanks were on the following day filled up in the presence, and with the assent, of the defendant; and he afterwards joined with his wife in levying the fine, and wrote to the tenants on the estate, desiring them to pay their rents to the plaintiff's agent:—Held, that the subsequent filling up of the blanks did not avoid the deeds.

This was an issue directed by the Court in last Trinity term, to try the validity of certain deeds of lease and release, bearing date the 25th and 26th of November 1825, and of an accompanying deed of trust, dated on the last-mentioned day; and whether they had been obtained from the defendant by fraud, covin, or misrepresentation.

By the deeds in question, the defendant conveyed to the plaintiff all his estates in the county of Suffolk, upon trust, for the benefit of his (the defendant's) creditors, among whom were the plaintiff and one Mills; the costs, charges, and expenses of preparing, settling and executing the deeds, to be first paid; and, in the next place, the costs, charges, and expenses incurred in the sale of the estates, of which one Robert Browne was to be the manager and receiver; the surplus arising from the sale, after payment of the debts, incumbrances and expenses, to be paid to the defendant. The deeds of lease and release also contained a

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covenant on the part of the defendant to levy a fine to enure to the uses of the trust-deed.

The cause came on for trial, before Mr. Justice Holroyd, at the last Assizes for the county of Suffolk.

Robert Browne was called as a witness for the plaintiff. He stated, that, in November 1825, he was employed professionally on the part of the plaintiff and Mills, creditors of the defendant, to prepare the deeds in question; and that he was a party to the deed of trust, and had acted under it.

An objection was thereupon taken, on the part of the defendant, to his testimony, on the grounds, that he had an interest in supporting the deeds, on account of his costs for preparing them; and that he had an equitable claim on the monies arising from the sales of the estates under the deeds, for defraying the expenses attending those sales. It was also objected, that he had set up the conveyance as his defence to an action of trespass which had been brought against him by the present defendant, for breaking and entering a chapel on the estate, of which he had taken possession under colour of the trust-deed (1).

The learned Judge was, however, of opinion, that the deeds did not give the witness any higher security for his costs, and that he could not take notice of his equitable claim upon the defendant's estates. His evidence was therefore received.

He stated, that, in the month of November 1825, the deeds in question were executed by the defendant whilst a prisoner in the King's Bench prison at the suit of the plaintiff, and of one Mills; that, at the time of its execution, blanks were left in the trust-deed for Mills's debt, he claiming 16,000*l.*, the defendant asserting the debt to be only 14,858*l.* 8*s.* 8½*d.*; that it was thereupon agreed that the sum, when ascertained, should be afterwards inserted; and that, on the following day, the balance due to Mills having been adjusted, the blanks were filled up in the presence of the defendant, by the insertion of the sum of 14,858*l.* 8*s.* 8½*d.*

The testimony of Browne was confirmed by another witness.

The plaintiff then gave in evidence a letter, dated the 29th of November 1825, a copy of which was sent to each of the tenants on the defendant's estates, in the following terms:—

"Sir,—Having this day executed to Mr. Thomas Hudson (the plaintiff) a conveyance of all my estates and hereditaments, in trust for the purpose of satisfying various charges and incumbrances on my property, I write to desire that you will in future pay your rents to the said Thomas Hudson, or his appointed receiver, whose receipt will be a sufficient discharge."

And also a letter from the defendant to the steward, desiring him to deliver over to Browne the court-rolls and books of the manor, and stating that the manor had been conveyed by him to the plaintiff, for whom Browne was the attorney.

It was further proved, that, in December 1825, the deeds were executed by the defendant's wife in his presence, and that, in Hilary term 1826, a fine was levied by them, to enure to the uses of the trust-deed; and a witness named Chapman also proved, that, in the same month of December, he saw the defendant at the house of one of his tenants in Suffolk, who then told him (the witness) that he had assigned his property to the plaintiff.

The defendant offered no evidence; but it was contended on his part, that the trust-deed was void by reason of the blanks left therein at the time of its execution, and that the case was not altered by the subsequent assent of the defendant to the filling up of those blanks—as to which *Buller's Nisi Prius* was referred to, where it is said (2), "If there be blanks left in an obligation in places material, and filled up afterwards by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered; as, if a bond were made to C., with a blank left after for his christian name, and for his addition, which is afterwards filled up." It was also submitted, that, under the statute 55 Geo. 3. c. 184, sched. part. 1, tit. "Mortgage" (which provides "that any conveyance of lands, estate, or property whatsoever, in trust to be sold or otherwise converted into money, which should be intended only as a

(1) See *Revett v. Browne and others*, 2 M. & P. 12; s. c. 5 Bing. 7; 6 Law Journ. C.P. 194.

(2) 7th Edit. p. 267.

security, and should be redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, shall be stamped with a progressive duty"), the deeds of lease and release required an *ad valorem* stamp, it not appearing on the face of those deeds, so as to bring them within the exception in that statute in favour of such conveyances, that the conveyance was made for the benefit of creditors exceeding the number of five, the creditors not being named in those deeds, but only in the trust-deed, which, by reason of the alterations, was void.

The learned Judge told the jury, that the only question for their consideration was, whether the deeds in question were the deeds of the defendant, and, if so, whether either, or which of them had been obtained by fraud or misrepresentation; that, notwithstanding the subsequent alteration of the trust-deed, if there were any circumstances to shew the intention of the party, that the deed should be acted upon in its altered state, and the alterations were made in his presence and with his assent, the deed would still be good, inasmuch as the subsequent assent would operate as a re-delivery. His Lordship referred to the case of *Goodright v. Carter v. Straphan* (3), where a *feme covert* having delivered a deed during the lifetime of her husband, which deed was therefore void, and re-delivered it after his death—it was held to be a sufficient confirmation of the deed to bind her, without its being re-executed or re-attested; and Lord Mansfield, referring to *Perkins* (4), said—"The question is, whether circumstances may not be equivalent to a delivery without actual delivery:" and to *Coke* (5), where it is said, that, "as a deed may be delivered to the party without words, so a deed may be delivered by words without any act of delivery."

The jury found that the deeds in question were the deeds of the defendant, and that the execution of them had not been obtained by any fraud, covin, or misrepresentation; and they accordingly returned a verdict for the plaintiff.

Mr. Serjeant Wilde, in the last term, obtained a rule *nisi* that this verdict might be

set aside and a new trial had, on the grounds—that the evidence of Browne was improperly received—that the deeds of lease and release should have been stamped with the progressive duty imposed by the statute; and that the trust-deed should have been re-stamped when the blanks were filled up, to constitute a re-execution or re-delivery—and that there was no evidence of any re-execution or re-delivery, and nothing in the subsequent conduct of the defendant to raise any such inference; but, on the contrary, strong evidence to rebut the presumption, the deed never being in the possession of the defendant, but remaining in the adverse custody of Browne.

Mr. Serjeant Storks and *Mr. Serjeant Russell* now shewed cause.—The jury having negatived fraud, the only point to be considered is, whether the deeds in question, or either of them, were avoided by any subsequent act of the parties.

The evidence of Browne was properly admitted; he had no interest in supporting the deeds; the verdict in this cause could not in any shape be made available either to advance or to defeat any claim he might have for the costs of preparing them; nor could his mere equitable interest as receiver render him incompetent.

The case of *Coates v. Perry* (6) is an authority to shew that the common deed stamp was sufficient. There, parties by deed conveyed all their effects to trustees, in trust to sell, and, with the proceeds to be derived from the sale, to discharge, in the first place, debts due to the trustees, then debts to other creditors; with a resulting trust, as to the residue, to the parties conveying—and it was held, that this deed did not require an *ad valorem* stamp, as upon a conveyance or mortgage, under the statute 55 Geo. 3. c. 184, the clause as to a conveyance operating only as to actual sales between the vendor and purchaser; and that it fell within the exception as to a conveyance made for the benefit of creditors.

The blanks left in the trust-deed, were so left at the express instance of the defendant, and with his assent they were afterwards filled up. The insertion of the sum due to Mills was not an alteration, but a mere

(3) Cowp. 201. ,
(4) Section 154.
(5) Co. Litt. 36, a.

(6) 6 B. Moore, 188; s. c. 3 Brod. & Bing. 48.

completion of the deed ; and no re-execution or re-delivery was necessary to give effect to it. Lord Coke says (7), "that, as a deed may be delivered to the party without words, so may a deed be delivered by words without any act of delivery ;" and in *Thoroughgood's case* (8), one party saying to another—"Here, I deliver you this writing"—was held to be a good delivery thereof to take effect as a deed. In *Buller's Nisi Prius*, it is said (9), that, "if there be blanks left in an obligation in places material, and filled up afterwards by the assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered ;" and for that doctrine *Pigot's case* (10) is cited : but, on reference to the authority it appears thus—"That, if a deed be altered in a point material, by the plaintiff himself, or by a stranger, without the privity of the obligee, be it by interlineation, addition, rasure, or by drawing of a pen through the midst of any word, the deed by this becomes void ; for it is not now the same deed ; as, if an obligation be made to a sheriff to appear, &c., and in the obligation the name of the sheriff is omitted, and, after the delivery of it, his name is interlined, either by the obligee, or a stranger without his privity, yet the deed is void by it ; but, if the deed be interlined in a thing not material, by a stranger, without the assent of the obligee, this shall not make the obligation void," and *Pigot's case* (11) is the authority cited. In that case, however, the alteration was made after the execution and delivery of the bond, and was not at the time contemplated by the parties, and the words in the condition were inserted without the privity of the sheriff. The instance, therefore, put by Mr. Justice Buller is not supported by *Pigot's case*. In *Markham v. Gonaston* (12), where A., at the request of B., was bound in a statute with B. to C. as his surety, and upon this, B. caused D. his servant to make a counter-bond, in which he and one E. were bound to A. to save him

harmless from the said statute, and B. commanded his servant to leave out of the condition of it, the christian name of C., the place of his residence, the county, and his addition, and the servant did it accordingly, and afterwards E. sealed and delivered the counter-bond as his deed to the use of A. ; and afterwards the servant, by the command of B., and with the assent of E., inserted in the spaces or blanks, the christian name of C., the place of his residence, and county, and his addition, and afterwards B. sealed and delivered the obligation—it was held to be a void obligation against E., by the addition in the spaces, although it was done by the assent of E. : but that was an action on the case brought by C. against D., in the nature of deceit, for destroying the effect of the bond ; and Mr. Justice Popham there said, that, "if it had been appointed by the obligor before the sealing and delivery thereof, that it should be afterwards filled up, it might then peradventure have been good enough, and should not have made the deed to be void ; but that, being after, it avoided the deed." In the report of the same case in *Moore* (13), it is said, that, afterwards, the plaintiff brought a new action on the bond against the obligor, who pleaded the special matter, and concluded that therefore it was not his deed ; to which the plaintiff replied, that the blanks were filled up with the assent of A. and B. the obligor ; to which the latter demurred : and it was adjudged for the plaintiff. That case was subsequently recognized in *Zouch v. Clay* (14), which was an action of debt upon an obligation. There A. and B. delivered the bond to C., and after, by the consent of the parties, the name and addition of D. were interlined, and he also sealed the obligation and delivered it ; and the question was, whether or not, by this alteration, the obligation was made void against A. and B. Lord Chief Justice Hale, and the whole Court, adjudged that it was not ; and "that it was the obligation of all three, and so was *Moore's Rep.* pl. 738, although 3 *Cro.* 626. was before adjudged to the contrary : but, as the case is in 3 *Cro.*, the obligation was altered only by consent of the obligors, in the absence of the obligee,

(7) Co. Litt. 36, a.

(8) 9 Rep. 137, b.

(9) 7th Edit. 267.

(10) 2 Rol. Abr. 29, pl. 2, S, tit. "Faits," Inter-
kner (U).

(11) 11 Rep. 27.

(12) Cro. Eliz. 626.

(13) Page 547.

(14) 2 Lev. 35 ; s. c. 1 Vent. 185.

and without his notice, though to his use : but here it is *by consent of all parties*." In *Paget v. Paget* (15), a deed of revocation, and a new settlement made by that deed, though after the sealing and execution thereof, blanks were filled up, and they were not read again to the party, nor re-sealed and executed, were held good. In *Hall v. Chandless* (16), after C. D. and E. had executed a lease, and, previously by A. and B., the lease was altered, with the consent and privity of C. only, by an erasure, expunging a certain portion of land which had been inserted by mistake, but in which D. and E. had no interest, and A. and B. then executed the lease—the deed was held valid, notwithstanding the alteration. In *Doe d. Lewis v. Bingham* (17), where a mortgagee by deed conveyed to the mortgagor the legal estate, upon being paid the mortgage-money, and the latter re-conveyed it to trustees for the purpose of securing an annuity ; and, at the time of the execution by the mortgagee, there were several blanks left in the deed for the sums to be received by the mortgagor from the grantees of the annuity, which blanks were all filled up at the time of the execution of the deed by the mortgagee—it was held, that the deed was not therefore void, but operated as a good conveyance of the estate from the mortgagor to the trustees for the payment of the annuity. Mr. Justice Bayley there said (18)—“The whole deed may be considered as one entire transaction, operating, as to the different parties to it, from the time of the execution by each, but not perfect till the execution by all the conveying parties. I am of opinion, that any alteration made in the progress of such a transaction, still leaves the deed valid as to the parties previously executing it, provided such alteration has not affected the situation in which they stood.” In *Texira v. Evans* (19), the defendant, wanting to borrow a certain sum, or so much of it as his credit should be able to raise, executed a bond with blanks for the name and sum, and sent an agent to raise money on the

bond. The plaintiff lent half the sum required, and the agent accordingly filled up the blanks with that sum and the plaintiff's name, and delivered the bond to him. In an action on the bond, the defendant pleaded *non est factum*. Lord Mansfield held the bond good. In *Matson v. Booth* (20), it was held, that the addition of an obligor to a bail-bond, after the bond had been executed by several others, but before the sheriff had accepted it, such addition being made *with the assent of the sheriff and the prior obligors*, did not vacate the bond, or render a new stamp necessary. Mr. Justice Bayley there said, (21)—“The bond was never out of the hands of the obligor ; it remained with his agent, and never passed to the obligee. All was *in fieri*, and the bond was in the nature of an escrow only. The addition of the name was made with the concurrence of the agent of the obligors, at a time when the bond could be considered no otherwise than as in the nature of an escrow ; and, being made with the concurrence of the agent of the obligors, it is the same as if it had been with their concurrence : which brings the case within the authority of *Zouch v. Clay*.” In *Coke v. Brummell* (22), where A., as surety for B., executed a joint bond and warrant of attorney to secure an annuity to C. ; and, after the execution by A. and B., it was discovered that part of A.'s christian name had been omitted in the body of those instruments, and he re-executed them after the name had been inserted, without the knowledge of B. In an action brought against A. on the bond, in the Court of King's Bench, he pleaded a judgment recovered against him and B. This Court afterwards refused to set aside a joint judgment entered up on the warrant of attorney, on the application of A. ; as that instrument was not defeated by the insertion of his christian name, and as he had recognized the validity of the judgment in the action brought against him on the bond. Lord Chief Justice Gibbs there said (23)—“In an action on the bond brought against A. (the surety) in the Court of King's Bench, he pleaded a judgment recovered

(15) 2 Chan. Rep. 410 ; s.c. Vin. Abr. tit. “Falsu,” Interlinea (U).

(16) 4 Bing. 123.

(17) 4 Barn. & Ald. 672.

(18) Ibid. 675.

(19) 1 Austr. 229, n.

(20) 5 Mau. & Selw. 223.

(21) Ibid. 226.

(22) 2 B. Moore, 495.

(23) Ibid. 499.

against himself and his principal, thereby not only recognizing the validity of the judgment, but, by making use of it, defeating that action; and after that he makes this application, whereby he seeks to set it aside: this the Court are of opinion they cannot do—first, because the nature of the securities was not defeated by the insertion of part of the christian name, to which alteration the surety himself was a party; and secondly, because he afterwards recognized the judgment as being legally entered up, and availed himself of it in the action brought against him in the Court of King's Bench." In *Perkins* (24) it is said—"It is to be known that a deed cannot have and take effect at every delivery as a deed; for, if the first delivery take effect, the second delivery is void." That, however, must be taken to apply to the case of a deed complete at the time of the first delivery; and not to a case where the first delivery requires confirmation. In *Butler and Baker's case* (25), Lord Coke refers to *Jenings v. Bragge* (26), where a special verdict found, that a disseisee made an indenture purporting to be a lease for years, and delivered it to a stranger off the land, as an escrow, and commanded him to enter on the land and to deliver it on the land as his deed to the lessee, which he did accordingly—and it was adjudged to be a good lease: and it was there also resolved, "that, to some intent the second delivery has relation to the first delivery, and to some not, and yet in truth the second delivery hath all its force by the first delivery, and the second is but an execution and consummation of the first; and therefore, in case of necessity, &c., *ut res magis valeat quam pereat*, it shall have relation, by fiction, to be his deed *ab initio*, by force of the first delivery." In *Goodright v. Straphan*, Lord Mansfield said that delivery is an act in *pais* only, and a deed is not to be re-executed or re-attested, but a second delivery is good and effectual, and circumstances alone may be equivalent to such re-delivery. So, here, the circumstances disclosed at the trial were abundantly sufficient to shew that the defendant recognized the deed in its altered shape, and that the intention of the parties was,

that the deed should have no operation as a deed until its completion by the subsequent filling up of the blanks.

Mr. Serjeant Wilde, in support of the rule.—The testimony of Browne ought not to have been received. He clearly was interested in supporting the deeds; he had a *lien* on them for the expenses of preparing them; he was also a party to them, viz. as manager or receiver, in which character he had acted, and he had in fact made these very instruments the foundation of his defence to an action of trespass, which the present defendant had brought against him for breaking and entering a chapel on the estate which the deeds purported to convey.

The deeds taken together formed a conveyance for the benefit of creditors. The trust-deed, however, being void, the deeds of lease and release do not fall within the exception in the statute, and consequently required the *ad valorem* stamp, as a common conveyance.

Upon the whole circumstances of the case, there was strong evidence that the deeds were obtained from the defendant by fraud, he being at the time a prisoner at the suit of the very persons by whom he was induced to execute them. *Doe d. Carter v. Straphan* is distinguishable from the present case, for there the deed could not enure as a valid deed during the coverture. In *Cruise's Digest* (27), it is said, "that, in the delivery of a deed as an escrow, two things must be attended to: first, that the form of the words used in the delivery be apt and proper; and this mode of delivery ought to be taken notice of in the attestation: and secondly, that the delivery be to a stranger"—citing *Shepherd's Touchstone*. The language, therefore, of Mr. Justice Bayley, in *Matson v. Booth*, cannot be taken to apply to a case like the present. In *Comyns's Digest* (28) it is said, "that delivery is essential to a deed, for it is not a deed without a delivery, though it be sealed; and that, if a man deliver a writing to A., to the use of B., it is not a delivery to B. if it was not delivered as his deed." In *Doe d. Lewis v. Bingham*, the interest of the mortgagee was not affected by the alterations.

(24) Section 154.

(25) 3 Rep. 35, b.

(26) Trinity, 37 Eliz.

(27) 3rd Edit. vol. 4. p. 32.

(28) Tit. "Facts," (A. 5, 4.)

Where several deeds are to enure for one purpose, the whole taken together operate as but one assurance; consequently, if one be void, the whole are destroyed. Thus, in *Crommel's case* (29), it was held that a bargain and sale, and recovery and fine, although they be made, suffered, and levied at different times, yet all of them, by the agreement and assent of the parties, make but one and the same assurance, according to one and the same original bargain and contract. Here, therefore, as the deeds of lease and release were only ancillary to the trust-deed, if this latter deed be declared void by reason of the alterations therein, the whole conveyance is avoided.

By the Court.—This was an issue directed by the Court for the purpose of ascertaining whether certain deeds were the deeds of the defendant; and, if so, whether they had been obtained from him by fraud, covin, or misrepresentation. The jury have found that the deeds were the deeds of the defendant, and that the execution of them had not been obtained by fraud, covin, or misrepresentation; and, consequently, a verdict has been taken for the plaintiff. A motion has since been made to set aside this verdict and that a new trial might be had, on the grounds—first, that the evidence of a witness named Browne had been improperly received—secondly, that the deeds of lease and release should have been stamped with the progressive duty imposed by the statute 55 Geo. 3. c. 184, schedule, part 1, tit. "Mortgage;" and that the trust-deed should have been re-stamped when the blanks were filled up, to constitute a re-execution or re-delivery—and, thirdly, that there was no evidence of any re-execution or re-delivery, and nothing in the subsequent conduct of the defendant to raise any such inference; but, on the contrary, strong evidence to rebut the presumption, the deed never being in the possession of the defendant, but remaining in the adverse custody of Browne, the trustee.

It is not necessary for us now to decide whether or not Browne was properly admitted to give evidence. If it were, we should

be disposed to think that, inasmuch as this was not the ordinary case of a trial at law, but merely an issue directed for the purpose of satisfying the conscience of the Court, the cause ought not to be sent down again on this account. There was, however, another witness (Chapman) who proved all that would be necessary to support the verdict; and his testimony remains uncontradicted. We have also the fact of the defendant's having written to the tenants on the estate, apprising them of his having assigned his property, and requiring them to pay rent to Browne, the receiver.

The objection as to the stamp is got rid of by our holding the whole of the deeds to be valid. The trust-deed coupled with the deeds of lease and release, operate as one assurance, and are within the exception in the stamp act relating to conveyances for the benefit of creditors.

We are of opinion that it was competent to the learned Judge to leave it to the jury to consider whether from the circumstances they could not presume a re-delivery of the deed when perfected by the filling up of the blanks. This case falls within the principle of *Doe d. Carter v. Straphan*. The deed, in that case, being executed by a married woman, was void; but, when her incapacity had ceased by the death of her husband, she by various acts confirmed the deed: and the Court of King's Bench held that the jury were therefore warranted in presuming a re-delivery or re-execution of it. Now, looking at the intention apparent on the face of these deeds, it is impossible to say that they could have any operation until the subsequent insertion of the amount of Mills's debt. It cannot be said that there was any perfect execution of the deeds until the time of the filling up of the blanks, for until that time they were incomplete. Upon the whole, therefore, we are of opinion that the first execution of the trust-deed was imperfect, and that it was evidently the understanding of the parties that that imperfect execution should be afterwards rendered perfect by the insertion of the sums for which the blanks were left in it; and on this ground we think that the rule should be discharged.

Rule discharged.

1829. } BRYANT v. SIR JOHN PERRING,
Feb. 12. } BART.

Notwithstanding his being under terms to rejoin issuably, a defendant is at liberty to plead puis darrein continuance.

This was action of assumpsit, for money had and received. The declaration was filed on the 18th of November last. On the 13th of December the defendant pleaded a release; to which the plaintiff replied. On the first day of this term, the defendant was served with a notice to rejoin within four days. The defendant obtained a Judge's order for three days' further time, on the terms of rejoining issuably, and taking short notice of trial for the last Sittings in the term. On the day on which the time allowed for rejoining expired, the defendant delivered a plea *puis darrein continuance*. Considering this not to be warranted by the terms of the Judge's order, the plaintiff's attorneys returned the plea, and signed judgment for want of a rejoinder.

Mr. Serjeant Russell, on a former day, on an affidavit stating these facts, obtained a rule *nisi* to set aside this judgment, with costs, for irregularity.

Mr. Serjeant Jones shewed cause, and contended, that, as the plea *puis darrein continuance* contained matter of defence not existing at the time of the replication, it could not be considered to be a rejoinder within the terms of the order to rejoin issuably.

By the Court.—The defendant was clearly entitled to take advantage of any new matter arising in the suit, by plea *puis darrein continuance*. Such matter is totally independent of the Judge's order; the judgment, therefore, was improperly signed.

Rule absolute.

1829. }
Feb. 12. } VERE v. CARDEN.

Pleading—*Sham Plea.*

Practice—*Judgment as for want of a plea.*

The plaintiff declared on a bill of exchange due on the 5th of December; the defendant pleaded a judgment recovered as of the pre-

ceding Michaelmas term: the plaintiff treated the plea as a nullity, and signed judgment:—The Court refused to set aside the judgment, the plea being on the face of it false.

This was an action of assumpsit by the indorsee against the acceptor of a bill of exchange. The bill became due on the 5th of December last. The defendant pleaded a judgment recovered upon the same bill as of the preceding Michaelmas term. This plea being false upon the face of it, the plaintiff treated it as a nullity and signed judgment.

Mr. Serjeant Andrews, on a former day in this term, obtained a rule *nisi* that this judgment might be set aside for irregularity.

Mr. Serjeant Wilde shewed cause.—The bill for which the action was brought not being due until after the term of which the former judgment was alleged to have been recovered, the plea was clearly a sham plea, and the plaintiff had a right to treat it as a nullity, and sign judgment as for want of a plea. *Lamb v. Pratt* (1), is expressly in point. There, a plea of judgment recovered as of a term prior to the accrual of the cause of action, was treated as a nullity; and the Court said—"If defendants will plead judgments recovered for the purpose of delay, let them at least take care that their pleas are good in form."

Mr. Serjeant Andrews, in support of his rule, cited *Young v. Gadderer* (2), where, in an action against the acceptor of a bill of exchange, there was a plea of judgment recovered for the same debt, and the Court refused to set aside the plea, or to allow the plaintiff to sign judgment, although the defendant had admitted the debt, and had repeatedly promised to pay it, after he had been served with process in the action. Mr. Justice Park there observed, that such a plea was an ordinary defence, and that the Court were not to assume that it was false. The learned Serjeant contended, that, at all events, the plaintiff ought not to have signed judgment in the first instance, but should have applied to the Court that the plea might be set aside.

(1) 1 Dowl. & Ryl. 577.

(2) 8 B. Moore, 457; s.c. 1 Bing. 380.

By the Court.—Where it is doubtful whether the plea be a substantial plea or not, the proper course undoubtedly is, either to demur or to move to set it aside; but, if, on the face of it, it is false, the plaintiff is not bound to adopt either of those courses: he may treat it as a nullity. The case of *Pratt v. Lamb* is expressly in point. In *Young v. Gadderer*, on the contrary, the plea was not defective in form; it might have been true for anything that appeared upon the face of it. Here, however, as in *Lamb v. Pratt*, the plea is manifestly false.

Rule discharged, with costs (3).

1829. { KEY AND ANOTHER, ASSIGNEES
Feb. 9. { OF SHERWIN, A BANKRUPT, v.
COOK.

Bankrupt—Construction of the 6 Geo. 4. c. 16.

The 92d section of the 6 Geo. 4. c. 16, which makes the depositions taken before the commissioners conclusive evidence of the matters therein contained, unless the bankrupt within a certain period gives notice of his intention to dispute the commission, applies only to commissions issuing after the act came into operation.

Bankrupt—Deposition of Petitioning Creditor.

A deposition by a petitioning creditor, stating that the bankrupt was, "at and before the suing out of the commission, and still is, justly indebted to him" in a certain sum on bills drawn by the bankrupt and indorsed to him:—Held, insufficient, it not appearing that the bills were indorsed to the petitioning creditor before the act of bankruptcy.

This was an action of assumpsit, by the assignees of one Sherwin, a bankrupt, for the use and occupation of premises, alleged to have come to Sherwin since his bankruptcy.

The cause was tried, before Lord Chief Justice Best, at the Sittings at Westminster

(3) Mr. Serjeant Wilde had obtained a cross-rule to compute principal and interest on the bill. This rule was accordingly made absolute.

VOL. VII. C.P.

after last term. It appeared, that the defendant had originally held the premises under the uncle of the bankrupt, who, dying, devised them to him. The commission issued on the 2nd of March 1822. The defendant gave notice to dispute the petitioning creditor's debt, trading, and act of bankruptcy.

The plaintiffs accordingly produced the proceedings, which purported to have been enrolled on the 1st of March 1828 (1). These proceedings had been enrolled, both under the 5 Geo. 2. c. 30. s. 41, and also under the 6 Geo. 4. c. 16. s. 92 (2). The witness who deposed to the act of bankruptcy was dead, but the plaintiffs were not in a situation to prove that fact sufficiently. It was thereupon contended, that the depositions could not be received under the 5 Geo. 2. c. 30. s. 41, that statute having been repealed by the 6 Geo. 4. c. 16. The depositions were then offered under the 92nd section of the latter statute, when it was objected, on the part of the defendant, that the 6 Geo. 4. c. 16. only applied to commissions issuing after that act came into operation. His Lordship, however, was of opinion that the 92nd section of the 6 Geo. 4. c. 16. was intended to have a retrospective operation, and therefore permitted the proceedings so enrolled to be read.

The deposition of the petitioning creditor (Key), sworn before the commissioners, in proof of his debt, was as follows:—

"That Sherwin, the bankrupt, was *at and before the date and suing forth of the commission*, and still is, justly and truly in-

(1) As to the enrolment, see the case of *Key v. Goodwin*, Easter Term, 1830—8 Law Journal; s. c. 6 Bing. 4 Moore & Payne—not yet reported.

(2) By which it is enacted—"That, if the bankrupt shall not (if he was within the United Kingdom at the issuing of the commission), within two calendar months after the adjudication, or (if he was out of the United Kingdom), within twelve calendar months after the adjudication, have given notice of his intention to dispute the commission, and have proceeded therein with due diligence, the depositions taken before the commissioners at the time of, or previous to, the adjudication of the petitioning creditor's debt, and of the trading and act or acts of bankruptcy, shall be conclusive evidence of the matters therein respectively contained, in all actions at law or suits in equity brought by the assignees for any debt or demand for which the bankrupt might have sustained any action or suit."

X

debted to the deponent and his partners, in the sum of 145*l.* 18*s.* 11*d.*, upon and by virtue of the four under-mentioned bills of exchange; the full amount of the two first of which bills the deponent and his partners gave to Sherwin, the bankrupt, in money, deducting legal discount; and the full amount of the two last of which bills the

deponent and his partners gave, on and previous to the 16th day of May 1821, to Sherwin in goods sold and delivered to him: and for which said sum of 145*l.* 18*s.* 11*d.* the deponent had not, nor had his partners, received any security or satisfaction whatsoever, save and except the said bills of exchange under-mentioned and set forth"—

Date.	Drawers.	Acceptors.	Sum.	Payable to	At what date drawn.	Indorsers.
16 April 1821.	Sherwin & Co.	Wm. Lewis.	£ s. d. 30 0 0	Drawer's order.	12 Months.	Sherwin & Co.
Do.	Do.	Plummer & Brewis.	42 0 0	Do.	Do.	Do.
16 May 1821.	Key, Brothers, & Son.	Sherwin & Co.	36 16 11	Do.	8 Months.	
Do.	Do.	Do.	37 0 0	Do.	9 Months.	

It was then objected for the defendant, that the above deposition was upon the face of it defective, inasmuch as the two bills drawn by the bankrupt were not due until the 19th of April 1822, more than a month subsequent to the date of the commission; and it was not shewn that they were indorsed to the petitioning creditor before the suing out of the commission: and the case of *Rose v. Rowcroft* (3) was cited, in which Lord Chief Justice Gibbs held, that, where the petitioning creditor's debt set up in support of a commission is a bill of exchange drawn by the bankrupt, and indorsed to the petitioning creditor, evidence must be adduced that it was indorsed before the suing out of the commission. This objection his Lordship thought not tenable.

A verdict was thereupon taken for the plaintiffs; and leave was reserved to the defendant to move that it might be set aside, and a nonsuit entered or a new trial had, in case the Court should be of opinion that the proceedings ought not to have been admitted, or that the deposition was not sufficient proof of the petitioning creditor's debt.

Mr. Serjeant Wilde, accordingly, on a former day, obtained a rule *nisi* to that effect.

Mr. Serjeant Taddy now shewed cause.—

The first question depends upon the construction of the 92nd section of the 6 G. 4. c. 16, viz. whether it be retrospective in its operation, or only prospective. From a general view of the spirit and intention of that act, it appears clearly, that, in all cases where the legislature intended to limit its operation to the case of commissions issuing after the act should have taken effect, they have expressly declared that intention by inserting the words "after this act shall have taken effect." The clause in question contains no such words, and must from its nature have been intended to operate retrospectively.

The deposition of the petitioning creditor was, on the face of it, sufficient to shew that the bills in question had been indorsed to him and his partner by the bankrupt prior to the suing out of the commission. The statute 7 Geo. 1. c. 31. (the provisions of which are incorporated in the 6 Geo. 4. c. 16.) made bills not due proveable under a commission, deducting a rebate of interest. In *Macarty v. Barrow* (4), it was held, that, if a bill be drawn before a trader becomes bankrupt, but not protested for non-acceptance until afterwards, it is nevertheless a debt proveable under the commission, for it is *debitum in presenti, solvendum*

(3) 4 Campb. 245.

(4) 2 Stra. 949; s. c. 3 Wils. 16.

in futuro. In *Starey v. Barnes* (5), it was held, that a bill of exchange not refused payment by the acceptor till after the bankruptcy of the drawer, might be proved under a commission against the latter. The case of *Rose v. Rowcroft* cannot be esteemed an authority; for Lord Chief Justice Gibbs there said—"I give no opinion on the point, whether it (meaning the bill) would have constituted a good petitioning creditor's debt, had it been proved to have been in his hands before the suing out of the commission." Here, it is manifest that the bills were, at the time of taking the deposition, and before the issuing of the commission, in the hands of the petitioning creditors. In *Ex parte Douthat* (6), the bankrupt drew a bill for value, in favour of A., to whom he was indebted, and committed an act of bankruptcy before either the bill was due or had been presented for acceptance, and the Court of King's Bench held, that it was a sufficient petitioning creditor's debt, although it appeared, that, subsequently to the commission, the bill had been duly presented, and was paid by the acceptor. Mr. Justice Bayley there said (7), "The words of the statute are, 'all persons who shall give credit, &c.' Now, a man who takes a bill from the drawer is surely a person giving credit to him. And the provision, as to the rebate of interest is also strong to shew that the legislature contemplated a possible proof under the commission, and a payment of a dividend, too, before the bill should become due." It is clear, therefore, that the bills in question were proveable under the commission, and consequently sufficient to form a good petitioning creditor's debt.

Mr. Serjeant Andrews and Mr. Serjeant Bompas (in the absence of *Wilde*), in support of the rule.—The 92d section of the 6 Geo. 4. c. 16. must have been intended to be construed prospectively; for a statute is never held to have a retrospective operation, unless it is clearly so expressed, and in this instance there are no words used that are capable of bearing the construction contended for.

(5) 7 East, 435.

(6) 4 Barn. & Ald. 67.

(7) Ibid. 71.

The deposition as to the petitioning creditor's debt was clearly insufficient to sustain the commission. It was not shewn that the bills were indorsed by the bankrupt before the act of bankruptcy. In *Clarke v. Askew* (8) it was held, that a deposition of a petitioning creditor, merely stating that the debt was due to him at and before the suing out of the commission, was insufficient, inasmuch as it did not shew that the debt existed before or at the time of the act of bankruptcy. In the year 1798, Lord Loughborough made an order by which the commissioners were directed to enter on their proceedings the deposition of the petitioning creditor, stating the nature and amount of the debt due to him, and for what consideration the same arose, and also the particular time or times the same accrued due. At that time, the depositions were not, as by the late act they now are, *conclusive* evidence of the matters therein contained. Greater accuracy, therefore, is now necessary to be observed.

By the Court.—We are of opinion that the 92d section of the 6 Geo. 4. c. 16. applies only to proceedings under commissions issuing after the time at which that statute came into operation, and does not extend to pre-existing commissions. If it were held to operate retrospectively, the consequence would be that the bankrupt, not having given the notice to dispute the commission, which he could have no opportunity of doing, would be for ever barred from calling it in question.

The same objection that has now been taken to the deposition of the petitioning creditor's debt, seems to have been urged successfully in the case of *Clarke v. Askew*, where Mr. Justice Bayley held the deposition to be insufficient, inasmuch as it did not shew that the debt existed at the time of the act of bankruptcy. That case afterwards came before the Court of King's Bench, when the ruling of that learned Judge was confirmed. It is clear that the petitioning creditor's debt, whereon a commission is founded, must be a debt existing at the time the act of bankruptcy was committed. The deposition in question does not shew that the two bills indorsed by

(8) 1 Stark. 458.

the bankrupt to the petitioning creditor, were so indorsed before the act of bankruptcy. It merely states that "the bankrupt was, at and before the date and suing forth of the commission, and still is, justly indebted to the deponent," &c. As the depositions taken before the commissioners are now made *conclusive* evidence of the facts therein contained, care should be taken that they are in due form, and that enough should appear on the face of them to shew that the debt existed before the time of committing the act of bankruptcy.

We, therefore, think that both the objections are valid, and, consequently, a nonsuit must be entered.

Rule absolute (9).

1829. }
Feb. 12. } STEWART v. WILLIAMSON.

Award—Revocation of Authority of Arbitrators.

*The plaintiff and defendant mutually entered into bonds to submit to arbitration a certain claim of the plaintiff on a charter-party, for the hire of a ship. The umpire chosen by the arbitrators evincing partiality towards the defendant, the plaintiff, before the award was made, revoked his authority, and afterwards brought an action on the charter-party, and recovered a verdict for 1,500*l.*, and sued out execution thereon. The umpire, notwithstanding the revocation, made an award in favour of the defendant, who afterwards commenced an action against the plaintiff on the arbitration-bond, but, by reason of the plaintiff's being resident in Scotland, was unable to serve him with process.—The Court, on motion, refused to order the execution issued at the suit of the plaintiff in the action upon the charter-party to be stayed.*

The plaintiff having a claim on the defendant for the hire of a ship, under a charter-party entered into between them in 1824, which claim the defendant dis-

puted, it was agreed that the matter should be referred to two arbitrators, with liberty to them to choose an umpire. Bonds of submission, in the penal sum of 3,000*l.*, were accordingly mutually given; and the submission was made a rule of the Court of King's Bench. The arbitration was proceeded in, and the case closed on both sides by the 2nd of April 1826. On the 26th the arbitrators and the umpire met, and on their intimating an opinion that the plaintiff was not entitled to recover any part of his claim, his attorney produced a deed of revocation, dated the 20th of April, putting an end to the authority of the arbitrators. Notwithstanding this, the arbitrator appointed by the defendant and the umpire made an award altogether negating the plaintiff's claim, and directing him to pay a moiety of the costs of the reference. The plaintiff afterwards sued the defendant in this court on the charter-party, and at the trial, before the Lord Chief Justice, at the Sittings after the last term, obtained a verdict against him for 1,500*l.*, and sued out execution thereon. The defendant commenced an action against the plaintiff on the arbitration-bond, but was unable to serve him with process, he being resident in Scotland.

Mr. Serjeant Taddy, on a former day in this term, on an affidavit setting forth the above facts, and that the plaintiff had expressed his determination to remain without the jurisdiction, in order to avoid the process of the Court, obtained a rule *nisi* that, on the defendant's paying into court, on a day named, the sum of 1,500*l.*, the amount of the verdict, together with the costs, execution might be stayed until the further order of the Court. The learned Serjeant submitted that this was the only mode by which the plaintiff could be compelled to appear to the process sued out in the action on the arbitration-bond, or the payment of the moiety of the costs of the reference, in pursuance of the award.

Mr. Serjeant Wilde, now shewed cause on affidavits in which it was stated, that one of the arbitrators was an intimate friend of the defendant, by whom the umpire was appointed; that the partiality of the arbitrators in favour of the defendant was manifest from the first meeting; that the defendant had, after the umpire (a sail-maker)

(9) Mr. Justice Park was at chambers, Mr. Justice Burrough abstained from giving any opinion on the last objection, and Mr. Justice Gaselee reserved his judgment on the first.

had taken upon himself to act as such, given him an order for sails to be furnished to a vessel belonging to him; that the plaintiff had acted under the advice of counsel in causing the submission to be revoked previously to the making of the award; and that the plaintiff was a native of Scotland, and seldom had occasion to come to England. The learned Serjeant contended that the plaintiff had a right to revoke the authority of the arbitrators when he found that they were acting partially and improperly, and to enforce his remedy on the charter-party; and that, as the defendant had no claim against him which could form the subject of a set-off, the Court would not, under the circumstances, interfere to deprive the plaintiff of the fruits of his judgment and execution.

Mr. Serjeant Taddy, and Mr. Serjeant Spankie, in support of the rule, insisted that the plaintiff had no right to revoke the authority of the arbitrators, particularly as the evidence was closed and the arbitrators and umpire were prepared to make their award; that he was thereby guilty of a contempt, and liable to an attachment (1); and that, as he wilfully kept out of the juris-

diction of the Court for the purpose of avoiding the service of the process, the Court might exercise their discretion in the manner prayed, as the only means of affording the defendant an opportunity of trying the action commenced by him upon the arbitration-bond, on its merits.

By the Court.—This motion is one of first impression. It is, in effect, calling upon the Court to compel the appearance of a party residing in a foreign country. We think there is no foundation for it. The conduct of the umpire was highly improper, and under the circumstances we cannot say

ber, and the defendant on the 6th of November made the submission a rule of court. Rules having been obtained, on the one side, for an attachment for non-performance of the award; and, on the other side, for setting aside the attachment and award, and to discharge the rule for making the submission a rule of court—Lord Chief Justice Gibbs said:—"If the plaintiff has covenanted to perform an award, and an award is made, the party cannot, by revoking his authority, relieve himself from the action of covenant; nor will the Court in such case set aside the award, because it would deprive the other party of his action; and, if the award is, according to the plaintiff's own doctrine, void, it would be superfluous so to do. My present impression is, that, if there be a penalty, the penalty cannot be revoked; but that the authority may be revoked at any time before award made. I take it to be quite clear, that, where an award is made under such circumstances, the Court will not grant an attachment for non-performance of the award, but will leave the plaintiff to his action: that disposes of the rule for an attachment. As to that part of the rule which has for its object the setting aside the rule of court recording the submission, the submission should never have been made a rule of court after this revocation. As to the last point made, the Court will certainly not sustain the attachment upon it, though it is an extremely ingenious and acute suggestion of the attorney."

(1) It seems, that, if a submission to arbitration by deed be revoked by deed before the award is made, the party revoking is not liable to an attachment; but, if he be bound in a penalty, the penalty is not avoided by the revocation. In *Milne v. Gratrix* (7 East, 608), it was held, that, where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either, even since the statute 9 & 10 Wm. 3. c. 15, to revoke by deed his submission, and notify the same to the arbitrators before the execution of the authority. But, in *Brown v. Tanner* (1 M. & C. 464; s. c. 1 Car. & P. 651), it was held, that, a revocation of a submission to arbitration, not under seal, before award made, is in effect a breach of an agreement to stand to, obey, abide, perform, &c., an award, for which assumpsit will lie; and in *Warburton v. Storr*, (6 Dow. & Ry. 213; s. c. 4 Barn. & Cress. 103; 3 Law Journ. K.B. 156,) it was also held, that assumpsit lies on an agreement not under seal, where the parties bound themselves in a penalty "for the true and faithful observance and performance of the award which should be made," and one party revoked his submission before an award was made.

In *King v. Joseph* (5 Taunt. 452), the parties had submitted to arbitration, and by deed covenanted to perform the award: the plaintiff, after the cause had been heard, by deed of the 21st of September, revoked his submission, and on the 24th gave notice of the revocation to the arbitrators and defendant. The arbitrators made their award on the 25th of Septem-

In the late case of *Macdougall v. Robertson* and another (1 M. & P. 147; s. c. 2 Y. & J. 11; 4 Bing. 435), where a deed of submission to arbitration provided that the submission should not vacate or expire through the *decease* of either of the parties, the Court of Exchequer Chamber held,—on the authority of the cases of *Toussaint v. Hartop* (7 Taunt. 571; s. c. 1 B. Moore, 287)—*Cooper v. Johnson* (2 B. & A. 394; s. c. 1 Chit. 187)—*Blundell v. Brettargh* (17 Ves. 242)—*Tyler v. Jones* (4 D. & R. 740; s. c. 3 B. & C. 144)—*Clarke v. Croft* (4 Bing. 143; s. c. 5 Law Journ. C.P. 127), and *Dowse v. Coxe* (3 Bing. 20; s. c. 10 B. Moore, 272; 3 Law Journ. C.P. 127—the reversal of which, on error, by the Court of King's Bench, proceeded on a different ground)—that the authority of the arbitrator was not revoked by the death of one of the parties before the making of the award; but that the sureties were liable for the performance of the award.—See also on this subject, *Marshall and another v. Wilder*, ante, K.B. p. 323.

that the plaintiff was guilty of a contempt of the order of the Court, in revoking the power he had previously delegated, when he found that it was about to be made an improper use of. If a party has reasonable ground to believe that the arbitrators are acting improperly, he may revoke the authority at any time before the award is made. It does not appear that the plaintiff withdrew from this country to Scotland for the mere purpose of avoiding the process of the Court; but, on the contrary, his affidavit states that his place of residence is in Scotland, and that he seldom has occasion to visit this country. The circumstances disclosed on the face of the affidavits would, we think, form a good defence to the action on the bond. If, however, the defendant be so advised, he may proceed against the plaintiff in Scotland. The Lords of Session have the peculiar power of deciding equitably, as well as legally, in all matters.

Rule discharged, with costs.

1829. } BOUSFIELD AND ANOTHER v.
Feb. 12. } GODFREY.

Production of Papers—where ordered.

The plaintiffs and defendant mutually executed an agreement which was deposited in the hands of a trustee. Shortly afterwards the defendant improperly procured it from the trustee, and neglected to return it. The plaintiffs demanded it from the defendant about a fortnight after its execution, for the purpose of getting it stamped; but he refused to restore it. In an action for a breach of the agreement, the plaintiffs obtained a judge's order, that the defendant should produce the original agreement, or a copy, which copy being read at the trial (if stamped), the defendant should be precluded from setting up the original. On motion to rescind this order, the defendant having sworn that the original was either lost or destroyed, but his attorney admitting that he had a copy—the Court confirmed that part of the order which related to the copy.

This was an action of assumpsit for the breach of an agreement.

Mr. Serjeant Cross, on a former day, obtained a rule nisi to discharge or rescind

an order made by Mr. Justice Park, at chambers, on the 3rd instant, which directed, that the defendant should, within two months from that day, produce to the plaintiffs' attorney the original agreement, in order that it might be stamped at the plaintiffs' expense; and also that the defendant should deliver a copy of it to the plaintiffs; and that, in default of such production, the defendant's attorney should deliver to the plaintiffs' attorney a copy of a copy of the agreement which the defendant's attorney admitted to be in his possession, and that, upon such copy of the copy being read in evidence at the trial, the defendant should be precluded from producing the original agreement, or setting it up to defeat the plaintiffs' action. The defendant in his affidavit admitted that the agreement had once been in his possession, but stated that it had never been stamped; that in February 1828 he had changed his residence, and believed that it was then lost, or that he had burned it, as he had never seen it since; and that, although he had made diligent search for it among his papers, he had been unable to find it.

The learned Serjeant submitted, that, under these circumstances, the order in question could not be sustained; for that the defendant had positively sworn that the original agreement was not in his custody, but that he believed he had destroyed it; and that, even if it were proved to be in existence and in his possession, the Court could not compel him to produce it, as that would subject him to the penalty imposed by the statute 9 & 10 Wm. 3. c. 25. s. 59(1). He referred to the following authorities—*Bateman v. Phillips* (2), where, the plaintiffs having obtained a rule nisi, requiring the defendant to produce an original agreement, in order that the plaintiff might

(1) By which it is enacted, "That, if any deed, instrument, or writing whatsoever, by that act intended to be stamped, shall, contrary to the true intent and meaning thereof, be written or engrossed by any person or persons whatsoever upon vellum, parchment, or paper not marked or stamped according to the act, then and in any such case there shall be due and paid to his Majesty (over and above the duty), for every such deed, instrument, or writing, the sum of 10*l.*; and that no such deed, instrument, or writing shall be pleaded or given in evidence in any court until as well the duty as the said sum of 10*l.* shall be first paid to the use of his Majesty," &c.

(2) 4 Taunt. 157.

have it stamped, or otherwise that the plaintiff might be at liberty to read a copy thereof at the trial, and that the defendant might in that case be estopped from producing the original—the Court afterwards made the rule absolute as to such parts as prayed that the paper might be produced in order to be stamped, but discharged as to the residue—Lord Chief Justice Mansfield saying—“ We should have had a difficulty in granting the other part of the rule, which prays that the defendant may be restrained from producing the original, and that the plaintiff may give the copy in evidence, because it is a means of prejudicing the revenue, as it would make it less necessary for persons to put stamps upon their instruments”—*Rippiner v. Wright*(3), where it was held, that no parol evidence can be given of the contents of an unstamped paper that has been destroyed, even if it appear to have been destroyed by the wrongful act of the party taking the objection—and *Rex v. the Inhabitants of Castle Morton*(4), where, an unstamped agreement in writing for the letting of a tenement, being lost, it was holden that parol evidence of its contents was not admissible to shew the yearly value of the tenement.

Mr. Serjeant Wilde shewed cause on affidavits which stated that the defendant had formerly been in partnership with one of the plaintiffs; that, he being desirous to retire, the other plaintiff was appointed to succeed him; that a certain sum was paid to the defendant on retiring, in consideration of which the agreement in question was drawn up, whereby the defendant engaged that he would not set up in business against the plaintiffs, and that he would continue to assist them for three months; that, at the defendant's request, the agreement was deposited with one Rogers for the benefit of all parties; that afterwards, the defendant telling Rogers that he wished to take a copy of the agreement, it was given to him for that purpose, but was never returned, although the plaintiff, within fourteen days of its date, required it from him for the purpose of its being stamped. The affidavits also set forth certain letters written by the

defendant, dated in July and August 1828, wherein he admitted that the agreement was then in his custody. It further appeared, that, when before Mr. Justice Park, the defendant's attorney admitted that he held a copy of the agreement.

The learned Serjeant contended that sufficient appeared to warrant the learned Judge in making the order, as the defendant was bound to produce the original agreement, provided it was still in existence, and in his possession: or, supposing the original to be lost or destroyed, he was equally bound to deliver a copy of the copy which was admitted to be in the hands of the attorney.

Mr. Serjeant Cross, in support of his rule.—The former part of the order, at all events, cannot be complied with, for the defendant has expressly alleged that the original agreement was either lost or destroyed; and the latter part would be unavailing, for the copy cannot be stamped, and therefore would not be admissible in evidence. The case of *Rippiner v. Wright* strongly resembles the present. It was there objected, that parol evidence of the contents of the written instrument could not be received, inasmuch as the paper itself, if in existence, could not be read, it not being stamped; and the Court there said “ that it is the duty of the parties to an agreement to take care that when it is executed it is properly stamped; and that it is one of the risks attendant upon an omission to do this, that, if any accident happened to the agreement before the stamp is affixed, there is no remedy upon it whatsoever.”

By the Court.—The affidavit as to the loss or burning of this agreement is very loose; and the assertion of the defendant, that he has not seen it since February 1828, is expressly contradicted by his own letters, dated in the months of July and August of that year, wherein he admits it to have been then in his possession. When executed, the agreement was deposited with Rogers as a trustee for all parties, and the defendant has not denied that he obtained it from Rogers, under pretence of taking a copy of it. There has been no attempt on the part of the plaintiffs to defraud the revenue, for it seems that within a few days after the execution of the instrument they

(3) 2 Barn. & Ald. 478.

(4) 5 Ibid. 588.

demanded it from the defendant, for the purpose of having it stamped, but that the defendant refused to let them have it. It is admitted, that the attorney for the defendant holds a copy. We do not, therefore, see any objection to the latter part of the order, which requires him to deliver a copy of it to the plaintiffs, in order that they may stamp it, to give in evidence at the trial. The commissioners of stamps may, in their discretion, permit the stamp to be imposed on payment of the penalty. If they do so, we think it may be given in evidence at the trial, and that the defendant should be precluded from then producing the original in

order to defeat it. By this course, we shall not interfere with the authority of *Rippiner v. Wright*. To pursue a different course, would operate to no good purpose; it would only be allowing the defendant to take advantage of his own wrongful act.

The rule was *discharged* (5), on the defendant's attorney delivering to the plaintiffs' attorney the copy of the agreement.

(5) See *Cooke v. Tanswell*, 1 B. Moore, 465—*Morrow v. Sanders*, 3 B. Moore, 671; *a. c.* 1 Brod. & Bing. 218.

END OF HILARY TERM, 1829.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

IN

EASTER TERM, 10 GEO. IV.

1829. }
May 8. } BURNS v. CARTER.

Limitation of Action—under local Paving Acts.

The limitation clause (s. 136.) in the general paving act, 57 Geo. 3. c. 29, overrides those in the various existing local paving acts. The time of commencing actions, therefore, for anything done in pursuance of any local paving act, is confined to three months from the time of the fact committed.

This was an action of trespass brought against the defendants as commissioners under the Clink Liberty Paving Act, 52 Geo. 3. c. 14, for forcibly ejecting the plaintiff from his house.

At the trial, before the Lord Chief Baron, at the last Surrey Assizes, it appeared in evidence, that, on the 13th of July 1827, the defendants, having, in the exercise of the powers given them by the act (1), purchased the house in question, and having given the defendant (the occupier) notice to quit, expelled him.

(1) Sect. 39, by which the commissioners appointed under that act are empowered to make compensation to the occupiers of premises within the liberty, if they require them to quit, after purchasing the premises under that act.

VOL. VII. C.P.

Notice of action was served on the 20th of August 1827, but the action was not commenced until the 11th of January 1828.

It was contended, on the part of the defendants, that the action was not commenced in time; for that the 136th section (2) of the 57 Geo. 3. c. 29, by which the limitation clause (3) in the 52 Geo. 3. c. 14, was repealed, required the action to be

(2) Which enacts, "That no action or suit shall be commenced against any person or persons, for anything done in execution or pursuance of any local act or acts of parliament, relating, either exclusively or jointly with any other objects or purposes, to the pavement of any parochial or other district within the jurisdiction of this act, until after twenty-one days' notice in writing, signed by the person or persons intending to bring such action or suit, and specifying his or their real residence, and his or their trade or profession, shall be thereof given to the clerk or clerks of the said commissioners or trustees, or other persons having the control of the pavements in any parochial or other district within the jurisdiction of this act, wherein any fact may be committed for which such action or suit may be brought; nor after sufficient satisfaction shall be made or tendered; nor after three calendar months next after the fact may be committed for which such action or suit shall be so brought."

(3) Which enacts, "That no action shall be commenced for anything done in pursuance of that act, until twenty-one days' notice thereof shall be given into writing, to the clerk or treasurer, or after six calendar months after the fact committed for which such action shall be brought."

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brought within *three* calendar months next after the fact committed.

His Lordship was of opinion that the objection was well founded, and thereupon directed a nonsuit.

Mr. Serjeant Andrews now moved for a rule nisi, that this nonsuit might be set aside, and a new trial had.—The only question in this case is, whether the general paving act, 57 Geo. 3. c. 29 (4) over-rides the local act, 52 Geo. 3. 14. The two acts were clearly intended to be concurrent. The 138th section (5) of the general Paving Act, shews that it was not contemplated by the legislature that any of its enactments were to interfere with any local act. Inasmuch as the act of which the plaintiff here complains is an act that could only have been done by virtue of the powers conferred upon the commissioners by the 52 Geo. 3. c. 14, the case can only fall within that act, and consequently the action was commenced in time.

Lord Chief Justice Best.—I think there is no room for doubt in this case. The 136th section of the general paving act expressly enacts, "that no action or suit shall be commenced against any person or persons for anything done in execution or pursuance of any *local* act or acts of parliament relating, either exclusively or jointly with any other objects or purposes, to the pavement of any parochial or other district within the jurisdiction of the act, after *three* calendar months next after the fact may be committed for which such action or suit shall be so brought." I am clearly of opinion that the enactment applies here; I think it impossible for a case to be clearer.

Mr. Justice Park.—The words of the 57 Geo. 3. c. 29. s. 136, which is subsequent to the local act in question, apply to everything done under colour of local paving acts.

(4) Commonly called Michael Angelo Taylor's Act.

(5) By which it is enacted, "That neither any act or acts of parliament, relating either exclusively to the paving or repairing the pavements of the streets or public places in any parochial or other district within the jurisdiction of that act, or relating thereto jointly with any other object or purpose, nor any clause, matter, or provision therein contained, shall be thereby repealed."

Mr. Justice Burrough.—The effect of holding this nonsuit to be wrong, would be to repeal the general paving act.

Mr. Justice Gaselee concurred.

Rule refused.

1829. }
May 9. } COE AND ANOTHER V. CLAY.

Landlord and Tenant—On a contract of present demise, the landlord is bound to give possession.

Where a party by words of present demise lets premises to another, he is bound to give him possession; and if the tenant in possession refuses to quit, the lessee is not bound to proceed against him by ejectment, but may sue the lessor for the breach of the agreement.

This was an action of assumpsit for the breach of a special agreement.

The declaration stated, that the defendant, on &c., at &c., agreed to let certain lands and premises to the plaintiffs, for the term of seven years from the date of the agreement, at the yearly rent of 80*l.*, payable half-yearly; that it was further agreed that the plaintiff should pay all taxes, &c.; and that, if either of the parties should back from the terms of the agreement, he should forfeit 10*l.* Breach, that the defendant did not let the plaintiff into possession of the premises.

At the trial, before Mr. Baron Vaughan, at the last Cambridge Assizes, the plaintiffs proved the agreement as stated in the declaration; and also, that the plaintiffs could not obtain possession of the premises, the party who held them refusing to quit.

On the part of the defendant, it was contended that this was no evidence of a breach of the agreement by him; and that, inasmuch as the agreement amounted to a contract of present, not for a future demise, the plaintiffs had mistaken their remedy, they having a sufficient interest to enable them to maintain ejectment against the party in possession.

A verdict was taken for the plaintiff—damages 10*l.*; with liberty to the defendant to move that it might be set aside and

a nonsuit entered, in case the Court should be of opinion that the action was not maintainable.

Mr. Serjeant Peake now moved accordingly.—The plaintiffs did not shew any breach of the agreement on the part of the defendant. There was no proof that the defendant did any act subsequent to the demise. Admitting, that, if a person being in possession of land, let it by words of present demise to another, and then refuse to give the possession, he would be liable to an action; still, in this case, the defendant had not the possession. The plaintiffs' only remedy, therefore, was an action of ejectment against the occupier, who wrongfully held over against them, and against the landlord.

Lord Chief Justice Best.—I am of opinion that there is no pretence for this motion. This instrument has been truly called a lease. Now, what does a man who lets premises agree to do? To give possession, undoubtedly—not the mere right to sue for the possession. The breach here is, that the defendant did not give to the plaintiffs the possession of the demised premises. He clearly was bound to give them possession; it is proved that he did not, which is sufficient to sustain the verdict.

The rest of the Court concurred.

Rule refused.

1829. } PROVIS AND ROWE, DEMANDANTS;
May 9. } REED, TENANT.

Evidence—Declarations of a deceased testator.

Parol evidence of declarations made by a testator in his last illness, tending to impeach his will, is not admissible.

Evidence—in support of the character of a deceased attesting witness—the attorney who prepared the will.

Where imputations were cast upon the conduct of the attorney who prepared a will and who was one of the attesting witnesses, tending to charge him with fraud in the execution of it:—The Court held, that wit-

nesses might be called to prove his general good character.

This was a writ of entry, *sur abatement*, tried before Mr. Justice Gaselee, at the last Assizes for the county of Cornwall.

The demandants claimed the property in question, as heir-at-law of one Henry Sara, who died seized thereof on the 31st of August, 1802. The tenant held as devisee under Sara's will.

The demandants' pedigree, and the seisin alleged in the count being admitted, the tenant commenced. To prove the execution of the will, one of the attesting witnesses (a Mrs. Bilkie) was called. She stated that it was executed by the testator in the presence of herself (the witness) and of the other witnesses, viz. Mr. Scott, the attorney who prepared the will, and a lady named Incedon, both of whom were since deceased.

A witness named Rapson, a legatee under the will of Sara, was then called, on the part of the demandants. He stated, that, the day after the death of Sara, the testator, he called at the office of Scott, the attorney, at Penryn, and requested to see the will; that Scott shewed it to him, saying—"There is an oversight; the will is not properly executed: but it is not of much consequence; we can manage it between ourselves;"—that Scott then called Mrs. Incedon, his mother-in-law, into the office, and desired her to subscribe her name to the will, which she accordingly did. The demandants then offered in evidence certain alleged declarations made by the testator in his last illness. The witness Rapson deposed, that he had the conduct of all the testator's affairs; that the testator, in his last illness, in conversation with him, said, "that he wished him (Rapson) to be executor to a will that he proposed making;" whereupon one Wills, who was present, observed to him—"Have you not made a will already?" to which the testator answered, "Tom Reed (meaning the tenant) has been trying to get hold of my property; but neither he nor his ever shall have it. Scott drew up a paper, and they got me to sign it; but, never fear, I know that it is not worth to Reed one farthing;" that, at another time, the testator said to Margaret Rowe (one of the demandants)—"My land

goes to my own family; Peggy, remember the land is yours; if I do not live to make my will, when I am dead, see that you are righted;" and that, shortly afterwards, the testator died.

The learned Judge rejected these declarations.

Evidence was then received as to the general good character of Mr. Scott. Several witnesses proved him to have been a man of the strictest honour and integrity.

The jury returned a verdict for the tenant.

Mr. Serjeant Taddy now moved for a rule *nisi*, that this verdict might be set aside, and a new trial had, on the grounds that the declarations of the testator as to the disposition of his property had been improperly rejected—and that the evidence as to the character of Mr. Scott had been improperly received.

These declarations were clearly receivable in evidence, both parties claiming under the deceased, the one by descent, the other by devise. They were not offered for the purpose of impeaching the dispositions contained in the will, but only to shew that it had not been properly executed (1).

Evidence as to the character of Scott was not admissible on the part of the tenant. It was irrelevant to the matter in issue. The general rule laid down in *Buller's Nisi Prius* (2) is, "that, in all cases where a general character or behaviour is put in issue, evidence of particular facts may be admitted; but not where it comes in *collaterally*." The rule there laid down applies equally to all kinds of instruments, as well to the case of a subscribing witness to a will, as to that of a bond, bill, or other similar security.

[*Mr. Justice Park*.—If the character of a subscribing witness to a will is impeached, the party interested under the will has clearly a right to give evidence to support his character.]

[*Mr. Justice Gaselee* referred to the case of *Doe d. Stephenson v. Walker* (3), where the attesting witnesses to a will were dead, and the will was impeached on the ground of fraud in the procuring of it, and that

fraud was imputed to the witnesses, Lord Kenyon held that evidence might be called to their characters; and *The Bishop of Durham v. Beaumont*, where Lord Ellenborough said (4)—"I fully accede to the doctrine laid down in *Doe d. Stephenson v. Walker*. There, the attesting witnesses, whose character was disputed, were dead: and it was properly held, that the party claiming under the will should have the same advantage as if they had been alive. In that case, they must have been personally adduced as witnesses, when their character would have appeared on their cross-examination; and, being dead, justice required that an opportunity should be given to shew what credit was to be attached to their attestation of the will."]

The adverse party could not be prepared to meet such evidence.

Lord Chief Justice Best.—Two objections are urged against the verdict in this case—the first, that evidence was rejected that ought to have been received; the second, that evidence was received that ought to have been rejected.

It has been contended, that certain declarations made by the testator in his last illness ought to have been received in evidence, in order to shew that he had not made a will. No case, however, has been cited to prove that a testator's declarations can be admitted for the purpose of destroying his will. I take it for granted, therefore, that the point has never yet been decided. I will not now, for the first time, say that such evidence can be received. If such a doctrine were to be established, the consequence would be lamentable; no will could ever stand; parties interested in avoiding the will would always bring some witness to impeach it; and advantage would be taken of every unmeaning word that might drop unconsciously from the lips of a dying man, or perhaps be extorted from him whilst in a state of delirium. Such a doctrine would be contrary to the principles of evidence. A will ought not to be invalidated by any loose expressions. It has been said, that these declarations ought to have been received, because both parties claimed under the same individual. They

(1) See Browne's Chancery Practice, 598, &c.

(2) 7th Edit. p. 295.

(3) 4 Esp. Rep. 50.

(4) 1 Campb. 210.

however, claim in different rights; the one, as heir-at-law, the other under the will. Declarations of a party can never invalidate a written instrument. In cases of pedigree declarations are held admissible by reason of the necessity of admitting them, and the impossibility of obtaining other evidence of the state of particular families. Such declarations, however, are very different from those that are set up for the mere purpose of avoiding a written instrument, or of giving an account of its execution other than appears upon the face of it. I therefore think that these declarations were properly rejected.

Imputations were cast upon the character of Mr. Scott, the attorney who prepared the will, and one of the attesting witnesses. If the course of defence had merely imputed to him an error in judgment, evidence as to his general good character might not have been receivable; but here he was charged with having done a highly improper act, viz. the adding the name of an attesting witness to a will, after the death of the testator, in order to cure its imperfect execution: it in fact charges him with forgery. As, therefore, the moral character of Mr. Scott was attacked, those who had an interest in his character have a right to give evidence to support it. *Buller's Nisi Prius* has been referred to, as laying down the general rule in cases of this sort; and it has been insisted that there is no difference in this respect between a subscribing witness to a will, and a witness to a bond, bill, or other security of the like nature. But I take it, the difference is this—instruments of the latter description are usually of recent date, when the witnesses may be alive; whereas, wills are often made and attested long previous to the time they are required to be put in force. Necessity forms law. There was a clear necessity in this case. The cases cited by my Brother Gaselee appear to be in point. The doctrine laid down by Lord Kenyon, in *Doe d. Stephenson v. Walker*, was approved by Lord Ellenborough in the subsequent case of *The Bishop of Durham v. Beaumont*. Whilst I was at the bar, I remember having repeatedly offered the sort of evidence that was given here, and also to have had it tendered against me; and I never heard it ques-

tioned. It has been the constant practice of Westminster-Hall to admit such evidence. I am clearly of opinion that the evidence in this case was well received.

Mr. Justice Park.—I am of the same opinion. It is clearly against every principle of law to receive in evidence declarations such as those offered in this case, made by a testator on his death-bed. I also think that the evidence as to the character of Mr. Scott was properly received.

Mr. Justice Burrough.—The testator is supposed to have made certain declarations as to the effect of his will. Such evidence as that has never yet been received. In a case of *Doe d. Teague v. Wood*, lately tried before me at Exeter (where the question turned on the validity of a will,) one of the attesting witnesses swore that the testator did not know what he was doing when he signed it; another swore the reverse; the third, who was the attorney by whom the will had been prepared, was dead: it being suggested that he was accessory to the imperfect execution of the will, I allowed witnesses to be called to evidence his general good character; this being satisfactorily established, I left it to the jury to weigh the testimony of the other witnesses, telling them that the good character of the deceased (attorney) ought to weigh in favour of the due execution of the will.

Mr. Justice Gaselee concurred.

Rule refused.

1829. }
May 9. } KNIGHT v. HUNT.

Deed of Composition—*Effect of.*

The plaintiff agreed to accept a composition of ten shillings in the pound for a debt, on his debtor's brother's agreeing to supply him with coals to the amount of the remaining moiety of the debt. The plaintiff was the last person who signed the agreement for the composition. The coals were delivered, and the plaintiff afterwards sued the surety on the composition note:—Held, that the note was void, the stipulation for the coals being a fraud on the rest of the creditors.

This was an action of assumpsit on a promissory note, bearing date November 1,

1818, whereby the defendant and two others (Watson and Aldred) jointly and severally promised to pay to the plaintiff, on demand, the sum of 150*l.*, with lawful interest for the same from the day of the date.

The defendant pleaded the general issue.

At the trial, before Mr. Justice Little-dale, at the last Assizes for Hampshire, it appeared in evidence, that, in the month of October 1818, Watson, being in insolvent circumstances, entered into an agreement with his creditors to pay them a composition of 10*s.* in the pound upon the amount of their respective debts; that the plaintiff was a creditor for 311*l. 5s.* but refused to accede to the composition, whereupon the brother of Watson (a coal-merchant) agreed with the plaintiff, that, on his signing the memorandum for the composition, he (the brother) would send him coals to the value of 150*l.*; that, in consequence, the plaintiff on the 10th of October signed the agreement to take from Watson, his debtor, ten shillings in the pound, to be paid with the other creditors, the amount to be secured by bills payable at three, six, nine, and twelve months; that, on the 20th of October, the promissory note in question was given to the plaintiff, the defendant signing it as surety for Watson; and that, up to the year 1824, the interest had regularly been paid. It appeared further, that this arrangement as to the plaintiff's debt was unknown to the rest of Watson's creditors; but the plaintiff was the last person who had signed the agreement. The delivery of the coals was proved.

For the defendant, it was contended, that the private agreement between the plaintiff and the brother of the debtor was in fraud of the other creditors: and that, as the plaintiff had received coals to the value of 150*l.*, he had received a full equivalent for the composition he had contracted to take, and consequently could not be entitled to recover upon the note.

The learned Judge left it to the jury to say, whether the note in question was not given to secure the payment of the composition, and whether the plaintiff had not in fact received the stipulated amount in the supply of the coals.

The jury returned a verdict for the defendant.

Mr. Serjeant Bompas now moved for a rule *nisi*, that this verdict might be set aside and a verdict entered for the plaintiff for the amount of the promissory note and interest.—The note was given by the defendant as a security for the payment of the composition, and there is nothing to prevent his availing himself of it. There was no fraud committed upon the rest of the creditors by the gratuitous supply of coals on the part of the brother of the debtor; the insolvent's funds were not in any degree affected by it. Besides, as the plaintiff was the last creditor who signed the agreement for the composition, it cannot be contended, that, by his apparent assent, others were fraudulently induced also to agree to take less than the full amount of their demands. In *Cockshott v. Bennett* (1), where all the creditors of an insolvent consented to accept a composition for their respective demands, upon an assignment of his effects by a deed of trust, to which they were all parties, and one of them, before he executed the deed, obtained from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note was given—it was held, that the note was void in law, as a fraud on the rest of the creditors; but it was also held, that, if a bankrupt or insolvent, after becoming free from his engagements, having no restraint on his mind, voluntarily give security for a former demand, which is only due in conscience, such a security may be enforced in a court of law. In that case, too, it appeared that the party to whom the note was given had induced other creditors to accept the composition offered. The principle pervading all the cases is this—that the insolvent's creditors have an interest in his not paying to any particular person more than the amount of the stipulated composition; as in *Steinman v. Magnus* (2), where, a debtor having entered into an agreement with his creditors whereby they agreed to receive 20*l.* per cent. in satisfaction of their several demands, and released the remainder in consideration that half of the composition should be secured by the acceptances of a third person, which secu-

(1) 2 Term Rep. 763.

(2) 11 East, 390; a. c. 2 Campb. 124.

urity was accordingly given and paid when due—it was held, that such agreement was binding on the plaintiff, one of the creditors, though not under seal; and that his suing the debtor after having received the composition, was a fraud upon the surety and the other creditors. In *Thomas v. Courtney* (3), the creditors of an insolvent agreed, by an instrument not under seal, that they would accept, in full satisfaction of their debts, 12s. in the pound, payable by instalments, and would release him from all demands; one of the creditors, who had signed for the whole amount of his debt, held at the same time, as a security for part, a bill of exchange drawn by the debtor and accepted by a third person; the money due on this bill having afterwards been paid by the acceptor—it was holden that the creditor might retain it, the agreement of composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt. None of the cases go the length of avoiding the composition note. Although the agreement for the coals might be illegal, still the note is good.

Lord Chief Justice Best.—There is not the slightest pretence for this motion. Agreements for compositions should be made with the strictest good faith. If a creditor affect to take from his debtor ten shillings in the pound, when by a secret agreement he stipulates for the full amount of his debt, he is guilty of a fraud upon the rest of the creditors, who might have been induced to accept the composition by his apparent acceptance of it. The true principle in cases of this kind is, that all the creditors must be put in the same condition. It has been said that no fraud was committed upon the rest of the creditors by the gratuitous supply of coals on the part of the brother of the debtor, as the insolvent's funds were not in any degree affected by it; but still the question is, whether the rest of the creditors might not have been influenced by the supposition that all were to be paid alike. This is very different from the case of a creditor afterwards receiving a gratuity; the plain-

tiff refused to sign the agreement until the additional security was promised him. He has, in fact, been paid the sum he had stipulated to receive.

Mr. Justice Park.—There is a material distinction between a gratuitous gift after a payment under a composition deed, and a previous secret understanding that one creditor shall receive more than the rest. I think this is a case of the latter description.

The rest of the Court concurring—

Rule refused.

1829. }
May 9. } JONES v. NICHOLLS.

Evidence—*Sealed and certified Orders, &c., under s. 76. of the Insolvent Act, 7 Geo. 4. s. 57.*

A copy of an order of the Insolvent Debtor's Court, referring the matters of an insolvent's petition to be heard by the justices at Sessions in Wales; in pursuance of the 7 Geo. 4. c. 57. s. 41, together with a copy of the affidavit of the service of the order upon the insolvent's creditors, affixed to it with a pin (the latter only bearing the seal of the Court and the certificate of the proper officer), were tendered in evidence under the 76th section of the statute:—Held, that the certificate and seal on the copy of the affidavit, was a sufficient verification of both documents.

Malicious Arrest—*Case for, where maintainable.*

Semble, that, in an action on the case for having maliciously arrested the plaintiff, and caused him to be taken in execution after his discharge under the Insolvent Debtors' Act, the defendant cannot discharge his liability, by shewing that he was ignorant of the proceedings of his attorney.

This was an action on the case for maliciously causing the plaintiff to be arrested after his discharge under the Insolvent Debtors' Act.

At the trial, before Mr. Justice Park, at the last Assizes at Hereford, it appeared that the plaintiff had been brought before the justices at the General Quarter Ses-

sions of the Peace for the county of Glamorgan, in pursuance of the forty-first section of the statute 7 Geo. 4. c. 57 (1), and by them discharged, on the 28th of February 1827.

On the part of the plaintiff, copies of the order of Insolvent Debtors' Court, referring the matter of the insolvent's petition to the Justices in session, and also of the affidavit of the service of the order upon the creditors, were offered in evidence. The certificate of the officer of the court and the seal of the court were not on the copy of the order, but on that of the affidavit only, to which the copy of the order was fastened with a pin.

It was thereupon objected, for the defendant, that the copy of the order could not be received, inasmuch as it did not bear the seal of the court, nor the certificate of the proper officer; and, further, that the order itself should have been given in evidence, the justices deriving therefrom their authority to discharge the plaintiff.

For the plaintiff, it was insisted that the evidence offered was sufficient, under the 76th section of the act (2).

The evidence was admitted.

The attorney for the defendant was called as a witness. He stated that the defendant had not interfered in the matter; but that all that had been done was done by himself (the witness) alone.

The learned Judge told the jury that the mistake or negligence of the defendant's

attorney was no answer to the action; but that, having employed him, the defendant was responsible for his acts.

The jury accordingly returned a verdict for the plaintiff—damages 40*l*.

Mr. Serjeant Spankie now moved for a rule nisi that this verdict might be set aside and a new trial had, contending, that the copy of the order of the Insolvent Debtors' Court referring the matters of the plaintiff's petition to be heard by the justices at the Quarter Sessions for Glamorganshire, was improperly received in evidence, the copy of the order itself not being sealed and certified, but only that of the affidavit of service; and also that the original order itself should have been produced, in order to shew that the justices acted with competent jurisdiction.

[The Court, however, thought that, inasmuch as the copy of the order and of the affidavit were fastened together, the one seal and certificate satisfied the 76th section.]

The learned Serjeant then submitted, that the jury had been misdirected; for that, as it was proved that the act of which the plaintiff complained was committed by the attorney, without the cognizance of the defendant, and there being nothing to shew that the defendant had been actuated by any malicious motive in proceeding against the plaintiff, the action was not maintainable; and he referred to the case of *Ravenga v. Mackintosh* (3), where it was held to be a good defence to an action for a malicious arrest, that the defendant, when he caused the plaintiff to be arrested, acted *bond fide* upon the opinion of a legal adviser of competent skill and ability, and believed that he had a good cause of action against the plaintiff.

Lord Chief Justice Best.—I am of opinion that there is no pretence for this objection. I do not decide whether or not the doctrine of *respondet superior* applies to this species of action. The defendant had no probable cause for arresting the plaintiff after his discharge under the Insolvent Debtors' Act. I think the verdict is just. The point, however, was not agitated at the trial; if it had been, we then

(3) 2 Barn. & Cross. 693, s. c. 2 Law Journ. K.B. 137.

(1) By which it is enacted, "That, where any prisoner (applying for relief under the act) shall be in any gaol within the principality of Wales, or town of Berwick-upon-Tweed, the Court shall order such prisoner to be brought before the justices of the peace for the county, city, town, liberty, or place wherein such gaol shall be situate, in open court, at their general or general quarter sessions of the peace, or at some adjournment thereof, and the matters of the petition of such prisoner shall be heard by such justices in pursuance of such order."

(2) By which it is enacted, "That a copy of the petition, schedule, order, and other orders and proceedings (made and had in the matter of the prisoner's petition), purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order or other proceeding, and sealed with the seal of the said court, shall at all times be admitted in all courts whatever, and before commissioners of bankrupt, and justices of the peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the said court as aforesaid."

might have thought it fit to be considered, whether or not the doctrine of *respondet superior* applies to case, as well as to trespass. For many reasons, I incline to think that this principle ought to apply to case. A rich individual might otherwise always with impunity procure some worthless instrument of his oppression. But I decide on this ground: the point was not raised at the trial. It is contended that there was nothing in this case to shew that the defendant had been actuated by any malicious motive towards the plaintiff. Malice in law, however, means an act done wrongfully and without reasonable or probable cause, and not, as in common parlance, an act dictated by an angry or vindictive feeling.

Mr. Justice Burroughs.—The arrest in this case was made at the suit of the defendant and for his benefit; he was therefore clearly liable. As to the doctrine of *respondet superior*, I confess I never heard of the distinction contended for; the only one that I am aware of, is between civil and criminal cases. In *The King v. Huggins* (4), it was held, that a principal is not criminally responsible for the act of his deputy, unless such act were done with his consent or by his command. There, the Warden of the Fleet prison was indicted for murder, his deputy having caused the death of a prisoner in his custody; but the warden was held not to be amenable. I do not, however, see any ground of distinction in civil cases.

Mr. Justice Gaslee.—On the simple ground that the point was not made at the trial, I think the rule ought not to be granted. Independently of that, however, I should be inclined to say that the verdict was right. In a case lately tried before me on the Western Circuit (5), I held the defendant liable in an action for maliciously causing the plaintiff to be taken in execution, though it was proved that, subsequent to the arrest, all the proceedings were carried on solely by the attorney. Here, the affidavit upon which the plaintiff was originally held to bail must have been made by the defendant.

Mr. Justice Park.—This point was not argued at the trial. If it had been, I should

have left it to the jury with a very strong intimation of opinion that the defendant was cognizant of all the proceedings in the cause, as well as of the plaintiff's discharge.

Rule refused.

1829. } NICHOLAS AND THREE OTHERS,
May 12. } VOUCHES.

Recovery—Passing of.

Where a part of the proceedings in a recovery taken in France were written on paper and in the French language, and a copy thereof engrossed on parchment, in English, and certified by a notary to be "a faithful translation"—The Court refused to allow the recovery to pass, and said that the notary must also make affidavit that he "understood the French language;" and that the proceedings must be re-taken on parchment.

Mr. Serjeant Adams moved that this recovery might pass. Part of the proceedings, which had been taken in France, were written on paper, and in the French language; but there was a copy of them in English, written upon parchment, and certified by a notary public here to be a faithful translation. The warrants of attorney were taken on two separate pieces of parchment, the one being signed by Nicholas, the other by the other three vouches. It was contended, on the authority of the case of *Lang, demandant; Lee, tenant; Woodhouse, vouches* (1)—that this latter circumstance was no objection to the validity of the proceedings. In that case, there were three vouches; two of them had given a joint warrant of attorney; the third had given his separately: and it was objected that the warrants of attorney of all ought to have been joint—but the Court thought that there was nothing in the objection; *Mr. Justice Heath* observing—"that the warrants would be good even in a real suit."

The Court said, that the notary must make affidavit that he understood the

(4) 2 Lord Raym. 1574; s. c. 2 Str. 882.

(5) *Todd v. Dorwick*, MS.

VII. C.P.

(1) 1 Bos. & Pul. 31.

sions of the Peace for the county of Glamorgan, in pursuance of the forty-first section of the statute 7 Geo. 4. c. 57 (1), and by them discharged, on the 28th of February 1827.

On the part of the plaintiff, copies of the order of Insolvent Debtors' Court, referring the matter of the insolvent's petition to the Justices in session, and also of the affidavit of the service of the order upon the creditors, were offered in evidence. The certificate of the officer of the court and the seal of the court were not on copy of the order, but on that of the affidavit only, to which the copy of the was fastened with a pin.

It was thereupon objected, for want of due authentication, that the copy of the order had not been received, inasmuch as it was not sealed with the seal of the court, nor countersigned by the proper officer; and that the order itself should be proved in evidence, the justice of the peace having no authority to do so.

For the plaintiff, evidence was offered.

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1829.

May 12.

DOE d. DIXON AND WESTERN v. WILLIS AND ANOTHER.

Inclosure Act—Allotments under.

Under an inclosure act an allotment was made to J. R. in respect of certain lands. After the allotment, but before the award of the commissioners, the lands in question were conveyed by J. R. to trustees for the payment of debts and incumbrances:—Held, that the allotment, though not mentioned in the conveyance, passed with the lands in respect of which the allotment was made.

This was an action of ejectment to recover possession of lands allotted under an inclosure act.

At the trial, before Mr. Baron Vaughan, at the last Assizes for the county of Buckingham, it appeared that the lessors of the plaintiff, who were bankers, had advanced money to one Rose, who was then seized

attorney was no answer that, having employed him, he was responsible.

The jury said that they were for the plaintiff.

Mr. Serjeant Taddy, in his rule nisi, said that the plaintiff's case was not proved.

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EASTERN TERM, 1829.

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(1) *See* the statute 1 & 2 Geo. 4. c. 23. s. 2, by which it is enacted, "That it shall and may be lawful for every person to whom an allotment is set out, and to whom possession has been given by virtue of any order or direction by the commissioners, to commence any action or suit at law for any injury or damage that may be done or committed by any person to the ground or soil of any such allotment, and to bring, maintain, and prosecute any action of ejectment for recovering the possession of any such allotment from any person, notwithstanding the award of the commissioners should not be executed and perfected by them."

might be set aside, and a nonsuit or a new trial had.—By the assignment of the property in question, the particularly offending against the statute, and against the common law, the statute was but a conveyance of the plaintiff never made; but Rose remained in possession of the property.

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Best now said that he consulted with Mr. Baron Vaughan, and that he had left the question of the case to the jury; and that, therefore, the first point was set at rest by the verdict; and he referred to the case of *Cadogan v. Kennett*, where Lord Mansfield said (2)—“The statute 27 Eliz. c. 4. does not go to voluntary conveyances, merely as being voluntary, but to such as are fraudulent. A fair voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted at the time of his making a voluntary conveyance, is an argument of fraud. The question, therefore, in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors.” As the deeds in question conveyed the lands in respect of which the allotment was made, the allotment itself of course passed also.

Rule refused.

(2) Cowp. 434.

1829. }
 May 12. } WRIGHT v. WALES.

Costs—under the *Malicious Trespass Act*.

The plaintiff having brought an action of trespass against the defendant for wrongfully causing him to be apprehended under the Malicious Trespass Act, 7 & 8 Geo. 4. c. 30, obtained a verdict, which was afterwards set aside, and a nonsuit entered, on the ground of the absence of the notice of action required by s. 41. of the act:—Held, that, under that clause, the defendant was entitled to costs as between attorney and client.

This was an action of trespass for an assault and false imprisonment.

At the trial, before Mr. Justice Holroyd, at the last Summer Assizes for Suffolk, it appeared that the plaintiff being in the act of making a road over certain common lands belonging to the parish of Walberswick, the defendant, a fen-reeve, having the care of the land, conceiving the plaintiff to be offending against the Malicious Trespass Act, 7 & 8 Geo. 4. c. 30, caused him to be apprehended and taken before a magistrate, who dismissed the charge. A verdict was found for the plaintiff, which verdict was afterwards set aside, and a nonsuit entered, on the ground of the absence of the notice of action required by the forty-first section of the act (1).

Mr. Serjeant Wilde, on a former day in this term, obtained a rule nisi that the Prothonotary might tax the defendant his costs as between attorney and client, under the forty-first section of the statute, whereby, for the protection of persons acting in execution of the act, it is enacted, “that, if a verdict shall pass for the defendant, or the plaintiff shall become nonsuit, or otherwise judgment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases.”

Mr. Serjeant Storks and *Mr. Serjeant Bompas* now shewed cause, and contended that, to entitle the defendant to his costs, it

(1) See 2 Moore & P. 613; s. c. 7 Law Journ. Mag. Cas. 60.

French language, as well as that the copy was a true and faithful translation of the document of which it purported to be a copy; and that the French document must be engrossed upon parchment and re-taken—on the authority of the case of *Tatham, demandant; Bazendale, tenant; Tabor, vouchee* (2), where, the necessary documents for taking the acknowledgment of a recovery being engrossed on parchment and sent to Holland, by the law of which country all documents bearing the certificate of a Dutch notary require a Dutch stamp, which can only be imprinted on Dutch paper; and the documents being therefore returned to this country written on paper thus stamped and certified—the Court refused to allow the recovery to pass; but enlarged the return to the writ of *dedimus potestatem*, and permitted it to be re-sealed, in order to give time for procuring the due execution of the proceedings on parchment; which was afterwards done.

The learned Serjeant, therefore, took nothing.

1829. } *DOE d. DIXON AND WESTERN v.*
May 12. } *WILLIS AND ANOTHER.*

Inclosure Act—Allotments under.

Under an inclosure act an allotment was made to J. R. in respect of certain lands. After the allotment, but before the award of the commissioners, the lands in question were conveyed by J. R. to trustees for the payment of debts and incumbrances:—Held, that the allotment, though not mentioned in the conveyance, passed with the lands in respect of which the allotment was made.

This was an action of ejectment to recover possession of lands allotted under an inclosure act.

At the trial, before Mr. Baron Vaughan, at the last Assizes for the county of Buckingham, it appeared that the lessors of the plaintiff, who were bankers, had advanced money to one Rose, who was then seized

(among others) of the lands in question, upon which they had an equitable mortgage; that, by deeds of lease and release of the 25th and 26th of November 1824, Rose conveyed the premises to the lessors of the plaintiff, upon trust to sell, and to pay, in the first place, certain incumbrances specified in the deeds, then the debt due from Rose, the grantor, to the lessors of the plaintiff, the remainder, if any, to be paid to Rose; that an action was pending against Rose at the time of executing the deeds, for non-payment of the sums advanced, in which action the lessors of the plaintiff were on the eve of obtaining judgment; and that, in the beginning of the year 1824, previously to the conveyance, the lands in question had been allotted to Rose under an inclosure-act, but that the award of the commissioners was not executed until May 1827 (1).

The defendants claimed under two writs of *elegit* sued out on judgments obtained against Rose on the 30th of November and 4th of December 1824, in actions commenced in Hilary term in that year.

It was contended for the defendants—that the deeds under which the lessors of the plaintiff claimed were fraudulent and void, as against the defendants, as creditors of Rose, under the statute 27 Eliz. c. 4—and that, as the commissioners had not made their award under the act until 1827, which was subsequent to the date of the conveyance, the allotment did not pass thereby.

The learned Judge left it to the jury to say, whether the deeds were executed with intent to deprive the defendants of the fruits of their judgments.

The jury negatived fraud, and accordingly returned a verdict for the lessors of the plaintiff.

Mr. Serjeant Taddy, on a former day in this term, moved for a rule nisi that this

(1) See the statute 1 & 2 Geo. 4. c. 23. s. 2, by which it is enacted, "That it shall and may be lawful for every person to whom an allotment is set out, and to whom possession has been given by virtue of any order or direction by the commissioners, to commence any action or suit at law for any injury or damage that may be done or committed by any person to the ground or soil of any such allotment, and to bring, maintain, and prosecute any action of ejectment for recovering the possession of any such allotment from any person, notwithstanding the award of the commissioners should not be executed and perfected by them."

(2) 4 B. Moore, 481; s.c. 2 Brod. & Bing. 65.

verdict might be set aside, and a nonsuit entered, or a new trial had.—By the assignment of the property in question, the parties were clearly offending against the statute of Elizabeth, and against the common law, of which the statute was but a confirmation. The lessors of the plaintiff never entered under the deed; but Rose remained in possession of the property.

The award was not executed until May 1827. Consequently, at the time of the conveyance, Rose was not entitled to the allotment, and he could not convey more than he actually was possessed of. Besides, the deeds make no mention of the allotment, but only profess to convey the lands in respect of which the allotment is made. On the other hand, the writ of *elegit* operates immediately upon the possession of the debtor; on the execution of the *elegits* in this case, the defendants, the judgment-creditors, became entitled.

Cur. adv. vult.

Lord Chief Justice Best now said that he had communicated with Mr. Baron Vaughan, who said that he had left the question of fraud to the jury; and that, therefore, the first point was set at rest by the verdict; and he referred to the case of *Cadogan v. Kennett*, where Lord Mansfield said (2)—“The statute 27 Eliz. c. 4. does not go to voluntary conveyances, merely as being voluntary, but to such as are fraudulent. A fair voluntary conveyance may be good against creditors, notwithstanding its being voluntary. The circumstance of a man being indebted at the time of his making a voluntary conveyance, is an argument of fraud. The question, therefore, in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors.” As the deeds in question conveyed the lands in respect of which the allotment was made, the allotment itself of course passed also.

Rule refused.

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This was an action of trespass for an assault and false imprisonment.

At the trial, before Mr. Justice Holroyd, at the last Summer Assizes for Suffolk, it appeared that the plaintiff being in the act of making a road over certain common lands belonging to the parish of Walberswick, the defendant, a fen-reeve, having the care of the land, conceiving the plaintiff to be offending against the Malicious Trespass Act, 7 & 8 Geo. 4. c. 30, caused him to be apprehended and taken before a magistrate, who dismissed the charge. A verdict was found for the plaintiff, which verdict was afterwards set aside, and a nonsuit entered, on the ground of the absence of the notice of action required by the forty-first section of the act (1)

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Mr. Serjeant Storks and *Mr. Serjeant Bompas* now shewed cause, and contended that, to entitle the defendant to his costs, it

(1) See 2 Moore & P. 613; s. c. 7 Law Journ. Mag. Cas. 60.

should be shewn that the plaintiff had been apprehended whilst committing an offence within the act, or that the defendant, in apprehending him, had been acting in pursuance of it.

But *the Court* said, that, as they had already directed a nonsuit to be entered, the costs must necessarily follow.

Rule discharged.

1829. } WITHINGTON AND OTHERS v.
May 12. } HERRING AND OTHERS.

Money had and received—*Where maintainable.*

*The defendants entered into an agreement with one J. C., appointing him their agent, for purchasing and working mines in Peru, for which he was to receive a certain salary, and a fifth of the profits. J. C. proceeded accordingly to South America, furnished with a letter of instructions, a letter of credit empowering him to draw upon them for 10,000*l.*, and also a general power of attorney to enter into, transact, complete, and execute contracts for obtaining a grant or lease of any mine, or for the purchase of ore, &c., or of the right to open, dig, or work any mine; and also to enter into, make and execute any deeds, conveyances, &c.; and generally to do all such acts, &c., as the defendants themselves could do if personally present and acting therein. The 10,000*l.* having already been raised on the letter of credit, the plaintiffs (in ignorance of that fact) made further advances to J. C. on bills drawn by him upon the defendants. The letter of credit and power of attorney were not shewn to the plaintiffs when they advanced the money, nor did it appear that they asked for them. The bills being refused acceptance:—The Court held, that the plaintiffs were entitled to recover the amount as money had and received.*

Partnership—*What will constitute.*

Quære—*Whether an agreement to give an agent a yearly salary, and also a certain share of the profits of a particular adventure, will constitute him a partner.*

This was an action of assumpsit, brought to recover the sum of 6,220*l.* 16*s.* 6*d.*, the amount of nine bills of exchange, drawn by

one John Crabtree, in the months of December, January, February, and March 1825-6, upon the defendants in London.

The cause was tried, before the Lord Chief Justice, at the Sittings at Guildhall, after last Michaelmas term, when it appeared that Crabtree, the drawer of the bills, had been sent out to Peru, in South America, as the agent of the defendants, furnished with a letter of instructions, a letter of credit for 10,000*l.* or 50,000 dollars, for the purpose of entering into negotiations for the taking and working of mines on their account. The agreement between them was as follows:—

“Memorandum of agreement between Mr. John Crabtree and Messrs. Herring, Graham & Powles:—

“Messrs. Herring, Graham, & Powles being desirous to enter into contracts for working such of the mines in Peru as may offer suitable encouragement for doing so, with the view of forming an association for the subsequent performance of such contracts, it is agreed that Mr. Crabtree shall proceed to Peru by the first Jamaica packet, to carry this object into effect, if he shall find it practicable and expedient so to do.

“Mr. Crabtree shall be furnished by Messrs. Herring, Graham, & Powles with their power of attorney, authorising him to enter into such proposed contracts on their behalf, which he engages to use in conformity with the instructions he may from time to time receive from them.

“Messrs. Herring, Graham, & Powles shall defray all Mr. Crabtree's reasonable travelling expenses, and expenses of living during the continuance of this mission.

“Mr. Crabtree shall receive from Messrs. Herring, Graham, & Powles for his remuneration the sum of 1,000*l.* and, if this mission shall occupy Mr. Crabtree more than a twelvemonth from the date of his leaving London to embark in the packet, he shall receive at the rate of 1,000*l.* per annum from the said date.

“Mr. Crabtree shall further receive one fifth share of the clear profits which Messrs. Herring, Graham, & Powles may make by such contracts, or by forming the association to be formed on the contracts to be entered into by him.

“Herring, Graham, & Powles.
“John Crabtree.”

Crabtree was also furnished with the following letter of instructions:—

“London, Jan. 7, 1825.

“Dear sir,—We have to request your attention to the following instructions on the objects of your mission to Peru.

“On your arrival at Peru, your first care will necessarily be to ascertain whether the political condition of the country be so far settled as to render it prudent to undertake any extensive engagements there. We need say nothing as to the means of ascertaining this fundamental point, or the rules by which you should be governed in deciding it. You know the character of the people and the nature of the country, and you will have the best channels of information open to you. We will only remark, that we should prefer measures being delayed so long as any serious doubts on this head may remain on your mind.

“Presuming this point satisfactorily settled, your next object will be to make engagements in our name, and on our behalf, for working such of the mines as on good information you may learn to be the most promising. Among other considerations, the following will deserve your attention: viz. the proximity of the mines to water-communication, so as to afford convenient means of transport for steam-engines and other machinery; their being situated in a neighbourhood where fuel for steam-engines and for smelting is to be found, and where labourers acquainted with mining are to be had; and the salubrity of the situation, with a view to the employment of European miners.

“The ways in which mines may be secured, are as follows, viz.

“First, by making contracts or leases with the government, for working such as may be government property. In this way we have engaged the Mariquita mines from the Colombian government; a copy of the lease or contract for two of which we inclose for your government.

“Secondly, by making contracts with individuals who may be proprietors of mines, on the principle of undertaking to put such mines at work, giving the proprietors a certain portion of the net produce. This portion varies according to the quality and circumstances of the mine. In some

cases one third, in others half, and in others two thirds being conceded to the owners. These terms apply more particularly to Mexico, which mines, being so much nearer to Europe, are necessarily much more desirable to English capitalists. We should think that in no case could any mine-proprietor in Peru look for more than half the net proceeds of the mine. The term of such contracts should be twenty-one years. We inclose for your government the copy of a contract made in London, for working a mine in Mexico, the provisions of which are considered very fair on both sides. We should recommend your taking this contract as a model in any such engagements, it having been prepared by one of the most experienced miners in England.

“It is indispensable that we take the entire management of the mine; and very much for the interest of the proprietors themselves that we should do so.

“The third way of securing mines, is, by taking possession of such as may be liable to be denounced, by having been abandoned by their former possessors. This is the most desirable way of obtaining mines if practicable, the entire possession being thereby secured; but, some difficulties may arise if it should happen (as is the case in some parts) that none but *citizens* can denounce mines. It will be so much the interest of the government to draw forth the resources of the country, that every practicable facility may reasonably be anticipated from them, and perhaps, if the name of a citizen be necessary, that of General Miller, (who is doubtless a naturalized citizen of Peru) may probably be made use of, by making an arrangement with him for that purpose. Of all this you will be best able to judge on the spot. There is one consideration, however, we should wish you to bear in mind on the subject of abandoned mines; and that is, that, where they have only been suspended working by the temporary difficulties of the proprietors, occasioned by the struggle for the establishment of independence, we should by no means wish to deprive such persons of the possession of their property. We would much rather purchase their rights, either by money or by an annual allowance, than take advantage of their misfortunes: but, where mines appear to be wholly deserted by their for-

mer proprietors, without hope of their being able to resume the working them, and consequently are liable to be denounced by any persons possessing competent means for working them, we see no objection to your taking measures for gaining possession of such mines if practicable.

"We need hardly suggest to you, that, in whatever manner you may obtain mines, whether by lease, or contract, or possession, it will be very important to see a clear legal title established, that we may be going on a secure foundation in this respect.

"As to the locality of the mines, it is important to keep in view, that the more you can meet with (if good) in one district the better, for the greater convenience of management.

"As it may be important to make advances to some of the mine-proprietors on the execution of the contracts with them, we inclose a letter of credit, authorizing you to draw on us for 10,000*l.* or 50,000 dollars, to be applied to this or the other purposes of this undertaking.

"If you succeed in making the proposed engagements for mines, you will please have them executed in four parts; and send three to us by different opportunities; the first by Mr. Miller, who accompanies you, and who will in that case return with all possible dispatch; and the other two by the quickest and safest occasions you can find.

"You will at the same time forward to us the fullest details regarding the mines you may engage, derived from persons practically conversant with the subject, so as to enable us to judge of the description of machinery, and other assistance necessary to be dispatched from this country, which will be immediately forwarded.

"For the purpose of enabling you to carry these instructions into effect, we inclose you our power of attorney.

"We remain, &c.

"Herring, Graham, & Powles."

"J. Crabtree, Esq."

The letter of credit was as follows:—

"London, Jan. 7, 1825.

"Dear sir,—We hereby authorize you to draw upon us for the sum of 10,000*l.* sterling, or 50,000 Spanish dollars, and we

undertake to honour your drafts accordingly.

"We are, &c.

"Herring, Graham, & Powles."

"To J. Crabtree, Esq."

The power of attorney was as follows:—

"To all to whom these presents shall come, we, Charles Herring, William Graham, and John D. Powles, of the city of London, merchants, send greeting. Whereas, we contemplate entering into certain undertakings within the empire, states, territories, dominions, and dependencies of Peru in South America, and, for carrying the same into effect, we have agreed with John Crabtree, of the city of London, gentleman, that he shall proceed to Peru with such powers as are hereinafter delegated to him:—Now, know ye, and these presents witness, that we, the said Charles Herring, William Graham, and John D. Powles, have, and each and every of us hath made, ordained, nominated, constituted, and appointed, and in our and each of our place and stead, put and deputed, and by these presents do, and each and every of us doth, make, ordain, nominate, constitute, and appoint, and in our and each of our place and stead put and depute, and by these presents do, and each and every of us doth, make, ordain, nominate, constitute, and appoint the said John Crabtree to be our and each of our true and lawful attorney, for us and each of us, and in our or each of our names or name, or in the name of our said attorney, to enter into, transact, complete, and execute all such negotiations, proposals, contracts, engagements or agreements which our said attorney shall, in relation to the said proposed undertakings, or any of them, deem it expedient or proper to enter into, transact, complete, and execute with the government or governments for the time being of the said empire, states, territories and dominions of Peru, and their dependencies in South America, or any of the ministers, officers, branches or departments thereof respectively, or with any public or private companies, or other persons entitled to, interested in, or having the care, superintendence, management, government, agency, control or direction of, or over any mine or mines, vein or veins of ore whatsoever, situate and being, or which may hereafter

be found or discovered, or be denounced within any part or parts of the aforesaid empire, states, territories, or dominions, and their respective dependencies, for the purpose of obtaining a grant, demise, or lease, of any such mines or veins, or of any lands or grounds over or adjoining the same, or for the purchase of any ore or ores, or of the right to open, dig, or work any mine or mines, or to smelt and refine the ore or ores thereof, or any other ores, or otherwise touching or concerning the management, conduct, or carrying on of the works of any such mines, or any other works or undertakings, or in, about, or relating to the same, or to the smelting and refining of the ores thereof, or any other ores; and, for the purposes and objects aforesaid, or any of them, or in relation thereto, and to the completion thereof, for us and each of us, and in our and each of either of our names, and as our and each of our acts and deeds, or in the name of our said attorney, to enter into, make, sign, seal, execute, and deliver such deeds, conveyances, leases, grants, covenants, petitions, memorials, and other instruments, acts, and writings whatsoever, as in the judgment or opinion of our said attorney shall appear requisite or expedient; and also, for the purposes and objects aforesaid, or any of them, or in relation or incidental thereto, or to any of them, to take to himself, hire, engage, or employ all such engineers, surveyors, agents, collectors, clerks, artificers, artizans, workmen and other persons, and at such salaries and rate of compensation or recompense as our said attorney shall in his discretion think requisite, proper, or expedient; and also for him, our said attorney, to conduct, manage, superintend and carry on, and purchase all needful and necessary tools, implements, and materials, and erect and establish all proper and needful buildings and other works for the conducting and carrying on in a beneficial manner, the works of any such mines, and the smelting and refining of any such ore or ores through all the different processes and branches thereof, in such manner in all respects as our said attorney shall think advisable and expedient for our benefit and advantage; and also for him, our said attorney, from time to time to contract to sell, and absolutely to sell and dispose of, the pro-

duce and proceeds of any such mines or ores, or any part thereof, or barter or exchange or deliver the same for or in lieu of any goods, wares, or merchandize, the produce of Peru, or otherwise, as to our said attorney shall seem meet or convenient or expedient; and also in the discretion of our said attorney to transmit to England to us, or on our account, all or any part of the proceeds or produce of any such mines or ores, or of the goods, wares or merchandize received or taken by way of barter or exchange as aforesaid, or else to sell or dispose of any such goods, wares, or merchandize so received or taken in exchange as aforesaid, and also to ask, demand, sue for, recover, and receive, of and from all and every person or persons whomsoever, liable, interested or compellable in that behalf, all debts, sums of money, bonds, bills, notes, securities for money, goods, chattels or effects, which, in the prosecution of the said undertakings or any of them, or in relation to the purposes and objects aforesaid, or arising out of the same, shall become due, owing, payable or deliverable, or of right shall belong to us, or any or either of us; and, upon receipt or delivery thereof respectively, or of any part thereof, to make, sign, seal, execute, and deliver good and sufficient receipts, releases, acquittances and other discharges for the same, and also, if necessary, to compound any debts, sums of money, claims and demands, so due and owing and to become due and owing to us, or any or either of us, and to take less than the whole in full for the same, or to extend the time of payment thereof, or the delivery of any goods or effects, and to accept security for the same respectively, or any part thereof; and also to adjust, settle and allow or disallow any accounts which may subsist between us or any other person or persons, or between our said attorney, or any other person or persons, in respect or in any way relating to such mines or ores, or the working, smelting or refining thereof, or to the proceeds or produce thereof, or to any goods or effects bartered, sold or exchanged as aforesaid, or to any of the purposes or objects aforesaid, or to any other matter, cause or thing relating thereto, or arising out of the same respectively, wherein we may in any manner be interested or concerned; and, for all or any of the purposes

or objects aforesaid, or relating thereto, for us, and in our and each or either of our names or name, and as our and each of our act and deed, or in the name of our said attorney, to sign, seal, execute and deliver any deed of composition or release, or other deeds, bonds of arbitration, or other bonds, agreements, instruments, assignments, assurances, and other acts whatsoever, as there may be occasion in the judgment or opinion of our said attorney; and accordingly to perform and carry into full effect any covenant, engagement or liability in such deeds or other instruments or assurances to be contained on our parts or behalves, or on the part of our said attorney; and also, in manner aforesaid or otherwise, to commence, sue forth, and prosecute any action, suits, processes or other proceedings whatsoever, according to the laws of the country, which it may be necessary or expedient, in the judgment or opinion of our said attorney, to commence, sue forth, and prosecute in and about, and for the purposes of carrying into effect all or any of the purposes or objects hereinbefore mentioned, and the powers and authorities herein contained, and, if he shall think it proper or expedient, to discontinue or become nonsuit in any such action, suits or proceedings; and also to defend any action, suits and proceedings which may be instituted against us, any or either of us, or against our said attorney, on our or any or either of our accounts in relation to the premises; and, for or about or respecting any of the purposes or objects aforesaid, to appear in or before any courts, tribunals, judges, ministers, or officers whatsoever, when and as there may be occasion, and there to make such protests, appeals, and declarations, and to take, adopt and pursue all such other proceedings as our interest may from time to time require, and as to our said attorney shall seem requisite and expedient; and, generally, for the purposes aforesaid, or any of them, or otherwise in relation to the premises, to transact, negotiate, manage, execute and perform all such acts, deeds, matters, and things, whatsoever as to our attorney shall in his judgment and opinion seem meet or expedient to be done or performed in and about all and singular the premises aforesaid; and that as fully, extensively and effectually in all respects and to all intents and purposes

whatsoever as we ourselves could do, perform or act in the same if we were personally present and acting therein: and we do hereby give and grant unto our said attorney full power and authority from time to time to nominate, substitute and appoint one or more attorney or attorneys under him to act in and about all or any of the purposes or objects aforesaid, and such substituted attorney or attorneys at pleasure to dismiss from time to time; and, notwithstanding the substitution of any other attorney or attorneys as aforesaid, to exercise and perform all or any of the powers and authorities hereinbefore expressed and contained and given to him: and we do hereby give and grant unto our said attorney, and his substitute and substitutes to be appointed from time to time, our full and whole power and authority over the premises: and we do hereby promise and agree to ratify and confirm and allow all and whatsoever our said attorney and such substitute or substitutes shall lawfully do or cause to be done in and about the premises under and by virtue of these presents. In witness whereof, we have hereunto set our hands and seals, at London, the 8th day of January 1825.

" Charles Herring.

" William Graham.

" John D. Powles."

The defendants refused to accept the bills drawn upon them by Crabtree for the advances made to him by the plaintiffs, whereupon this action was brought.

Crabtree, who was called as a witness, stated, that he arrived at Lima in May 1825; that, whilst there, he received for the defendants' use more than 10,000*l.* upon the letter of credit; and that he afterwards obtained from the plaintiffs the various sums for which the bills were drawn, the whole being applied towards the purchase and working of mines in pursuance of his instructions; that he told the plaintiffs that he had authority from the defendants to draw upon them, but that he did not shew them the letter of credit; that he did not know whether or not the plaintiffs were aware that any previous advances had been made on the faith of the letter of credit; that he did not recollect whether or not he had shewn the plaintiffs the

power of attorney; but that he had shewn it to other persons, and that they might have seen all the documents if they had wished.

The Lord Chief Justice left it to the jury to say, whether or not, by the usual course and practice of merchants, the plaintiffs should have asked to see the power of attorney and letter of credit, before he made advances to Crabtree; whether or not they had done so, or had seen them or either of them; and whether or not they were aware of the advances that had previously been made to Crabtree—reserving for the opinion of the Court the question on the construction of the power.

They returned a verdict in writing, as follows:—

That it was the duty of the plaintiffs to call for and examine the power of attorney and letter of credit—that there was no evidence whether they did see them or not—and that there was no evidence that the plaintiffs had any knowledge that any money had been previously advanced by others upon the letter of credit. And they returned a verdict for the plaintiff for 1,520*l.* 16*s.* 6*d.*

Mr. Serjeant Wilde, in the last term, obtained a rule nisi that this verdict might be set aside and a verdict entered for the defendants, or a nonsuit, on the ground that the authority given by them to Crabtree only enabled him to draw upon them to a limited amount and for a specific purpose, and therefore that the advances made by the plaintiffs to Crabtree, after he had procured the full sum of 10,000*l.* upon the letter of credit, were not made on the credit of the defendants.

Mr. Serjeant Taddy and *Mr. Serjeant Russell* now shewed cause.—This case involves a difficult question of commercial law. The situation of Crabtree should be considered, independently of the power of attorney—whether he was not a partner with Messrs. Graham, Herring & Co. It is common with commercial men to remunerate their clerks by giving them a share of profits; but, here, Crabtree was to receive for his services a salary of 1,000*l.* per annum, independently of the fifth share of the profits. It is clear, that, where a person receives an indefinite share of pro-

fits, he becomes a partner. In *Waugh v. Carver*, Lord Chief Justice Eyre said (1)—“Upon the authority of *Grace v. Smith* (2), he who takes a moiety of all the profits indefinitely, shall by operation of law be made liable to losses if losses arise; upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts;” and that, “though, with respect to each other, the parties (in that case) were not to be considered as partners, yet they had made themselves such with regard to their transactions with the rest of the world.” That doctrine has been confirmed in many subsequent cases. In *Hesketh v. Blanchard* (3) the same distinction is adopted. Lord Ellenborough there said—“The distinction taken in *Waugh v. Carver* applies to this case. Quoad third persons, it was a partnership; for, the plaintiff was to share half the profits. But, as between themselves, it was only an agreement for so much, as a compensation for the plaintiff’s trouble.” However the matter stood as between Crabtree and the defendants, as to third persons, the latter was clearly in such a situation as to be enabled to draw bills, he being a partner. The power of attorney, too, gives Crabtree an additional authority—an extensive authority, not resulting from the relation of partner.

The Court called on—

Mr. Serjeant Wilde and *Mr. Serjeant Stephen* to support the rule.—The question is, whether, on the authorities, these defendants are chargeable with the money advanced by the plaintiffs to their agents. It has been contended, that Crabtree was a partner with the defendants, and cases have been cited to shew that he would have been liable had the action been against him, and it is thence inferred that he was therefore empowered to contract so as to bind the defendants. He was, however, merely to have a share of the contracts, or of the profits to be derived from the sale or transfer of those contracts to a company to be formed for the purpose of working the mines. The letter of credit shews that it

(1) 2 H. Black. 247.

(2) 3 Sir W. Bl. 998.

(3) 4 East, 147.

was in his character of agent only that he dealt with the plaintiffs, and not in that of partner. The case of *Sheriff v. Wilkes* (4), is an authority to shew that a person who deals with a partner, knowing his limited authority, deals with him in fraud of the other partners. It was there held, that two of three partners, who contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent, by accepting a bill drawn by a creditor upon the firm in their joint names—but that such security, as against the third partner, was fraudulent and void. In *Saville v. Robertson* (5), it was held, that a partner not originally liable, could not be charged by afterwards acknowledging himself to be responsible, or even by accepting bills drawn upon the firm. In *Young v. Hunter* (6), it was held, that, where a party purchases goods, and afterwards permits another to share in the adventure, the vendor cannot recover against such other person for the price of the goods. Mr. Justice Gibbs there said—"I am by no means of opinion that there may not be a case where two houses shall be interested in goods from the beginning of the purchase, yet not be both liable to the vendor: as, if the parties agree amongst themselves that one house shall purchase the goods and let the other into an interest in them, that other being unknown to the vendor; in such a case, the vendor could not recover against him, although such other person would have the benefit of the goods." That supposed case is precisely the present, merely substituting "mines" for "goods." The case of *Meyer v. Sharpe* (7) establishes the same general principle. It was there held, that an agent who is paid by a proportion of the profits of the adventure, is not therefore a partner in the goods. At all events, it could only be a partnership *in futuro*, not a partnership existing at the time of making these contracts.

The next question is, whether the power of attorney or the letter of instructions gave Crabtree authority to raise money, and whether such an authority can be an implied

one. In *Attwood v. Munnings* (8), it was distinctly held, that powers of attorney must be construed most strictly; and that it is not to be intended that the party meant to grant all that may be found necessary to carry into effect the purposes for which the power is given. In that case, the defendant, who carried on business on his own account, and in partnership, gave a general power of attorney to his wife and partners to act for him and in his name, and to his use, and to indorse bills, and generally to act for him while abroad. He gave another power to his wife alone, to act for him and on his behalf, and to pay and accept such bills as should be drawn by his agents and correspondents as occasion should require. One of the partners drew a bill on the defendant for money to supply the partnership concerns, the defendant having while abroad received money on the partnership account, and the wife accepted the bill for her husband—it was held: first, that the partner could not be called the defendant's agent, and therefore, that the wife had not power to accept the bill. Secondly, that she had not power to accept a bill for partnership transactions, but only bills on *his* account. Thirdly, that the general words in a power of attorney were not to be construed at large, but as giving general powers for carrying into effect the special purpose for which they were given; and therefore, that an indorsee who had not used due caution could not recover. Mr. Justice Bayley there said (9)—"It would be dangerous to hold that the plaintiff was not bound to inquire into the propriety of accepting. He might easily have done so by calling for the letter of advice; and I think he was bound to do so." That case is an authority to shew that these plaintiffs were bound to call on Crabtree for the power of attorney and letter of credit, which enabled him to raise money on the defendants' account. Other cases are in strict harmony with this. In *Hogg v. Swaith* (10), it was held that a power of attorney to receive all salary and money, with all the principal's authority to recover, compound, and discharge, and to give releases, and appoint substitutes, does

(4) 1 East, 48.

(5) 4 Term Rep. 730.

(6) 4 Taunt. 582.

(7) 5 Id. 74.

(8) 7 B. & C. 278; a.c. 1 M. & R. 66; 6 Law Journ. K.B. 9.

(9) 7 Barn. & Cres. 283.

(10) 1 Taunt. 347.

not authorize the attorney to negotiate bills received in payment, nor to indorse them in his own name; nor does a power to transact all business. So in *Hay v. Goldsmid*(11), where a power of attorney was given to parties, authorizing them, for and in the name of the principal, to ask, demand, and receive all money that might become due to him, on any account whatsoever, and to *transact all business* for him—the Court was of opinion, “that the power to transact business did not authorize the attorneys to indorse a bill; that the most large powers must be construed with reference to the subject matter; and that the words ‘all business’ must be confined to all business necessary for the receipt of the money.”

It is clear, that, in this case, the power of attorney gave Crabtree no authority to raise money; that authority was given by another instrument which accompanied that power of attorney, viz. a letter of credit to draw upon the defendants to the extent of 10,000*l*. All the documents must be taken together. More than the sum mentioned in the letter of credit had already been drawn for. The plaintiffs, before they advanced the money which they now seek to recover from the defendants, should have looked to the authority of Crabtree to obtain it. In the case of *De Bouchot v. Goldsmid*, Lord Loughborough said (12)—“I take it not merely to be a principle of the law of England, but by the civil law, that, if a person is acting *ex mandato*, those dealing with him must look to his mandate.”

Lord Chief Justice Best.—At the trial, I thought that this was not a case of partnership, but rather a case where a servant or agent receives a proportion of profits. It is not necessary now to say, whether that be so or not. I decide this case, considering Crabtree to be merely an agent. This was not at all a commercial transaction. I left it to the jury to say, whether or not the plaintiffs should have looked to the authority of Crabtree before they advanced him the money. They found that it was the duty of the plaintiffs to call for the power of attorney and letter of credit; thereby negating the necessity of their calling for

the letter of instructions—and wisely, because it was not reasonable that they should see it. As, therefore, the jury have found that it was their duty to call for the power of attorney and letter of credit, I say, that, if these two instruments do not shew the authority of Crabtree to raise money, the plaintiffs cannot recover. I think he had such authority. The jury have also found (a material fact) that the plaintiffs had no knowledge that any money had before been advanced to Crabtree under the letter of credit. I agree that authorities of this nature are to be construed strictly, and that, although they contain general words, yet they will not extend the authority beyond the express words. Let us look at the power of attorney and letter of credit, and see whether they do not give Crabtree a general authority to raise money for the defendants' use. The language of the power of attorney is extremely large. It recites “that the defendants contemplated entering into certain undertakings within the empire, states, territories, and dependencies of Peru, and, for carrying the same into effect, had agreed with Crabtree that he should proceed to Peru, with such powers as were therein-after delegated to him.” It then proceeds thus—“Now, we do make, ordain, nominate, constitute, and appoint him (Crabtree) to be our and each of our true and lawful attorney, for us and for each of us, and in our or each of our names or name, or in the name of our said attorney, to enter into, transact, complete and execute all such negotiations, proposals, contracts, engagements or agreements which our said attorney shall, in relation to the said proposals, undertakings, or any of them, deem it expedient or proper to enter into, transact, complete and execute with the government or government, for the time being of the said empire, states, &c., of Peru, and their dependencies, in South America, or any of the ministers, officers, branches or departments thereof respectively, or with any public or private companies, or other persons entitled to, interested in, or having the care, superintendence, management, government, agency, control, or direction of or over any mine or mines, vein or veins of ore whatsoever, situate and being, or which may hereafter be found or discovered, or be denounced, within any part or parts of the

(11) 1 Taunt. 349, n.

(12) 5 Vesey, 213.

aforesaid empire, states, &c., and their respective dependencies, for the purpose of obtaining a *grant*, demise, or lease of any such mines or veins, or of any lands or grounds over or adjoining the same, or for the *purchase* of any ore or ores, or of the right to open, dig, or work any mine or mines." The terms of the power clearly convey an authority to *purchase*, not merely to take *leases* of mines, as has been contended. If Crabtree were authorized to purchase mines, he was undoubtedly authorized to pay for them. The general words, too, at the end, are very strong:—"And, generally, for the purposes aforesaid, or any of them, or otherwise in relation to the premises, to transact, negotiate, manage, execute and perform all such acts, deeds, matters and things whatsoever, as to our said attorney shall, in his judgment and opinion, seem meet or expedient to be done or performed in or about all and singular the premises aforesaid; and that as fully, extensively and effectually, in all respects, and to all intents and purposes whatsoever, as we ourselves could do, perform, or act in the same if we were personally present and acting therein." I am clearly of opinion that the power of attorney gave Crabtree authority to raise this money. But it has been said, that this authority was, by the letter of credit, restricted to 10,000*l*. The proper form of a letter of credit, usual in the commercial world, is given in *Beawes's Lex Mercatoria* (13); and it is there said (14)—"These letters are of two sorts, viz. general and special, and both given to furnish travelling persons with cash as their occasions may require; they are commonly open or unsealed, and contain an order from the writer to his correspondent or correspondents to furnish the bearer with a certain sum, or an unlimited one; and the difference between them is, that the former is directed to the writer's friends at all the places where the traveller may come (though it is not customary to give separate letters to each place), and the other directed to some particular one, obliging himself for the repayment of whatever monies shall be advanced in compliance with the credit given, on producing a receipt or a bill of exchange, which he thinks

proper to have, from the person credited." This instrument, however, is not strictly a letter of credit; it is addressed to Crabtree. The jury have expressly found that the plaintiffs did not know that any other money had previously been advanced to Crabtree on the power. Looking, therefore, at both instruments, viz. the power of attorney and the letter of credit, I am of opinion that the people in America had a right to suppose that Crabtree was entitled to raise the money. For these reasons, I think this rule should be discharged.

Mr. Justice Park.—I concur with my Lord Chief Justice. I also agree that powers of attorney must be strictly construed. I concur in the opinions expressed by Mr. Justice Holroyd and Mr. Justice Littledale in *Attwood v. Munnings*. There, the principal gave to his agent two powers of attorney, by the former of which she was authorized to indorse bills and to do certain other specified acts for the principal, and in his name and to his use; and, by the latter, to accept for the principal and in his name bills drawn or charged on him by his agents or correspondents:—it was held that the special power to accept extended only to bills drawn by an agent in that capacity, and that the general words in both powers were not to be construed at large, but as giving general powers for carrying into effect the special purposes for which they were given. A bill having been drawn upon the agent by a partner of the principal, which the agent accepted in the name of the principal, *by procuration*, and which was indorsed by the drawer to the plaintiffs—Mr. Justice Holroyd said (15)—"The powers in question did not authorize this acceptance. The word 'procuration' gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given. Then, as to the general powers. These instruments do not give general powers, speaking at large; but only when they are necessary to carry the purposes of the special powers into effect. The power to indorse was exclusive of the power to accept, which was confined to bills to be

(13) 6th Edit. vol. 1, p. 607.

(14) *Ibid.* 606.

(15) 7 Barn. & Crem. 284.

drawn by the agents or correspondents of the principal, and not to be extended to partners;" and Mr. Justice Littledale said—"The first power of attorney contains an authority to indorse, but not to accept bills; the latter, therefore, seems to have been purposely omitted. Neither is this varied by the general words, for they cannot apply to anything as to which limited powers are given." *Expressio unius est exclusio alterius*. Admitting this doctrine, who can look at this power of attorney and say that Crabtree was not empowered to do every act that might be found requisite to the completion of the purpose for which he was sent out? I strongly incline to think that Crabtree was a partner; but it is not necessary to give any opinion upon that point. No principle of law will be affected by this decision.

Mr. Justice Burrough.—I am clearly of opinion that this verdict ought not to be disturbed. The distinction between a gene-

ral and a special power of attorney is this—the former must be construed according to the subject-matter and the general purposes for which it is given—the latter, according to its own special provisions. The construction of a deed cannot be aided by something *aliunde*. I do not say that there was not a partnership between the defendants and Crabtree; but it is not necessary to decide that point.

Mr. Justice Gaselee.—I think that there is no ground for disturbing this verdict. At first, I was very much disposed to think that Crabtree was a partner with the defendants, but my opinion has been somewhat shaken by the authorities to which we have been referred. On the other point, I concur with the rest of the Court. The power of attorney does not refer to the letter of credit; and, of itself, it contains no restriction as to the sums to be raised.

Rule discharged (16).

(16) As to whether, under the circumstances, Crabtree could be fairly deemed a partner with the defendants, the authorities are somewhat conflicting. In the case of *Ex parte Hamper* (17 Ves. p. 412), Lord Eldon says—"It is clearly settled, though I regret it, that, if a man stipulates that, as the reward of his labour, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that will not make him a partner; but, if he agrees for a part of the profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner;" and, in *Ex parte Rowlandson* (1 Rose's B.C. 91), his Lordship said, "that it was settled, that, if a man, as a reward for his labour, chooses to stipulate for an interest in the profits of a business, instead of a sum proportioned to those profits, he is, as to third persons, a partner, and no arrangement between the parties themselves could prevent it." And in the case of *De Berkow v. Smith* (1 Esp. Rep. 29), Lord Kenyon held, that a partnership may exist in a particular concern, which should charge the parties to engagements only connected with such concern. It is clear, therefore, that Crabtree, if a partner at all, was a partner only toward third persons and toward the particular adventure in which he was engaged.

The following cases, however, seem decisive to shew that even this limited partnership did not exist between the parties. In *Grace v. Smith* (28 Ir. Wm. Bl. 1000), it was held, that, to constitute a partnership, the parties must participate in the losses as well as in the profits. In *Hoare v. Dawes* (1 Doug. 371), it was held, that, to make a man liable as a partner, there must either be a contract between him and the

ostensible person to share jointly in the profits and loss, or he must have permitted the other to make use of his credit, and to hold him out as one jointly answerable with himself. So, in *Dry v. Boswell* (1 Camp. 329), where there was an agreement between the sole owner of a lighter and his man, that the latter should work her, and that the net profits should be equally divided between them. Lord Ellenborough held, that they were partners in the concern; but that if the agreement had been, that the man, in consideration of working the lighter, should receive half the gross earnings, it would not have constituted a partnership, being only a mode of paying the man for his labour. And in *Meyer v. Sharpe* (5 Taunt. 74), it was held that an agent who is paid by a proportion of the profits of the adventure, is not therefore a partner in the goods. Lord Mansfield there said—"There is a plain and clear distinction between the being partners in the goods, and being interested in the adventure."

It is evident, that, in the case in the text, when it was stipulated that Crabtree should have a fifth share of the profits, the parties did not contemplate that he should also, in the event of the speculation not proving successful, bear a fifth share of the loss. This, therefore, seems clearly to bring it within the principle of *Grace v. Smith*, *Hoare v. Dawes*, and *Meyer v. Sharpe*.

1829. { *DON dem. EDWARD SOUTHOUSE,*
May 15. { *CLERK, v. JENKINS AND WOOD-*
HOUSE.

Devise—Construction of.

A testator devised to his sons T. and S. and their heirs males, then to his (testator's) four grandsons, share and share all alike, then to the heirs males of all his said grandsons, and then to go to his grandsons' heirs males that part that belonged to their father, and then to them, and then to the last liver, to their heirs males of his said grandsons; and, for want of issue males of his grandsons, to the testator's nephew, and his heirs males, &c.; and, for want of such issue male, to the testator's own right heirs for ever:—Held, that cross-remainders might be implied.

Lease—Confirmation of.

Where the heir-in-tail had for ten years received rent reserved in a lease for ninety-nine years granted by his ancestor, tenant in tail:—Held, a confirmation of the lease.

This was an action of ejectment brought to recover two undivided third parts of certain messuages, vaults, yards and premises in Southouse Court, otherwise Edward's Court, in the parish of St. Martin in the Fields, in the county of Middlesex.

The cause was tried, before Mr. Justice Burrough, at the Sittings at Westminster after last Trinity term, when a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court upon the following case:—

“ Henry Southouse, being seised in fee (*inter alius*) of the freehold part of a messuage in the Strand, in the county of Middlesex, then called the Sun Tavern (whereof the messuages and premises in question, or the land on which the same are situate, were at that time parcel), by his last will and testament, bearing date the 3rd November 1743, and properly executed and attested so as to pass real estates, after devising to his son Thomas Southouse certain lands and tenements not in question in this cause, proceeded to devise as follows:—‘ I give and devise to my said son Thomas Southouse, lately in the possession of Watkins, or Mrs. May, now

Mrs. Hayes, the Sun Tavern in the Strand, in the parish of St. Martin in the Fields, in the county of Middlesex, for and during his natural life. I do give and devise to my said son Thomas Southouse all those two farms, &c., at Ravensdon in Bedfordshire, for and during his natural life; but whosoever shall be in possession of the said lands at Ravensdon, and all the aforesaid premises so given by me to my said son Thomas Southouse, I charge on it a rent or annuity of 40*l.* per annum to be paid to my daughter Ann Pellatt, for and during her natural life; and an annuity of 40*l.* per annum to be paid to my daughter Elizabeth Parker for and during her natural life.’ And in another part of the said will, as follows:—‘ And, from and after the decease of the said Thomas Southouse, I give and devise the said farms, &c., at Ravensdon, and my houses in the occupation of the late Watkins, and Mrs. May, now Mrs. Hayes, to the first son of the body of the said Thomas Southouse lawfully begotten, and the heirs male of the body of such first son issuing; and, for default of such issue, to the second, third, and fourth, and all and every other the son and sons of the body of my said son Thomas Southouse, severally and successively and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and the several heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body issuing, being always preferred and to take before the younger of such sons and the heirs males of his and their body and bodies issuing. I give and devise part of the said messuage and premises unto my son Samuel Southouse, for his life, and to his heirs males of his body, after the decease of my son Thomas Southouse, and his heirs males, viz. my farms at Upminster, &c., and the Sun Tavern, late Mrs. Hayes’, in the Strand, in St. Martin’s in the Fields; and, for want of issues males of my son Thomas and my son Samuel Southouse, after their decease I give the aforesaid farm at Upminster, &c., and the Sun Tavern, I give and devise to my son Edward’s four sons, to Henry Southouse, to Edward Southouse, to Tho-

mas Southouse, and to William Southouse, my four grandsons. And I do further give to my four grandsons as above, after the decease of my son Thomas Southouse and his heirs males, all my farms, &c., at Ravensdon in Bedfordshire; and I do hereby order to be paid out of the premises as is before given to my son Samuel Southouse and his heirs males, and also my four above grandsons, out of their premises, in proportion to the value of the several rents [to pay certain annuities mentioned in the will]; and then, after the decease of my son Thomas Southouse and his heirs males, and after the decease of my son Samuel Southouse, and his heirs males, then I give all the above said farms and premises and messuages to my above said four grandsons, they to have share and share all alike of all the aforesaid premises; and then I give to the heirs males of all my said grandsons, and then to go to my grandsons' heirs males, that part that belonged to their father, and then to them, and then to the last liver, to their heirs males of my said grandsons; and, for want of issue males of my grandsons, I give my grandson Henry Southouse, son of my son Henry Southouse, and to his heirs males of his body lawfully to be begotten; and, for default of such issue male, to my nephew William Southouse and his heirs males, and to my nephew Samuel Southouse and his heirs males, and to my grandson Edward Parker, and his heirs males; and, for want of such issue male, I will that the same remain to my own right heirs for ever.'

"The testator, from the time of making his said will, until and at the time of his decease, remained seised as aforesaid of the said freehold part of the Sun Tavern, and died in or about March 1744, being survived by his said sons Thomas and Samuel, and by his four grandsons, Henry, Edward, Thomas, and William.

"In or about the year 1779, Thomas, one of the said four grandsons of the testator, died, leaving no issue male.

"In or about the same year, William, another of the said grandsons, died, leaving issue male of his body lawfully begotten only two sons, Edward and John Carr.

"In 1789, the said Thomas and Samuel,

sons of the testator, were both deceased without issue male.

"On the 29th of September 1790, by indenture of that date, between Edward Southouse, one of the said grandsons of the testator, and Charles Southouse, eldest son lawfully begotten of the last-mentioned Edward (and described as his eldest son and heir in the said indenture), of the one part, and the said Edward Southouse, son of the said William Southouse deceased, of the other part—the said parties of the first part did demise unto the said party of the second part one undivided third part or share of the freehold part of the Sun Tavern, being the same messuage or tenement in the said will described as the Sun Tavern (then in the occupation of the said lessee or his under-tenants)—to hold the same unto the said lessee, from the day of the date of the indenture, for the term of ninety-nine years thence next ensuing, yielding and paying unto the said lessor Edward and his assigns, during his natural life, and after his decease to the said lessor Charles, his heirs or assigns, the yearly rent of 9*l*.

"On the same 29th day of September 1790, by indenture of the same date, between Henry Southouse, another of the said grandsons of the testator, and Edmund Edward Southouse, eldest son lawfully begotten of the said last-mentioned Henry (and described as his eldest son and heir in the said last-mentioned indenture), of the one part, and the said Edward (lessee in the first-mentioned indenture), of the other part—the said parties of the first part did demise unto the said party of the second part one other undivided third part or share of the said freehold part of the Sun Tavern, then in the occupation of the said lessee or his under-tenants—to hold the same unto the said lessee, from the day of the date of the said last-mentioned indenture, for the term of ninety-nine years thence next, yielding and paying unto the said lessor Henry and his assigns, during his natural life, and, after his decease, to the said lessor Edmund Edward, his heirs or assigns, the yearly rent of 6*l*. 13*s*. 4*d*.

"Counterparts of the said leases were also duly executed and delivered to the respective lessors, and produced in evi-

dence at the trial on the part of the lessor of the plaintiff.

"On the 5th of August 1791, the lessors in the indenture first mentioned, by their writing obligatory of that date, became jointly and severally bound to the lessee in that indenture in the penal sum of 200*l.*; and, after reciting that the obligor Edward Southouse was entitled to the said premises by that indenture demised, for the term of his natural life only, and the said obligor Charles Southouse was entitled thereto as tenant in tail, after the decease of his father; and they being desirous of saving the expense of a recovery, and that the said recited lease might be fully performed for and during the term aforesaid, by such person or persons as should take the inheritance of the said premises in remainder; and, to the end and purpose that the said lease might continue to be in force for the term aforesaid, the said obligors had agreed to enter into the said bond—the condition of that obligation was declared to be, that, if the said Edward and Charles, the obligors, or either of them, their or either of their heirs, executors or administrators, should perform the agreements in the said first-mentioned indenture on the part of the lessors, their heirs and assigns, then the obligation should be void.

"On the 5th of August 1791, the lessors in the indenture secondly mentioned executed to the said lessee a writing obligatory of this date, and to the like effect, in respect of the premises by them demised as aforesaid.

"In 1793, the said Henry Southouse, grandson of the testator, and lessor in the said indenture secondly mentioned, died, and was survived by the said Edmund Edward, his co-lessor, and only issue male.

"In 1794, the said Charles Southouse, lessor in the said first-mentioned indenture, died without issue.

"In 1799, the said Edward Southouse, lessee in the said indentures, and his said brother John Carr, were both deceased without issue.

"In September 1810, the said Edward Southouse, grandson of the testator and lessor in the said first-mentioned indenture, died, and was survived by Edward, the lessor of the plaintiff, his son and heir-at-law.

"In February 1812, the said Edmund Edward, lessor in the said indenture secondly mentioned, died without issue.

"The defendant Jenkins claimed possession of the said demised premises as assignee of the estate and interest of the said Edward Southouse, lessee under the said leases of 1790; and the defendant Woodhouse claimed possession of the same as assignee of a lease granted by the said last-mentioned Edward in March 1795, purporting to be a demise of the freehold part of the Sun Tavern, for sixty years from Christmas 1794.

"On the 28th of May 1817, the lessor of the plaintiff wrote and sent a letter to one Thomas Roe, demanding rent; in answer to which he received a letter written and addressed to him by Roe, then acting as the attorney of the defendant Jenkins, in whom the estate and interest of the said Edward Southouse, the lessee, were then vested; of which last-mentioned letter the following is a copy:—

"Howard Street, Strand,
31st May 1827.

"Sir,—Your letter of the 28th instant reached me in due course, and I have sent to Messrs. Roberts & Co. to pay the money, but a demur arises respecting the receipt, which I wish to have and they decline giving, apprehending some penalty will be incurred, which I cannot think is the case. The difficulty may, however, be obviated by your sending through the Cheltenham Bank a receipt from yourself, to be delivered to me upon payment of the money. I am merely an agent, and therefore wish to have a regular voucher.

"The leases under which the rents are payable bear date the 29th of September 1790. By the one a rent of 9*l.* is reserved to Edward Southouse for his life, and, after his decease, to Charles, his son, his heirs or assigns; by the other a rent of 6*l.* 1*s.* 4*d.* is reserved to Henry Southouse for life, with remainder to Edmund Edward Southouse, his heirs or assigns.

"As to the first rent, you, I understand, are the youngest of the three sons of Edward, viz. Charles, George, and yourself. Charles died in the lifetime of his father, leaving George and yourself; whereupon George became heir-at-law to Charles.

"George also died in the lifetime of his father (he, George, being, as well as Charles, a bachelor), whereupon you became heir of George, who was heir of Charles. There was also another brother, Henry, younger than yourself.

"Edmund Edward Southouse died in 1813, a bachelor; whereupon the property would, as I am informed, devolve to the family of your father Edward, and consequently to you—if a recollection which occurs to me of having formerly understood that Edmund Edward had a sister, be erroneous; or, it may be that she died in his lifetime and without children.

"My first-traced descent proceeds upon the idea that both Charles and George died intestate and without issue, and the second, that Edmund Edward so likewise died, and further that he left neither brother nor sister, nor any child of such.

"I shall feel obliged by your informing me whether my conclusions be correct, or in what manner you are (which I have no doubt is as represented) entitled to 6*l.* 13*s.* 4*d.* If you will please so to do, and forward the receipts in any manner to Messrs. Roberts & Co., I will there call and exchange money for them. I am, &c.

"Thomas Roe."

"To the Rev. E. Southouse."

"In this letter the said Thomas Roe inclosed and sent to the said lessor of the plaintiff the form of a receipt, of which the following is a copy:—

"Received of Anthony Jenkins, Esq., by the payment of T. Roe, the sum of 7*l.* 16*s.* 8*d.*, for half a year's rent due at Lady-Day last, as reserved by two separate indentures of lease, each dated 29th of September 1790, the one reserving a yearly rent of 9*l.*, and the other of 6*l.* 13*s.* 4*d.*; each being for premises described as one undivided third part of the freehold part of The Sun Tavern, in the parish of St. Martin in the Fields, in the county of Middlesex."

"The lessor of the plaintiff, from the date of Mr. Roe's letter till the giving of the notices hereinafter mentioned, received from time to time, from the defendant Jenkins, the several rents reserved by the said several indentures of 1790; and, after

receiving the said letter from the said Thomas Roe, gave receipts for the said rents according to the form inclosed in that letter; the first of those receipts, being for the whole rent that had become due since the title of the lessor of the plaintiff accrued.

"On the 23rd of March 1827, the lessor of the plaintiff gave the defendant Jenkins notices in due form to quit the several premises demised by the said two several indentures of 1790 respectively.

"The defendant Jenkins having refused to comply with such notices, the lessor of the plaintiff, after the expiration of the periods in such notices limited, served the declaration in this action in April 1828, containing a demise by the lessor of the plaintiff on the 2nd of April 1828, with notice to the tenants to appear in Easter term following; and in that term the defendants, having obtained leave to defend as landlords, entered into the usual rule to confess lease, entry, and ouster.

"The jury found that the lessor of the plaintiff had established his title, but that he had by his acts confirmed the said leases of 1790."

The question for the opinion of the Court was—

"Whether the lessor of the plaintiff was entitled to maintain this ejectment for the said two undivided third parts of the premises in question, or for either of them. If the Court should be of opinion that he was entitled to maintain the same for both or for either of them, the verdict was to stand for the lessor of the plaintiff accordingly. But, if the Court should be of opinion that he was not entitled to maintain the same for either, then a nonsuit was to be entered."

The case now came on for argument.

Mr. Serjeant Stephen, for the lessor of the plaintiff.—The lessor of the plaintiff claims by this ejectment two distinct undivided third parts of the demised premises. The first question to be considered is, what is the effect of the devise, and what interest passed by it. It was clearly the intention of the testator that his four grandsons should take as tenants in common in tail male, with cross-remainders between them. As to one third, it is not necessary

to establish cross-remainders, the lessor of the plaintiff claiming directly as tenant in tail; as to the other third, however, he claims as remainder-man in tail, and therefore he must shew that cross-remainders arise on the construction of this devise. The lease granted by Edward Southouse was at common law *voidable*, being made by a tenant in tail. That granted by Henry Southouse was absolutely *void*, and could not be set up again or confirmed. The lease by Edward might have been confirmed; but the facts of the case are such that the jury could not legally find that it was confirmed: for when he gave receipts for the rent (which is the only fact upon which the jury could have presumed a confirmation), the lessor of the plaintiff was ignorant of his title. In *Jenkins d. Yate v. Church*, where a tenant for life made a lease for twenty-one years, and died before the expiration of the term, and the remainder-man in tail suffered the tenant to remain in possession four or five years, received the rent regularly during that time, and then gave him notice to quit, and brought an ejectment, Lord Mansfield said (1)—“This is a void lease, and not voidable only. But, if it were merely voidable, the acceptance of the rent alone, unaccompanied with any other circumstances, is not a sufficient confirmation. It cannot be a confirmation, unless done with a knowledge of the title at the time.” In *Doe d. Simpson v. Butcher* (2) it was held that a lease void against a remainder-man could not be set up by his acceptance of rent and suffering the tenant to make improvements after his interest became vested in possession. Lord Mansfield there said—“There did not appear to have been any intention either to confirm the old lease or to grant a new one. Both parties had proceeded under a mistake, and had supposed the original lease to be good.” Here, the rent was received on a false representation of the parties as to the nature of the plaintiff’s interest.

As to the cross-remainders—*Utile per inutile non vitiatur*. There is undoubtedly great exuberance of diction in the will, still the intention of the testator is suffi-

ciently apparent; he clearly meant that no part of his property should go over until the failure of issue of all his grandsons, and therefore cross-remainders necessarily must be implied. In *Doe d. Watson v. Foxon* (3), under a limitation (after estate for life to A. and B.) of “all and every the said premises to all and every the younger children of B. begotten or to be begotten, if more than one, equally to be divided amongst them, and to the heirs of their *respective* body and bodies as tenants in common, &c., and if only one child, then to such only child, and to the heirs of his or her body issuing;” and, for want of such issue, devise of the said premises to C. N., &c., with several limitations over; and, for want of such issue, the testator divided the said premises between several branches of his family—it was held, that cross-remainders were to be implied between the younger children of B., from the apparent intention of the testator from the whole of the will, notwithstanding the use of the word “*respective*” in such devise. That case was confirmed by *Doe d. Gorges v. Webb* (4), where it was held, that, wherever it appears to be the intention of a testator that the whole of his estate shall go together, upon the failure of issue of more than two tenants in common, cross-remainders shall be implied between them in the meantime, in order to effectuate that intent. The oldest case on this subject is that in *Dyer* (5), where cross-remainders were given by implication among five. In *Cooper v. Jones*, there was no ulterior limitation over, and *therefore* it was held that cross-remainders could not be raised by implication, Mr. Justice Best there said (6)—“In all the cases, it is the language of the *devise over* on which the Courts have relied. Here there is no such devise in the will.” In *Holmes v. Meynel* (7), where a testator gave all his lands to his two daughters and their heirs, equally to be divided between them, and, in case they should happen to die without issue, then over—it was held that the daughters took estates tail with

(1) Cowp. 483.

(2) Doug. 50.

(3) 2 East, 36.

(4) 1 Taunt. 234.

(5) P. 303, b.

(6) 3 Barn. & Ald. 429.

(7) Sir T. Raym. 452.

cross-remainders. In *Wright v. Holford* (8), a testatrix devised lands to all and every the daughter and daughters of P. H., and to the heirs of her and their body and bodies, such daughters, if more than one, to take as tenants in common, and not as joint tenants; and, for default of such issue, to the testatrix's right heirs—it was held that the daughters took cross-remainders. In *Atherton v. Pye* (9), under a devise to all and every the daughter and daughters of B, and the heirs male of such daughter or daughters equally between them, if more than one, as tenants in common; and, for default of such issue, then over—it was held that the daughters of B. took cross-remainders. All the cases are collected by Mr. Serjeant Williams in a note to the case of *Cook v. Gerrard* (10), where it is said to be clear that cross-remainders may be implied, if, by any expressions to be found in his will, it appear to be the intention of the testator to create them.

Mr. Serjeant Wilde and Mr. Serjeant Adams, for the defendants.—A lease granted by a tenant in tail, which is merely voidable as not being warranted by the statute 32 Hen. 8. c. 28, is capable of confirmation (11). The jury have found that the lease by Edward Southouse was confirmed by the acts of the lessor of the plaintiff.

The question is, whether cross-remainders are created by this devise. In *Powell on Devises* all the authorities are collected, and the result summed up. It is there said, that (12)—“Under a devise to several persons in tail, being tenants in common, with a limitation over in default of such issue, cross-remainders are to be implied between the several devisees in tail; and this rule applies whether the devise be to two or a larger number, though it be made to them ‘respectively,’ and though in the devise over the deviser have not used the words, ‘the said premises,’ or ‘all the premises,’ or ‘the same,’ or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares.” There

is not in this case the absence of those words, the absence of which has given rise to that doctrine. The remainder over here is not an ultimate remainder over to the right heirs of the testator; there is an intermediate remainder—to Henry, another grandson. The will is not framed upon any general view of the testator, but contains an arbitrary disposition of his property. The issue of Edward Southouse were not the primary objects of the testator's bounty. The four grandsons took as tenants in common. Their children were to take “that part that belonged to their father.” The language of the will is such as to rebut the implication of cross-remainders. Cross-remainders can only be implied when there appears to be no sensible meaning in the will without implying them. In *Cooper v. Jones*, Lord Chief Justice Abbott said (13)—“It is admitted that no case can be cited in which the Courts have defeated the claim of the heir-at-law, unless there are words in the will by which the testator has clearly indicated his intention that the heir-at-law shall take nothing until the happening of some particular event.”

Lord Chief Justice Best.—This was an action of ejectment brought to recover two undivided third parts of a messuage called The Sun Tavern, of which Henry Southouse, under whose will the lessor of the plaintiff claims, was seised in fee. Edward, the grandson of the testator, and father of the lessor of the plaintiff, being tenant in tail of one undivided third part of the premises in question, in the year 1790 granted a lease of his share for ninety-nine years; Henry, the uncle of the plaintiff, being also tenant in tail of another undivided third part of the premises, in the same year demised his share for a like term. The interest in the premises demised by Edward, descended to the lessor of the plaintiff as his son and heir in tail; and therefore the lease by him was not void, but voidable only, and might be confirmed. The jury have found that that lease was confirmed; and I think, properly. He had every means of informing himself of his title, and he received rent for ten years,

(8) Cowp. 31; s. c. Loft, 443.

(9) 4 Term Rep. 710.

(10) 1 Wms. Saund. 185, n. (6).

(11) Co. Litt. 45, b; 4 Cruise's Dig. 3rd edit. 75.

(12) Third edit. by Jarman, vol. 2, 604—623.

(13) 3 Barn. & Ald. 428.

As to that part, therefore, I think he is not entitled to recover. With respect to the other third, which was demised by his uncle Henry, and which the lessor of the plaintiff claims as remainder-man in tail, I think he is entitled. That lease, being not within the statute 32 Hen. 8. c. 28, was not capable of confirmation, being absolutely void. Some parts of this will are quite unintelligible; but enough appears to shew that the testator did not intend that any part of his estate should go over, until the entire failure of issue of his four grandsons. Can we collect from the language of the will, that no subsequent taker was to have any interest until a total failure of such issue? I think we can come to that conclusion. The four grandsons took as tenants in common in tail. The devise is "to the testator's four grandsons, share and share alike, and to all their heirs male; and then to go to his grandsons' heirs males, that part that belonged to their father; and then to them, and then to the last liver (by which I understand, 'the last of the four grandsons'), to their heirs males of his said grandsons; and, for want of issues males of his grandsons, he gives to his grandson Henry Southouse, son of his son Henry Southouse, and to his heirs male of his body lawfully to be begotten." The estate was not to go over until the failure of issue of the grandsons; nor to pass to the heir-at-law until the failure of issue of Henry Southouse. That clearly establishes cross-remainders. There can be no subsequent confirmation to set up again that which is absolutely void.

Mr. Justice Park.—I fully concur in what has fallen from my Lord Chief Justice. The words of this will are sufficient to shew a probable intention in the testator to create cross-remainders between his four grandsons. In the case of *Cooper v. Jones*, there was no devise over. There, the testator left a farm to his two youngest sons, equally between them, share and share alike, entailing it "on their male heirs being born in wedlock." Lord Chief Justice Abbott said that the latter words only enlarged the previous estate for life into an estate tail, but left untouched the question as to the tenancy in common. *Mr. Justice Bayley* said, "The usual ground on which the Courts of Justice have relied for raising cross-remainders by implication is, the language used in the *limi-*

tation over;" and *Mr. Justice Best* said, "In all the cases, it is the language of the *devise over* on which the Courts have relied." It seems to me that we are not going beyond the principle there laid down, when we decide that in this case cross-remainders may be implied.

Mr. Justice Burrough.—The jury found that the leases in question were confirmed, if capable of confirmation. The first lease was voidable only, the second absolutely void. The latter could not therefore be confirmed. The former might, and the jury have found that it was.

Mr. Justice Gaselee concurred.

Postea to the lessor of the plaintiff, as to one-third.

1829. } BRITTEN AND OTHERS v.
May 16. } HUGHES.

Composition-deed—Construction and effect of.

By an agreement entered into between the defendant and his creditors, reciting that the defendant was indebted to his said creditors in the several sums of money set opposite to their respective names in the schedule thereunder written, the creditors, in consideration of a composition of 10s. in the pound, upon and in respect of their said several debts, agreed to execute a general release. This deed was executed by the plaintiffs. Besides the amount inserted in the schedule as the debt of the plaintiffs, they held a bill, of which the insolvent was the drawer. This bill, having afterwards been dishonoured by the acceptor, was put in suit against the insolvent:—Held, that the release contained in the deed operated in discharge of the insolvent's liability, the concealment of the amount of the debt being in effect a fraud upon the other creditors.

This was an action of assumpsit on a bill of exchange for 400l., bearing date the 1st of August 1825, drawn by the defendant upon and accepted by one James Murphy, payable, at nine months after date, to the defendant's order, in London, and indorsed by the defendant to Messrs. Sard & Co., and by them to the plaintiffs.

At the trial, before the Lord Chief Justice, at the Sittings at Guildhall after last Michaelmas term, a deed of composition entered into by the defendant with his several creditors, was put in.

This deed of composition was as follows:—

"To all to whom these presents shall come, We whose names, hands and seals are hereunto set, subscribed and affixed, creditors respectively of Henry Hughes, of &c., severally send greeting:—Whereas, the said Henry Hughes is and stands justly indebted unto us his said creditors in the several sums of money mentioned and set forth in the first column of figures set opposite to our respective names in the schedule hereunder written; and whereas the said Henry Hughes, by reason of various losses and misfortunes in trade, is rendered unable to pay his said creditors the full amount of their said several debts, and has therefore proposed and agreed to pay, and we his said several creditors have agreed to accept and take, a composition of 10*s.* in the pound upon the amount of and in full for our respective debts, by five instalments, payable respectively at the times and in the proportions following, that is to say: 3*s.* in the pound at four months, 2*s.* in the pound at eight months, 2*s.* in the pound at twelve months, 1*s.* 6*d.* in the pound at fifteen months, and 1*s.* 6*d.* in the pound, residue of the said composition, at eighteen months after date; the first four of the said instalments to be secured by the promissory notes of the said Henry Hughes, and the last of the said payments to be guaranteed or secured by bills or promissory notes to be drawn or accepted, as to one half part in amount, by G. M., and as to the other half part, by W. G.: and, upon receipt of such bills and notes, we the said several creditors have agreed to execute to the said Henry Hughes such general release as is hereinafter contained. Now know ye that we, the said several creditors of the said Henry Hughes, in pursuance and in performance of the said recited

agreement by us and on our parts, and in consideration of the said composition or sum of 10*s.* in the pound, upon and in respect of our said several debts, claims and demands, upon or against the said Henry Hughes secured to be paid unto us respectively in manner aforesaid, have, and each and every of us hath, for and on behalf of ourselves and our several and respective partners, remised, released, and for ever quitted claim and discharged, and by these presents do, and each and every of us doth, remise, release, and for ever quit claim and discharge unto the said Henry Hughes, his heirs, executors and administrators, all and all manner of action and actions, suit and suits, cause and causes of action and suits, accounts, reckonings, bills, notes, sum and sums of money, and securities for money, controversies, damages, claims and demands whatsoever, which we the said several creditors of the said Henry Hughes, or any or either of us, ever had or now have, or which we or any or either of us, or any or either of our respective heirs, executors, &c., can, shall or may have, sue for, claim, challenge or demand of, from or against the said Henry Hughes, for or on account of any debt, claim or demand of us, or any or either of us, in respect of any security, account or reckoning now standing and being between us or any or either of us, or any part or parts thereof, with or against the said Henry Hughes, or for or on account of any other matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these presents (save and except the said bills of exchange and promissory notes for securing the payment of the said composition as aforesaid). In witness whereof we have hereto set our hands and seals the 10th of May 1829."

The names of the several creditors were inserted in a schedule at the foot of the composition deed, together with the amounts respectively due to them. In this schedule the plaintiffs' names and the amount of their debt were inserted thus:—

Names of Creditors.	Amount of Debts.	Amount of Composition.
Britten, Wilson, & Meek.	£156 19 <i>s.</i> 10 <i>d.</i>	£78 9 <i>s.</i> 11 <i>d.</i>

As to that part, therefore, I think he is not entitled to recover. With respect to the other third, which was demised by his uncle Henry, and which the lessor of the plaintiff claims as remainder-man in tail, I think he is entitled. That lease, being not within the statute 32 Hen. 8. c. 28, was not capable of confirmation, being absolutely void. Some parts of this will are quite unintelligible; but enough appears to shew that the testator did not intend that any part of his estate should go over, until the entire failure of issue of his four grandsons. Can we collect from the language of the will, that no subsequent taker was to have any interest until a total failure of such issue? I think we can come to that conclusion. The four grandsons took as tenants in common in tail. The devise is "to the testator's four grandsons, share and share alike, and to all their heirs male; and then to go to his grandsons' heirs males, that part that belonged to their father; and then to them, and then to the last liver (by which I understand, 'the last of the four grandsons'), to their heirs males of his said grandsons; and, for want of issues males of his grandsons, he gives to his grandson Henry Southouse, son of his son Henry Southouse, and to his heirs male of his body lawfully to be begotten." The estate was not to go over until the failure of issue of the grandsons; nor to pass to the heir-at-law until the failure of issue of Henry Southouse. That clearly establishes cross-remainders. There can be no subsequent confirmation to set up again that which is absolutely void.

Mr. Justice Park.—I fully concur in what has fallen from my Lord Chief Justice. The words of this will are sufficient to shew a probable intention in the testator to create cross-remainders between his four grandsons. In the case of *Cooper v. Jones*, there was no devise over. There, the testator left a farm to his two youngest sons, equally between them, share and share alike, entailing it "on their male heirs being born in wedlock." Lord Chief Justice Abbott said that the latter words only enlarged the previous estate for life into an estate tail, but left untouched the question as to the tenancy in common. *Mr. Justice Bayley* said, "The usual ground on which the Courts of Justice have relied for raising cross-remainders by implication is, the language used in the *limi-*

tation over;" and *Mr. Justice Best* said, "In all the cases, it is the language of the *devise over* on which the Courts have relied." It seems to me that we are not going beyond the principle there laid down, when we decide that in this case cross-remainders may be implied.

Mr. Justice Burrough.—The jury found that the leases in question were confirmed, if capable of confirmation. The first lease was voidable only, the second absolutely void. The latter could not therefore be confirmed. The former might, and the jury have found that it was.

Mr. Justice Gaselee concurred.

Postea to the lessor of the plaintiff, as to one-third.

1829. } BRITTEN AND OTHERS v.
May 16. } HUGHES.

Composition-deed—Construction and effect of.

By an agreement entered into between the defendant and his creditors, reciting that the defendant was indebted to his said creditors in the several sums of money set opposite to their respective names in the schedule thereunder written, the creditors, in consideration of a composition of 10s. in the pound, upon and in respect of their said several debts, agreed to execute a general release. This deed was executed by the plaintiffs. Besides the amount inserted in the schedule as the debt of the plaintiffs, they held a bill, of which the insolvent was the drawer. This bill, having afterwards been dishonoured by the acceptor, was put in suit against the insolvent:—Held, that the release contained in the deed operated in discharge of the insolvent's liability, the concealment of the amount of the debt being in effect a fraud upon the other creditors.

This was an action of assumpsit on a bill of exchange for 400*l.*, bearing date the 1st of August 1825, drawn by the defendant upon and accepted by one James Murphy, payable, at nine months after date, to the defendant's order, in London, and indorsed by the defendant to Messrs. Sard & Co., and by them to the plaintiffs.

At the trial, before the Lord Chief Justice, at the Sittings at Guildhall after last Michaelmas term, a deed of composition entered into by the defendant with his several creditors, was put in.

This deed of composition was as follows:—

"To all to whom these presents shall come, We whose names, hands and seals are hereunto set, subscribed and affixed, creditors respectively of Henry Hughes, of &c., severally send greeting:—Whereas, the said Henry Hughes is and stands justly indebted unto us his said creditors in the several sums of money mentioned and set forth in the first column of figures set opposite to our respective names in the schedule hereunder written; and whereas the said Henry Hughes, by reason of various losses and misfortunes in trade, is rendered unable to pay his said creditors the full amount of their said several debts, and has therefore proposed and agreed to pay, and we his said several creditors have agreed to accept and take, a composition of 10s. in the pound upon the amount of and in full for our respective debts, by five instalments, payable respectively at the times and in the proportions following, that is to say: 3s. in the pound at four months, 2s. in the pound at eight months, 2s. in the pound at twelve months, 1s. 6d. in the pound at fifteen months, and 1s. 6d. in the pound, residue of the said composition, at eighteen months after date; the first four of the said instalments to be secured by the promissory notes of the said Henry Hughes, and the last of the said payments to be guaranteed or secured by bills or promissory notes to be drawn or accepted, as to one half part in amount, by G. M., and as to the other half part, by W. G.: and, upon receipt of such bills and notes, we the said several creditors have agreed to execute to the said Henry Hughes such general release as is hereinafter contained. Now know ye that we, the said several creditors of the said Henry Hughes, in pursuance and in performance of the said recited

agreement by us and on our parts, and in consideration of the said composition or sum of 10s. in the pound, upon and in respect of our said several debts, claims and demands, upon or against the said Henry Hughes secured to be paid unto us respectively in manner aforesaid, have, and each and every of us hath, for and on behalf of ourselves and our several and respective partners, remised, released, and for ever quitted claim and discharged, and by these presents do, and each and every of us doth, remise, release, and for ever quit claim and discharge unto the said Henry Hughes, his heirs, executors and administrators, all and all manner of action and actions, suit and suits, cause and causes of action and suits, accounts, reckonings, bills, notes, sum and sums of money, and securities for money, controversies, damages, claims and demands whatsoever, which we the said several creditors of the said Henry Hughes, or any or either of us, ever had or now have, or which we or any or either of us, or any or either of our respective heirs, executors, &c., can, shall or may have, sue for, claim, challenge or demand of, from or against the said Henry Hughes, for or on account of any debt, claim or demand of us, or any or either of us, in respect of any security, account or reckoning now standing and being between us or any or either of us, or any part or parts thereof, with or against the said Henry Hughes, or for or on account of any other matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these presents (save and except the said bills of exchange and promissory notes for securing the payment of the said composition as aforesaid). In witness whereof we have hereto set our hands and seals the 10th of May 1829."

The names of the several creditors were inserted in a schedule at the foot of the composition deed, together with the amounts respectively due to them. In this schedule the plaintiffs' names and the amount of their debt were inserted thus:—

Names of Creditors.	Amount of Debts.	Amount of Composition.
Britten, Wilson, & Meek.	£156 19s. 10d.	£78 9s. 11d.

The rest of the creditors were ignorant that the plaintiffs held the bill on Murphy at the time of the execution of the deed.

On the part of the defendant, the case of *Holmer v. Viner* (1) was relied on to shew that, where a party has several demands, on different accounts, against a person who becomes insolvent, and consents to execute a deed of composition, he cannot be allowed to split his demand, and, proving only part under the deed of composition, sue for the remainder at a subsequent period.

For the plaintiffs, *Payler v. Homersham* (2) was cited, to shew that the general words of release contained in the deed were restrained by the recital that the defendant was indebted to the creditors in the several sums mentioned and set forth in the first column of figures set opposite to their respective names in the schedule thereunder written, and that the plaintiffs did not release any greater sum than that so set opposite their names.

His Lordship, however, on the authority of *Holmer v. Viner*, thought that the plaintiffs' severing their demand was a fraud upon the other creditors, who might thereby have been erroneously led to suppose that the plaintiffs had engaged to receive a composition upon the whole of their claims, in common with themselves, under the terms of the deed; and he accordingly directed a nonsuit, with leave to the plaintiffs to move that it might be set aside and a verdict entered for them, if the Court should be of opinion that, under the circumstances, they were entitled to recover.

Mr. Serjeant Taddy, in the last term, in pursuance of the leave so reserved, obtained a rule *nisi*, on the ground that the manifest intention of the parties, to be collected from the language of the deed, was, that it should enure to discharge only those debts which were mentioned in the schedule referred to, and not to a general discharge of all debts.

Mr. Serjeant Wilde now shewed cause.—Although the general words in a release may be controlled by particular stipulations, yet the obvious intent here was, that all the defendant's creditors should receive

an equal composition of ten shillings in the pound, in full of their respective debts; the object of the deed was to make the debtor a free man on payment of the composition. On the faith of this release, certain persons agreed to guarantee the last instalments. The release was general, and the schedule was not intended to limit its general operation, but was a mere notice or adjustment of the amount of the several debts. The fact of the plaintiffs' having kept back a large portion of their debt operated a fraud upon the body of the creditors, and also upon the sureties, who were thereby deceived as to the nature and extent of their suretyship. In *Jackson v. Lomas* (3), where an insolvent assigned his effects in trust for his creditors, and, before the whole of them had executed the deed, one of the creditors signed it on the faith of a private agreement with the insolvent, securing to the creditor the remainder of his debt—it was held, that this agreement was fraudulent and void. In *Leicester v. Rose* (4), as the condition of their signing the composition-deed, the plaintiffs stipulated with the insolvent for a collateral security, unknown to the rest of the creditors, who afterwards executed the deed—it was held, that such private agreement was a fraud upon the other creditors, and void. In *Holmer v. Viner*, the bills which formed part of the creditor's demand, and which he did not prove under the deed of composition, were not due at the time the deed was executed; yet Lord Kenyon said that the creditor could not split his demand, and come in under the composition-deed for part, and sue for the remainder at a subsequent time. In *Cecil v. Plaistow*, Mr. Baron Hotham said (5)—“Where there is a composition to take a smaller sum than the whole debt, a creditor signing it cannot afterwards claim any other debt then due to him. This was a composition by which creditors agree to take the effect of their respective demands in a less beneficial manner than they were before entitled to; and signing a false schedule in order to induce them to come into that measure, was to deceive and defraud them.”

(1) 1 Esp. Rep. 131.

(2) 4 Mau. & Selw. 423.

(3) 4 Term Rep. 166.

(4) 4 East, 372.

(5) 1 Austr. 203.

In *Harry v. Wall* (6), where a creditor executed a composition-deed, although he did not set the amount of his debt opposite to his name in the deed, yet he was held to be bound by the terms of the composition, to the amount of his then existing debt. With respect to *Payler v. Homersham*, there is nothing in that case to control the present; it merely decided, that, if the provisions in a deed are, upon the face of them, applicable to two different items, it may be averred, in pleading, to which of the two they were intended to apply.

Mr. Serjeant Taddy and *Mr. Serjeant Jones*, in support of the rule.—The cases cited have no bearing on this, for there the agreements were held void, either on the ground of fraud, or on the ground that the creditors had expressly contracted to compound for the whole of their debts; whereas, here, the release was limited to the debts inserted in the schedule. It was not pretended at the trial that there was any fraud in fact. In *Leicester v. Rose*, all the creditors contracted for the settlement of their whole debts. But in *Payler v. Homersham*, the deed recited that the defendant stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take fifteen shillings in the pound upon the whole of their respective debts; and the release contained words equally large with those in the present case—the Court there held that the general words of release were restrained by the previous recital. That case was confirmed by Lord Chief Justice Best, in the case of *Fennell v. Day* (7), lately tried at Guildhall. The plaintiffs in that case proved the receipt of a sum by the defendant for their use. The defendant then proved a general release by deed, in the usual form, dated and executed by the plaintiffs after the payment to the defendant. On the release, the sum of 825*l.* 4*s.* 6*d.* was written opposite the plaintiffs' names. The plaintiffs then proposed to give in evidence two promissory notes drawn by the defendant, payable to the plaintiffs, dated before the payment of the sum to the defendant, to recover which

the action was brought, and which together amounted to the precise sum of 825*l.* 4*s.* 6*d.* Upon this it was objected for the defendant, that the notes were not admissible in evidence to alter or control the effect of the deed: but his Lordship, on the authority of *Payler v. Homersham*, held that they might be received; affirming the principle established in that case, that general words in a deed may be restrained by the recital: otherwise, he observed, parties might release rights of which they were ignorant, and, intending to discharge one debt, would discharge another. *Harry v. Wall* was a case of manifest fraud; the party did not specify the amount for which he signed. In the *Nisi Prius* report of that case, Lord Ellenborough said (8)—“If a creditor signs a deed of this nature, and declines to specify the amount of the debt for which he compounds, he should not subscribe his name in an unqualified manner, which may have the effect of inducing others to sign, under the impression that he has compounded the whole of his demand.” In the present case, however, there was no intention to mislead or defraud; the respective creditors specified in the schedule the amount of the debts to which the release was intended to apply. In *Cecil v. Plaistow*, the proceedings were in a court of equity, and instituted on behalf of a married woman who had been improperly induced to join her husband in the security for the composition; and there, too, the release appears to have been general. In *Holmer v. Viner*, there was express evidence of fraud. If the plaintiff's demand had arisen on a bond, could the defendant have pleaded a release? Or, could the release of one demand operate in discharge of another? In *Harley v. Greenwood* (9), where a creditor proved one of several bills accepted in payment of the same debt, and afterwards declared against the bankrupt on the others—it was held, that the election of a creditor to take the benefit of the commission is confined to the debt actually proved, and does not extend to distinct debts *ejusdem generis* due at the same time. So, here, the plaintiffs might be willing to consent to take a com-

(6) 1 Barn. & Ald. 103; s. c. 2 Stark. N.P.C. 195.
(7) M.S. C.P. May 1, 1828.

(8) 2 Stark. N.P.C. 198.
(9) 5 Barn. & Ald. 95.

position upon one debt, but not upon another distinct and independent debt.

Lord Chief Justice Best.—I am still of the opinion I entertained at the trial. I think it is impossible to say that this debt is not released by the deed. The case of *Fennell v. Day*, I decided on the authority of *Payler v. Homersham*. In that case, the point established was, that, although there are general words of release in a deed, yet, if it is manifest that the intention of the parties was not to carry it so far as the general words import, they may be controlled by the recital. I do not mean to say that there was any moral fraud in this case; but there was fraud in law, for, a practice of this description, if sanctioned, would necessarily tend to the encouragement of moral fraud. In *Holmer v. Viner*, the plaintiff had two demands, and, having signed the deed of composition for one only, and not for the other, Lord Kenyon said, "that it was not to be allowed, that a party having several demands against an insolvent person, should split those demands, and come in under the composition-deed for part, and sue for the remainder at a subsequent time;" assigning as a reason, that it would operate a fraud upon the other creditors, as well as an oppression of the debtor, who had given up all his property to constitute a fund for their benefit. The Court of King's Bench afterwards confirmed that decision. In *Leicester v. Rose*, it was held, that the taking a different security from the debtor by some of the creditors, was a fraud upon the others, as they ought all to be placed in the same situation; and that, where the creditors in general have bargained for an equality of benefit, and mutuality of security, it was not competent to one of them to take any partial benefit or security to himself. The case of *Harry v. Wall* is not quite applicable; there the deed was executed in blank, the creditor not having set the amount of his debt opposite to his name. *Cecil v. Plaistow* is very like the present. The Court of Exchequer there held, that, where a creditor obtains from his debtor a new or separate security for part of his demand, and takes the composition for the other part only, it is a fraud upon the other creditors. *Per Mr. Baron*

Hotham, "It is an unfair attempt to gain a superior advantage over them (the other creditors), by a fraudulent concealment of the truth." I think the principle is so firmly established that it requires no further authority to support it. Where parties agree to sign a composition-deed, they must all stand in the same situation; no advantage should be taken by any. Apply that principle to the present case. The plaintiffs agreed, in common with the rest of the defendant's creditors, to take a composition of ten shillings in the pound. The other creditors would naturally conclude that they signed for the whole of their demand, without any reservation; whereas, in fact, they did not sign for a third. It is fair to presume that the creditors consented to accept the composition on the faith of all receiving the like proportion. Independently, therefore, of the terms of the deed, I am of opinion, that, if we were to decide in favour of the plaintiff's claim, we should be establishing a rule that would inevitably lead to frauds in the execution of instruments of this nature. Cases of bankruptcy bear no analogy to these. There is no concert between the bankrupt and the creditors. A man is generally made a bankrupt by one creditor without the privity of the others. Here, however, the compact is between all the creditors. Looking at the terms of this release, can any other construction be put upon it than that it is a release of *all* the debts of *all* the defendant's creditors? If the debt in question was retained with the consent and privity of the insolvent, it was a fraud upon his creditors; if without such consent and privity, then it was a fraud both on the creditors and on the insolvent himself. There are not (as has been contended) to be found in this deed any words tending to limit or control the general words of release. Any other construction would be contrary to that *uberrima fides* that should ever be observed, more especially on occasions of this sort.

Mr. Justice Park.—I am of the same opinion. In the case of *Jackson v. Duchaine* (10), A. having given B. a certain sum for goods in advancement of C., a secret agreement between B. and C. that the latter should

pay B. a further sum for the goods, was (per Lord Kenyon) held void, as a fraud upon A. That principle has since been universally adopted, and is still acted upon. It is clear, from the language of this deed, that the object of the parties was, that the debtor should be discharged from all debts then due to the several creditors who agreed to accept the composition, and who signed the deed. The sureties for the payment of the last instalment, as well as the body of the creditors, were led to suppose that the insolvent went forth to the world a free man. I think there is no ground for disturbing the nonsuit.

Mr. Justice Burrough.—I am also of opinion that the nonsuit ought to stand. I admit, that, if the clear intent of all the parties be different from what the general words of the deed would convey, they may be controlled by the particular stipulations. In the late case of *Wilmington v. Herring* (11), we were called upon to put a construction upon a power of attorney, which we there held to give authority to an agent abroad to raise money on account of his principals, although such an unlimited authority was not expressly mentioned in the power; but the words of it were most comprehensive, and there was nothing to control them. Here, also, the release contains the most extensive possible words, which are not controlled by the recital, or by any particular stipulations in the deed. The meaning of the parties clearly was, that the debtor should be completely released from all his engagements, on payment of the several instalments of the stipulated composition.

Mr. Justice Gaselee.—Although I am not prepared to concur in the decision which the Court has just pronounced, I am far from regretting the conclusion they have come to; for, the rule they have laid down cannot fail to be beneficial to the public, as tending to the prevention of frauds in the execution of instruments of this nature. But I doubt very much whether such a decision is quite warranted by the authorities. In the case of *Halmer v. Viner*, the debtor executed an assignment of all his effects, for

the benefit of the creditors at large; therefore, there would have been great hardship in holding that he was not equally discharged from all his debts. Here, however, there is no giving up of property by the insolvent; and, except as to one sixth, no security given for the payment of the composition. In *Leicester v. Rose*, there was a secret stipulation by one party that he should have a better security, which was a direct fraud upon the rest of the creditors. These cases, therefore, as well as the others that have been cited, appear to me to be all distinguishable from the present, with the exception of *Payler v. Homersham*, which in my opinion is precisely in point. The judgment now pronounced seems to me to put an end to that case. The Court there recognized the principle, that the general words of a release have reference to, and may be limited and controlled by a particular recital. Lord Ellenborough said—"Common sense requires that it should be so; and, in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it." There does not in this case appear to have been any fraudulent concert or concealment on the part of the plaintiffs. The amount of the bill was not included in the debt compounded for, it being expected that the acceptor would honour it. In *Pearsall v. Summersell* (12), this Court held, that the extent of the condition of an indemnity-bond might be restrained by the recitals, although the words of the condition imported a larger liability than the recitals contemplated. Here, the deed appears to me clearly to designate to what particular sums it was intended that the release should apply. The difficulty I feel is, that I find it impossible to distinguish this case from that of *Payler v. Homersham*; and therefore I cannot fully concur in the judgment that has now been pronounced by the rest of the Court.

Rule discharged.

(12) 4 Taunt. 593.

(11) *Ante*, 172; s.c. 3 Moore & Payne, 30.
VOL. VII. C.P.

1829. }
May 18. } MURRAY, VOUCHER.

Recovery—Passing of.

The Court refused to allow a recovery to pass, where the christian name of the vouchee had been written on erasure in the affidavit of the commissioners of the acknowledgment of the warrant of attorney.

Mr. Serjeant Taddy moved that a recovery might pass, although the acknowledgment of the warrant of attorney, which was taken in the East Indies (one hundred miles north of Calcutta), was not taken before a notary public, but before a Mr. Scott, a magistrate. He produced an affidavit of a gentleman at the East India House, that Scott was a magistrate; and he cited the case of Domville, demandant; Kinderley, tenant; Collier, vouchee (1)—where it was held, that, if a warrant of attorney for suffering a recovery be acknowledged in a part of the East Indies far distant from the residence of any notary public or British magistrate, an affidavit of the acknowledgment made before a British consul or agent there will suffice.

There was also an erasure in the affidavit of one of the commissioners, of the due taking of the acknowledgment of the warrant of attorney by the vouchee—the name "James" being erased and "George" substituted.

Lord Chief Justice Best.—The rule is strict, that no recovery can be allowed to pass where there is any erasure or interlineation in any part, unless such erasure or interlineation be taken notice of by the commissioners in the caption.

Refused.

[*Note.*—See *Price, demandant; Williams, tenant; Lord Somers, vouchee* (4 Taunt. 573)—where a notarial seal was dispensed with in attesting the taking of the acknowledgment of a vouchee in a country where the notaries did not use a seal.

See also *Bayley, demandant; Bremridge, tenant; Adams, vouchee* (7 B. Moore, 372)—where a recovery was permitted to pass, although in the affidavit of acknowledgment

(1) 3 Taunt. 275.

ment, notarial certificate, &c., Demerara had at first been improperly styled an "island," which word had been struck out by some person there, and the word "colony" substituted by way of interlineation. See also, *Still, demandant; Raymond, tenant; Laws, vouches*: (1 M. & P. 136, s. c. 4 Bing. 425, s. c. 8 Law J. C.P. 46)—where the word "sixteenth" was written on an erasure in the jurat of the affidavit of the commissioners of the due acknowledgment of the warrant of attorney by one of the vouches; and the recovery passed.]

1829. }
May 19. } GARNER V. SHELLEY AND
OTHERS.

Friendly Society—Construction of rules of.

By the rules of a friendly society, a committee was empowered to determine all grievances, differences, and disputes which might arise relative to the affairs of the Society (subject to an appeal to two magistrates), and it was provided that each member should pay 3s. annually to the society's doctor. The plaintiff was duly appointed to that office. The committee dismissed him and appointed another in his stead. An application was thereupon made to two magistrates, who recommended that a general meeting of the society should be convened. At this meeting, a large majority of the members voted for the plaintiff. In an action against the stewards of the society to recover the amount of the contributions received by them from the members, for the services of the doctor, subsequently to the dismissal of the plaintiff, the jury found that the committee had not acted bona fide in dismissing him: Held, that the plaintiff was entitled to retain the verdict, the matter not being a grievance or dispute within the jurisdiction of the committee.

This was an action of assumpsit. The declaration contained counts for money had and received by the defendants to the plaintiff's use, and for money due upon an account stated between them.

The cause came on for trial before Mr. Justice Gaselee, at the last Assizes for the county of Stafford, when the jury found a verdict for the plaintiff—damages 15*l.* 9*s.*—

subject to the opinion of the Court upon the following

CASE.

"The plaintiff is a surgeon and apothecary. In the year 1821, a Friendly Society was established at Yoxall, subject to certain rules, orders, and regulations, which were in due manner allowed, confirmed and approved by the Justices of the Peace assembled at the General Quarter Sessions of the Peace for the county of Stafford, held by adjournment on the 10th of August 1822; and the said rules, orders, and regulations, as well as the tables of the society, were on the same day deposited with the clerk of the peace, and enrolled at the same Sessions. Among the said rules, orders and regulations are the following, viz. :—

"*First*—'That the society was established for the purpose of raising by subscription from the several members thereof, and by voluntary contributions, a stock or fund for their mutual relief and maintenance in old age, sickness, and infirmity, and for the benefit of the widows and representatives of deceased members in certain cases, and for no other purposes whatsoever.'

"*Second*—'That twelve discreet and intelligent persons, members of the society, should be annually chosen as a committee, which committee, or any five of them, including the stewards or their proxies, should have the power to inquire into, settle and determine all grievances, differences and disputes whatsoever which might or should arise relative to the affairs of the society, save and except that the parties aggrieved might appeal to any two magistrates, as empowered by the acts relating to friendly societies—that the committee, under the control of the high and deputy stewards, should have power to lend and dispose of the society's money at interest, in such way and manner and in such sums as they believed to be most advantageous to the society, taking good and proper security for the same—that the old committee should nominate and appoint the persons composing the new one, and six of them at least should be annually changed by ballot—that, immediately after the new committee was chosen and formed, they, the said committee, should agree upon and appoint three sufficient, discreet and intelligent persons

among the twelve composing such committee to act as stewards, the other two as deputy stewards, to assist and help him the said high steward in the execution of his office. Any person refusing to serve the office of high steward should forfeit 5s.; and, refusing to serve as deputy steward, 2s. 6d. The high steward, in all matters of dispute or disagreement, either in the committee or society at large, should always have the power and privilege of the casting vote; and, if he should find it requisite to consider further the subject under discussion, or in dispute, he should for that purpose be at liberty to withhold his determination for the space of one month, or twenty-eight days, provided the subject would admit of such delay—that the three stewards should give their joint bond to the society for the stock entrusted to their care and disposal—that they should make up their accounts, and deliver up every thing belonging to the Society to the succeeding stewards, the next club night after their being appointed, or forfeit 10l.; and that no action or suit whatsoever should be commenced without the approbation and consent of the committee (or the major part of them); the high steward having in that, as in all other cases, the privilege of the casting vote.'

"*Sixteenth*—'That each member should pay 3s. annually to the society's doctor, in consideration of which, in case of sickness or lameness, he should be entitled to the necessary medicines and attendance his situation might require. Every member to pay the doctor, whether in or out of the limits, provided he resided not more than five statute miles from Yoxall; and the first payment should become due on the 19th of March 1822.'

"By the *twenty-third*, three trustees whose names were therein mentioned, were appointed.

"The other rules and regulations did not affect this case.

"When this society was established, in 1821, the plaintiff was duly appointed the doctor to the society, and continued to fill that situation, without any interruption, till the month of August 1826; but, before that time, complaints of his negligence and misconduct as such doctor had been made by different members of the society to the

high steward and to some of the members of the committee.

"On the 14th of August 1826, a meeting of the committee was held, at which eleven members attended. No notice was given of this meeting to the plaintiff. After the committee had assembled, the plaintiff was sent for, but was not at home, and did not attend. A Mr. Fernyhough was also sent for. At this meeting, the complaints against the plaintiff were discussed, but no evidence was given of the facts; and a vote for his dismissal and the appointment of Mr. Fernyhough, was carried. Eight persons voted for Mr. Fernyhough, and two for the plaintiff. Mr. Jackson, the then high steward, stated that the meeting was called to choose a fresh surgeon for the poor in the room of Mr. Garner (the plaintiff), because he had not attended as he ought to have done; but it did not appear whether any notice had been given of the meeting, or, if any, what were its contents.

"The following is a copy of the resolution of the committee:—

"Resolved—That Mr. John Garner, the surgeon and apothecary of the society, be henceforth dismissed from that office; and that Mr. Joseph Fernyhough, surgeon and apothecary, be appointed to succeed him; and a proper proportion only of the members' subscription to the surgeon and apothecary be paid to the said John Garner for the period he has acted as such during the present year, to this time; and that the remainder of such subscription be paid over to the said Joseph Fernyhough.

"Also ordered—That a copy of the following notice be delivered to Mr. Garner forthwith:—

"Sir,—You are hereby informed, that, the committee of the Yoxall New Friendly Society having met this day to consider the propriety of continuing you as surgeon to the society, it is agreed that your services shall cease from this day.

"I remain, for the deputy stewards and committee, yours, &c.

"John Jackson."

"A copy of such notice was delivered to the plaintiff on the same or on the fol-

lowing day. The proportion of the members' subscription up to that time was paid to the plaintiff, who did not however acquiesce in the dismissal, but had continually from thence attended as many of the members of the society as would permit him to do so, amounting to more than the majority; and seventy-five of them, the whole number being from one hundred to one hundred and ten, signed a paper approving of him as the doctor. It did not appear when the resolution was signed. On the 1st of December 1827, it had no signatures.

"The learned Judge left it to the jury to say whether the proceedings of the committee were *bona fide* for the investigation of the complaints, or merely for the purpose of getting rid of the plaintiff and appointing another medical man in his stead. The jury found the latter, and said that the plaintiff was an injured man.

"The plaintiff had been and then was a member of the society.

"The defendants, on the 19th of March 1827, were elected stewards of the society, and continued to act as such till May 1828; and, in the early part of that year, received from each of the several members of the society, according to the usual course, the sum of 3s. for their respective payments to the society's doctor, under the sixteenth rule, for one year ending on the 19th of March 1828, which amounted in the whole to 15*l.* 9*s.*

"Upon the 11th of March 1828, the following order was made by the committee, and entered upon the books of the society:

"At a meeting of the stewards and committee of the Yoxall New Friendly Society, held at the Golden Cup Inn, in Yoxall, this 11th day of March, 1828,—Ordered, that the sum of 15*l.* 9*s.* be paid to Mr. Joseph Fernyhough, surgeon and apothecary to the said society, that sum being the amount due to him for medicines and attendance for and on the sick and lame members thereof, we the undersigned stewards and committee of the society aforesaid considering the said Mr. Joseph Fernyhough the legally appointed surgeon and apothecary to such society; and we also further ratify and confirm his appointment to the said office. As witness our hands."

"This order was signed by the high steward, and ten other members of the society.

"Disputes having arisen respecting the aforesaid note of dismissal of the plaintiff, the committee (including the present defendants), and many members of the society, attended before two of the justices of the peace for the county of Stafford. It was denied, on the part of the defendants, that the magistrates had authority under the statutes (1) to settle the matters themselves or make any order respecting it; but, upon their recommendation, a public meeting of the society was held on the 17th of December 1827, of which the following notice had been given.

" 'Yoxall New Friendly Society,
December, 6, 1827.

" 'It having been agreed, in pursuance of the recommendation of the magistrates at their meeting at Wichnor Bridges on Saturday last, that the votes of the members should be taken at the next club-meeting, to be held on the 17th of December instant, for a surgeon to the club, you are requested to attend to give your vote on that occasion.'

"The meeting was attended by the present defendants, who were stewards, the rest of the committee, and by a very large majority of the members of the society; and at such meeting fifty-three voted for the plaintiff, eleven were neuter, and three voted for the rival surgeon.

"The plaintiff, before the action was brought, demanded the above sum of 15*l.* 9*s.* of the defendants, who refused to pay him, alleging that the committee considered Mr. Fernyhough to be the legal doctor."

The question for the opinion of the Court was—

"Whether the plaintiff was entitled to recover from the defendants the said sum of 15*l.* 9*s.* above demanded, or any part thereof. If the Court should be of opinion that the plaintiff was so entitled, the verdict was to stand for such sum as they should

think fit; if not, a nonsuit was to be entered."

The case now came on for argument.

Mr. Serjeant Spankie, for the plaintiff, contended that the finding of the jury incontrovertibly established that the plaintiff was duly appointed doctor to the society, and that the committee had no right to discharge him, or to appoint another; or, at all events, if they had such power, that what they did was not done fairly and *bona fide* in exercise of it. He referred to the case of *The King v. the Mayor of Doncaster* (2), to shew that, in the case of a corporation who have power to amove a member, such power must be exercised by an assembly duly convened by summons.

The learned Serjeant was proceeding with his argument, but the Court called on—

Mr. Serjeant Russell, for the defendants. —Friendly societies in this country are very numerous, and possessed of very large funds. It is requisite, therefore, that the responsibility of their regulation should rest on some particular persons. The committee in this case clearly had power to dismiss the doctor without the sanction of the society at large. But, even if they had not such authority, the plaintiff cannot recover in this action, as the defendants acted in obedience to the order of the committee of the 11th of March 1828. The statute 59 Geo. 3. c. 128. s. 9. enacts, "that the rules of every society or institution formed under the authority of that act, shall contain provisions with respect to the powers and duties of the members at large, and of such committees or officers as might be appointed for the management of the affairs of such society; and that such society should not be subject to the provisions and restrictions of the 33 Geo. 3, as to the appointment of committees, or otherwise with respect to the management of such society." No power can be conferred upon the committee save by the rules of the society. By the second rule set forth in the case, they were empowered to inquire into, settle and determine all grievances, differences and disputes whatsoever which might or should arise relative to the affairs of the society. It appears that there were complaints against the doctor. The com-

(2) 2 Burr. 738.

(1) 33 Geo. 3. c. 54—35 Geo. 3. c. 111—48 Geo. 3. c. 111—49 Geo. 3. c. 125—and 59 Geo. 3. c. 128—the acts then in force.

mittee, under this rule, had a right to remove him. The acts of the committee are made subject to review by an appeal to two magistrates. That, therefore, was the course which the plaintiff ought to have pursued, instead of bringing an action.

Lord Chief Justice Best.—I am of opinion that this action is maintainable. It appears to me that this matter was not one of the grievances within the province of the committee to redress. The jury have expressly found that the proceeding was not *bonâ fide* for the purpose of redressing any supposed grievance. It has been said that the plaintiff should have appealed to two magistrates. But it appears that there was an appeal, and that the parties attended before the magistrates, who recommended that a general meeting of the society should be convened; in which recommendation the defendants seem to have acquiesced. A meeting was accordingly called; and at this meeting there was a large majority of the members in favour of the plaintiff's continuance in office. He was, therefore, restored to his right, if even he had before been properly removed from the situation.

Mr. Justice Park.—I am of the same opinion. The expense attending the defence so improperly made to this action, is a shocking abuse of the money of the society.

The rest of the Court concurring—
Postea to the Plaintiff.

1829. }
May 19. } HUNT v. BLAQUIERE.

Husband and Wife—*Liability of husband to debts of the wife after a divorce a mensâ et thoro, and decree of alimony.*

Where husband and wife are separated by a sentence of divorce a mensâ et thoro, pronounced by the Ecclesiastical Court, on the ground of adultery on the part of the husband, and alimony decreed but not duly paid, the husband is still liable for debts contracted by his wife for necessities.

Furniture for a house comes within the description of necessities for which the wife may, under such circumstances, pledge her

husband's credit; provided it be such as is suitable to her rank and income.

This was an action of assumpsit to recover a sum of 488*l.* 17*s.* 6*d.*, for furniture supplied to the wife of the defendant, who lived separate from him under a decree of divorce *a mensâ et thoro*.

The defendant pleaded the general issue.

At the trial, before Lord Chief Justice Best, at Guildhall, at the Sittings after last Michaelmas term, it appeared that the defendant had married Lady Harriet, the daughter of the Marquis Townsend; that he treated her with great cruelty, frequently struck her, and eventually turned her out of his house, and sent her to her mother's; that, in the year 1820, the Ecclesiastical Court, at the instance of Lady Harriet, pronounced a decree of divorce *a mensâ et thoro*, on the ground of adultery on the part of General Blaquiere, and decreed Lady Harriet 380*l.* *per annum*, payable quarterly, by way of alimony; but it appeared that only 695*l.* in the whole had ever been paid of this annuity. The plaintiff's demand was for furniture supplied for a house at Brighton taken by Lady Harriet.

It was contended, on the part of the defendant, that the decree of alimony by the Ecclesiastical Court discharged him from liability for the contracts of his wife, inasmuch as she could no longer be considered as his implied agent for any purpose.

His Lordship told the jury, that, if a man turned his wife out of doors, or, by his cruel conduct, forced her to abandon his home and society, he gave her credit wherever she went; and that, notwithstanding the rank of Lady Harriet, she having only an income of 380*l.* *per annum*, it was for them to say whether the furniture supplied by the plaintiff was necessary and suitable to her situation in life—reserving for the opinion of the Court the question, whether the decree of alimony operated in discharge of the defendant's liability.

The jury returned a verdict for the plaintiff, for the whole of his demand.

Mr. Serjeant Spankie, in the last term, obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered.

If a party, by his own act, makes an arrangement with trustees on behalf of his

wife, to allow her a separate maintenance, and fails to make the stipulated payments, he is still liable for debts contracted by her: but, where the wife has obtained a decree of divorce in the Ecclesiastical Court, and a permanent allotment of alimony, it is otherwise; the decree for alimony absolutely discharges the defendant from all liability *ultra* the sum decreed. The allowance will be supposed paid until the contrary is shewn. The articles furnished by the plaintiff were not such as the defendant could, under any circumstances, be liable for. Expensive furniture for a house cannot be considered necessary for a woman divorced from her husband, with only an allowance of 380*l.* per annum. In the case of *Smith v. the Sheriff of Middlesex*, Lord Ellenborough said (1)—“I know of no case where a husband has been held liable upon a contract for the hire of goods made by his wife living apart from him, as for necessaries.”

Mr. Serjeant Wilde and Mr. Serjeant Russell now shewed cause.—The questions are—first, whether the divorce *a mensâ et thoro* and the decree of alimony, withdraw from the wife the implied credit of the husband—secondly, whether the supplies in question were reasonable, relation being had to the situation and rank in life of the party.

A divorce *a mensâ et thoro* does not absolutely annul the marriage. It does not render the wife a *feme sole*; she cannot contract or be sued as such; she is a married woman still to all intents and purposes, except so as to justify her living apart from her husband. In *Lewis v. Lee* (2), it was held that a woman divorced *a mensâ et thoro*, and living apart from her husband, upon a separate maintenance, is a *feme covert*, and cannot be sued as a *feme sole*. In *Ellah v. Leigh* (3), it was decided, that a *feme covert* living separate from her husband, and having alimony decreed her by the Ecclesiastical Court pending a suit there, cannot be sued as a *feme sole*. The same doctrine was held in *Marshall v. Rutton*. Lord Kenyon there said (4)—“We find no

authority in the books, to shew that a man and his wife can, by agreement between themselves, change their legal capacities and characters; or that a woman may be sued as a *feme sole* while the relation of marriage subsists, and she and her husband are living in this kingdom.” The divorce has no operation whatever upon the marriage itself. In this case the divorce was obtained on the ground of adultery on the part of the defendant. The terms of the decree are—“That Lady Harriet Blaquiére ought by law to be divorced and separated from bed, board, and mutual cohabitation with the defendant, her husband, until they shall be reconciled with each other.” The decree was, for permanent alimony (5). If the husband had remained within the jurisdiction and control of the Ecclesiastical Court, the wife would have had the means of enforcing this decree; but it is now absolutely unavailing, he having left this country shortly after the decree was pronounced, and having never since returned hither. If, indeed, he had duly paid the alimony, that might have been an answer to this action; but it appears that he has altogether only paid 695*l.*, leaving nine years now in arrear. If the defendant conceived that the amount of alimony decreed was greater than his means would admit of, he might have applied to the Ecclesiastical Court; for the amount may either be increased or reduced, according to the varying circumstances of the party's rank and means. In *Thompson v. Hervey* (6), it was held that a voluntary pension from the Crown to the wife during pleasure, would not exempt the husband from liability to be sued by his wife's creditors, by whom she was supplied with necessaries. In *Manby v. Scott* (7), the wife quitted her husband under circumstances of great impropriety; she wished to return to him, but he refused to receive her; and she had contracted debts, the husband having given the party, who furnished her with goods, notice not to trust her. According to the report of that case in *Levinz*, Mr. Justice Twisden and Mr. Justice Mallet thought that the husband should be charged,

(1) 15 East, 610.

(2) 5 D. & R. 98; a.c. 3 B. & C. 291; 3 Law J. K.B. 22.

(3) 5 Term Rep. 679.

(4) 8 Term Rep. 548.

(5) See *Blaquiére v. Blaquiére*, 3 Phillimore, 258.

(6) 4 Burr. 2177.

(7) 1 Sid. 109; a.c. 1 Mod. 124; 1 Lev. 4; Bac. Abr. (5th Ed.) vol. 1, 492; 2 Ventris, 45.

and said (8)—“Though alimony be recoverable in the Spiritual Court, yet, if the husband be obstinate, and will not obey their sentence, how shall the woman live? and, if he will obey it, yet, how shall she live in the meantime?” In *Burrett v. Booty* (9), where, on the separation of husband and wife, the former, by deed, conveyed property to trustees for the use of the wife; in an action against him for a debt subsequently contracted by the wife for lodging—it was held that it was incumbent on the husband to shew that the trustees gave effect to the deed, by taking possession. In *Nurse v. Craig* (10), it was held to be no defence to an action of assumpsit against the husband for necessities supplied to his wife, that he had covenanted with the plaintiff (a trustee) to pay the wife a separate maintenance, without proof of the regular payment of the stipulated allowance. Mr. Justice Chambre there said (11)—“Of what use is the covenant for an allowance, if the maintenance be not paid? It does not give a credit to the wife; for, no action can be brought against her. Is she to be taken into a court of equity, and to wait the usual period for decisions of this sort? How is she to subsist in the meantime?” Cases of this sort may be assimilated to cases where the liability of the defendant arises from a duty—as that of overseers to provide for casual poor, or of parents to provide for their children. In *Tugwell v. Heyman* (12), Lord Ellenborough held executors liable for the funeral expenses of their testator. So, in *Jenkins v. Tucker* (13), it was held, that, where a husband went abroad and left his wife, who died in his absence, a third person who voluntarily paid the expenses of her funeral (suitable to the rank and fortune of her husband,) though without the knowledge of the husband, might recover from him the money so laid out. In all these cases express contract is out of the question. In *Ozard v. Darnford* (14), Lord Mansfield said, that, “where husband and wife live separate, the person

who gives credit to the wife, is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual court, or a court of equity, will compel him to grant her an adequate alimony.” In *Anstey v. Manners* (15), Mr. Justice Park said, “that the liability of a husband for the debts of his wife does not continue after a divorce;” but there, the divorce was one dissolving the marriage altogether, and rendering it null *ab initio*.

The question whether or not the articles supplied by the plaintiff in this case to Lady Harriet, were necessities such as she had a right, regard being had to her station in society and her means, to take up on the credit of her husband, was properly left to the jury, and is set at rest by their finding.

Mr. Serjeant Spankie and *Mr. Serjeant Stephen*, in support of the rule.—There is a wide distinction between a voluntary separation and a divorce. Courts of common law recognize a state of separation of interests and of funds to a certain extent. Children born after a divorce *a mens et thoro* are illegitimate; though, for many purposes, the marriage still exists. Where the parties separate by mutual arrangement, the husband can only discharge himself by actual payment of the wife's stipulated allowance; but the case is very different where the rights and liabilities of the parties are fettered by an act of the law. It is not contended that a divorce *a mens et thoro* dissolves the *vinculum matrimonii*; but still the parties are separated in interest for many purposes. Under the statute of James (16), bigamy cannot be committed by them. After such a divorce, the wife cannot administer to the effects of the husband: *Shute v. Shute* (17). In *Chamberlaine v. Hewson*, Lord Chief Justice Holt said (18)—“If a *feme covert* sues sole in the Ecclesiastical Court for defamation, as she may, if she cohabits with her husband he may release the costs; but if they are divorced *a mens et thoro*, he cannot release the costs; and the reason is, that, if they are divorced *a mens et thoro*, the husband allows his wife alimony, and the costs of

(8) 1 Lev. 5.

(9) 8 Taunt. 343.

(10) 2 New Rep. 148.

(11) *Ibid.* 153.

(12) 3 Campb. 298.

(13) 1 H. Black. 90.

(14) Sel. Ni. Pri. (7th edit.) 247.

(15) Gow's N.P.C. 11.

(16) 1 Jac. 1. c. 11.

(17) Prec. in Chan. (2nd edit.) 111.

(18) 5 Mod. 71.

the suit are out of the alimony, and therefore he cannot discharge one more than the other. *Mutteram's case* (19) is the very same." In *Nurse v. Craig*, Sir James Mansfield said (20)—"Where a woman is put into a situation with respect to certain property, as a *feme sole*, no credit is given to the husband; but those who supply the wife trust only to the separate fortune which they know that she has. Nor can any assent of the husband be implied, where he has executed a deed covenanting to pay a certain stipulated sum; for, I cannot imagine that he could mean to make himself liable to any other payment." That case was considered to have gone to the very verge of what is reasonable in cases of this nature. The Court are now called upon to extend the principle of that case. The plaintiff here should have shewn that there was no means of enforcing the decree; he should have shewn a monition, and contumacy on the part of General Blaquiere. Now, at what particular time can the husband be said to become contumacious? In *Manby v. Scott*, the Court said that the wife ought to have applied to the Ecclesiastical Court. It must be observed, too, that that action was commenced at a time when, in effect, there was no Ecclesiastical Court in existence—the time of the Commonwealth. Mr. Justice Hyde there says (21)—"It is not sending the wife to another law, but leaving the case to its proper jurisdiction, it being of ecclesiastical consuance." Lord Hale, in his argument in that case, treating of the mode in which the necessities of the wife should be supplied, says (22)—"Although the law will not presume so much ill, that a husband should not provide for his wife's necessities, yet there is a severe obligation on him, not only to supply her in case of exigencies and extreme necessity, but according to conveniency; but the law has not made her her own judge, or provided her a judicature sufficient to reform the close-handedness of her husband; where she is driven to an extreme necessity and want of subsistence, the law has appointed a judge to compel the husband to supply

her—I mean the Chancellor. Then, for her conveniencies, the law has appointed the Bishops' Courts. And whereas it is said that this is not the common law; I answer that they are jurisdictions appointed by the common law; and, concerning the amplitude of their power, which is said not to be able to administer a remedy sufficient for this disease, I say, as it is aided by the *brachium seculare*, the power of it falls as severely upon them that disobey it, as the common law, can use when men will not pay their debts; for, they may excommunicate, and upon that follows imprisonment and a disability to sue any action." It is an universal maxim, that, where parties contract for themselves, the law deprives them of the prior advantages given by the common law. Here, the wife, by suing in the Spiritual Court, has made her election. The express duty imposed upon the husband by the decree of that Court, viz. that of paying the alimony, puts an end to the implied duty of otherwise providing her with necessaries. It was not for the defendant to shew that the decree for alimony has been obeyed; until the contrary be shewn, it must be presumed that a decree has been satisfied. No obligation could arise out of any implied contract until the decree had been enforced, and had failed to be effectual. Until it is shewn that the husband has disobeyed the monition of the Ecclesiastical Court, no other remedy exists for the wife; and so, of course, none for any other individual who stands on her rights. In *Keegan v. Smyth* (23), the husband was held liable for necessaries provided for his wife pending a suit between them in the Ecclesiastical Court, until alimony was assigned. Lord Chief Justice Abbott there said—"At the time when this credit was given, it was uncertain whether any or what alimony would be allowed." There are many authorities to shew that the wife has ample means of enforcing the sentence of the Spiritual Court. In *Blackstone's Commentaries* (24), it is said—"In case of divorce *a mens et thora*, the law allows alimony to the wife; which is that allowance which is made to a woman for her support out of the husband's

(19) 1 Salk. 115; s. c. 3 Bulst. 264; 1 Roll. Rep. 426.

(20) 2 New Rep. 162.

(21) 1 Mod. 132.

(22) Bac. Abr. (5th edit.) vol. 1. 492.

Vol. VII. C.P.

(23) 5 B. & C. 375; s. c. 8 D. & R. 118; 4 Law Journ. K.B. 189.

(24) 1 Bl. Com. 441.

estate; being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her *estovers*; for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law, *de estoveriis habendis*, in order to recover it (25). It is generally proportioned to the rank and quality of the parties. But, in case of elopement, and living with an adulterer, the law allows her no alimony (26)." The form of the writ *de estoveriis habendis*, is to be found in *Cowell* (27), and also in the *Registrum Brevium* (28). In *Manby v. Scott* (29), it is said that this writ, though ancient, is still law, although the law has now provided another remedy against the obstinacy of the husband, by a writ *de excommunicato capiendo*. But by the statute 53 Geo. 3. c. 127, that writ is now turned into a writ *de contumace capiendo*, which is in the nature of an attachment for non-payment of money—the most summary remedy known to the law.

Then, is this such a species of supply as the husband could be liable for? Is a tradesman authorized to execute such an order without any inquiry? These were not absolute necessities to support the wife's existence; not such things for which she was able to pledge her husband's credit pending a temporary suspension of the supply of alimony. In the case of *Smith v. the Sheriff of Middlesex* (30), where a married woman living separate from her husband, was supplied by a tradesman with furniture on hire, Lord Ellenborough said, that he knew of no case where a husband had been held liable upon a contract for the hire of goods made by his wife living apart from him, as for necessities.

Lord Chief Justice Best.—This was an action by a tradesman to recover the price of certain furniture supplied to a married lady living separate from her husband. At the trial, a verdict was found for the plaintiff. A motion has been made, to set aside

that verdict and enter a nonsuit, on two grounds—first, that a decree of the Ecclesiastical Court, awarding alimony to the wife, is an answer to the action—secondly, that the articles supplied by the plaintiff were not such necessities for which the action can be maintained.

Various circumstances have been mixed up in the case, which did not appear at the trial. I shall confine my opinion to the facts found by the jury. They found that the defendant had turned his wife out of doors. Now, it has been said by almost all the Judges that have ever sat in Westminster Hall, that, if a man turn his wife out of doors, he thereby gives her an implied authority to pledge his credit for all necessities supplied for her maintenance according to her degree and rank in society. It has been argued, however, that the decree of divorce *a mensâ et thoro*, and the award of alimony by the Ecclesiastical Court, are sufficient to discharge the defendant. But some authority should be produced by the party setting up this defence, to shew that a tradesman cannot recover under such circumstances. None, however, has been referred to, save only the case of *Manby v. Scott*. Although in the course of that case there are some *dicta* seeming to warrant such a doctrine, yet the decision went on another ground. The wife had eloped from her husband; she afterwards wished to be reconciled to him, but he refused to receive her back again. In *Govier v. Hancock* (31), it was held that a husband was not bound to receive or support his wife after she had committed adultery, although he had before committed adultery himself, and turned her out of doors without any imputation on her conduct; and the Court said that the question depended upon this, whether the necessities were provided before or after the wife had committed adultery: if after, the action could not be maintained. It has been contended that the only remedy of the wife was by an application to the Ecclesiastical Court. If that be so, all the cases of actions brought for the price of goods supplied to married women, from the days of Lord Hale to the present time, have been wrong. In *Manby v. Scott*, Mr. Justice Twisden and Mr. Justice Mallet asked if the wife was to

(25) 1 Lev. 6.

(26) *Cowell's Interpreter*, tit. "Alimony."

(27) *Ibid.*

(28) Page 89.

(29) 1 Lev. 6.

(30) 15 East, 607.

(31) 6 Term Rep. 603.

be allowed to starve pending the proceedings in the Spiritual Court. This is not like the case of a common annuitant; there is an express obligation on the husband to maintain his wife. I should feel no difficulty in deciding, upon principle, and without the assistance of any authority, that the defendant in this case is liable for the debts of his wife. His being ordered by the Ecclesiastical Court to maintain her, is nothing unless he shew that he has obeyed that order. The case of *Nurse v. Craig* was expressly confirmed in the time of Lord Chief Justice Gibbs, in *Burrett v. Booty* (32). There, there was an assignment of property to trustees for the wife's use—the Court held, that that was nothing unless it were shewn that the fund was productive; “for,” said the Lord Chief Justice, “if the husband does not take care that the trustees perform their part, and pay the allowance, the wife is left destitute.” But, it has been said, that, where the wife has resorted to the Ecclesiastical Court, she has made her election. So also a woman makes her election, when, as in *Nurse v. Craig*, she makes a compact with her husband for a separate maintenance. There is not in this case anything in law or common honesty to discharge the defendant's liability. There never was a case in which the doctrine contended for could be advanced with less plausibility than the present; for the husband has paid little or nothing of the alimony awarded by the Spiritual Court. There might have been some weight in the argument, if the alimony had been regularly paid to Lady Harriet. It has been asked, at what particular time does the husband become contumacious? If a man is directed to pay a debt on a particular day, he is contumacious if he do not pay it. Can it be said that this defendant has not disobeyed the decree? A great deal of argument has been introduced in this case, upon a curious ancient writ *de estoveriis habendis*, which is not to be found in the book wherein all the writs that are good for anything are to be found, viz. *Fitzherbert's Natura Brevium*. That writ, however, is at all events now obsolete. I am of opinion that the plaintiff is entitled to maintain his action, if the defendant has failed to perform the decree. The present

case is stronger in favour of the plaintiff than that of *Nurse v. Craig*; for the trustee there might have sued on the deed. But, independently of that authority, I think, that, upon principle, this defendant is not entitled to be relieved from the original liability cast upon him by the law.

As to whether or not the articles supplied by the plaintiff to the defendant's wife were necessities, was a question for the jury. I left it to them to consider, whether, under the circumstances, it was proper for her, and not inconsistent with her means, to hire a house and furnish it. They assented; and I am perfectly satisfied with their verdict, and see no pretence for disturbing it.

Mr. Justice Park.—I am of the same opinion. The question is, whether a decree of alimony by the Ecclesiastical Court is sufficient to discharge the liability of a husband for necessities supplied to his wife, where the alimony does not appear to have been paid. I am clearly of opinion that it will not. The facts have been very accurately detailed by my Lord Chief Justice. I am satisfied, that, under the circumstances, the defendant is liable. All the cases from *Manby v. Scott* to a very recent time, have uniformly held, that, to operate as a discharge, the alimony must be paid. In this all the text-writers agree. In *Bacon's Abridgment*, treating of how far the husband is bound by contracts for necessities made by his wife, that learned compiler sets out Lord Chief Baron Hale's argument in *Manby v. Scott* at length; his deduction therefrom is as follows (33)—“It is clear that a husband is obliged to maintain his wife, and may by law be compelled to find her necessities, as, meat, drink, clothes, physic, &c., suitable to the husband's degree, estate, or circumstances; it seems also settled, that the wife is not to be her own carver, and that she hath not an absolute power of binding the husband by any contract of hers, though for necessities, without his assent, precedent or subsequent; the law, therefore, in these cases, as it seems established by usage and practice, is, to leave it to the jury to find whether the hus-

band consented or not; and, though no express consent or agreement of his be proved, yet, if it appears that she cohabited with her husband, and bought necessities for herself, children, or family, the husband shall be chargeable, and the jury may find, on their oaths, that they came to the husband's use, he being by law obliged to provide for them; also, if she cohabits with her husband, and is ever so lewd, he shall be liable for her necessities, for he took her for better for worse; so, if he runs away from her, or turns her away, or forces her, by cruelty or ill usage, to go away from him: but, if he allows her a separate maintenance, or prohibits particular persons from trusting her, he shall not be liable during the time that he *pays* such separate maintenance, nor for necessities taken up of those persons particularly prohibited; for, in these cases, no consent, but rather the contrary, appears; but a general warning or notice in the *Gazette* or other newspaper, not to trust her, is not a sufficient prohibition. Also, the jury are to determine as to the wife's necessity, the husband's degree and circumstances, and the value of the things sold and delivered, and give a verdict and assess damages accordingly." I do not feel myself called upon to differ from the Court in *Manby v. Scott*. In *Nurse v. Craig*, it is true, all the Judges of the Court did not agree; but the opinion of Sir James Mansfield is not to be put in competition with those of the other Judges. Mr. Justice Chambre puts the case expressly upon the ground that the wife's maintenance had not been paid. He says (34)—"If reason, justice, or humanity ought to govern in the present case, I think it my duty to consent to the allowance of this action, since all the reasons upon which exceptions to this kind of action have been founded, totally fail in the present instance;" and, referring to *Todd v. Stoakes* (35), he observes, that "according to the report in Lord Raymond (36), it was averred in the plea that the allowance *was paid* according to the articles;" and, after citing several other authorities, he says, that, "in all these instances, it appears to have been thought necessary to lay a foundation for the exemption of the hus-

band, by shewing that the maintenance had been duly *paid* as well as secured." Mr. Justice Heath said (37)—"The common law does not relieve any man from an obligation, on the mere ground of an agreement to do something else in its place, unless that agreement be performed. The agreement could have no operation in destroying the husband's liability, by transferring the credit to the wife, *unless accompanied by payment*." That case is far stronger than the present; for there the plaintiff was the trustee under the deed. The case of *Keegan v. Smith* does not appear to me to have any bearing on this. In *Ozard v. Darnford*, Lord Mansfield draws a distinction between a case where the allowance has been paid, and where not. He says, that, "where the husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the spiritual court or a court of equity will compel him to grant her an adequate alimony. But, if she elope from her husband, and live in adultery, or if, upon separation, the husband agrees to make her a sufficient allowance, *and pays it*; in either of these cases, the husband is not liable: because, in the former case, she forfeits all title to alimony, and, in the latter, has no further demands on her husband." That case is precisely in point. In a similar case of *Turner v. Winter* (38), the decision in the case last referred to, was confirmed. In *Liddlow v. Wilmot*, Lord Ellenborough said (39)—"The only question is, whether the wife has been provided with resources adequate to her situation. When the wife lives separately from her husband, without any fault of her own, the law provides that her husband shall be liable for her adequate maintenance."

Whether or not the articles supplied by the plaintiff in this case were necessities, as well as the reasonableness of the charges, were clearly matters for the consideration of the jury.

Mr. Justice Burrough.—I admit, that, if a wife elope from her husband, she can claim neither maintenance nor dower. Here,

(34) 2 New Rep. 152.

(35) 1 Salk. 116.

(36) 1 Lord Raym. 444.

(37) 2 New Rep. 156.

(38) 1 Term Rep. 602.

(39) 2 Stark. Rep. 88.

the wife has been guilty of no misconduct. All the fault is on the side of the husband; and it is contrary to every principle of law, that a man shall be allowed to take advantage of his own wrong. The Ecclesiastical Court decrees alimony in lieu of the husband's liability to furnish his wife with necessaries; but this is no answer to an action like the present, unless the alimony be paid. There is no difference between payment of an allowance under a covenant, and payment of alimony under a decree, as here. It has been said that it was incumbent on the plaintiff to shew that the alimony had not been paid; but that would be to require him to give negative evidence. The case of *Nurse v. Craig* is, I think, decisive on the subject. If the writ *de esloveriis habendis* was a common law writ, it must have preceded the establishment of the Ecclesiastical Courts.

The articles furnished by the plaintiff were undoubtedly necessaries.

Mr. Justice Gaselee.—I do not find any case where it has been held, that, if a husband turns his wife out of doors, or so conducts himself as to destroy the possibility of her remaining under his protection, he can be discharged from his liability for any necessaries that may be supplied to her by strangers. It is said that we must on this occasion go beyond the decision in *Nurse v. Craig*, if we held the plaintiff to be entitled to recover in this action; but I think this case will fall far short of that.

The question as to whether or not the articles supplied were necessaries, or suitable to the rank of the lady, was clearly a question for the jury.

I am of opinion with the rest of the Court, that this rule ought to be discharged.

Rule discharged.

1829. }
May 21. } JAMES EVANS v. WHYLE.

Usury—Where cash and goods given for the discount of a bill.

Where, on the discount of a bill, part of the amount was given in cash and the remainder in goods, legal interest being charged for the money, and an advanced price being

charged for the goods for the time the bill had to run, which was the charge usually made in the trade for an extension of credit:—Held, not usurious.

Guarantie—Construction and effect of.

The defendant agreed to be answerable to the plaintiff, in a certain amount, for gold supplied to I. S. for the purposes of his trade. In the course of their dealings the plaintiff discounted bills for I. S., giving him the amount partly in cash and partly in gold:—Held, that this was not a dealing within the meaning of the guarantie.

This was an action on a guarantie, bearing date the 3rd April 1823, whereby the defendant agreed to be answerable to the plaintiff to the extent of 50*l.* for any gold he might supply to one Evan Evans, a working-jeweller, for the purposes of his trade.

At the trial, before Lord Chief Justice Best, at the Sittings at Guildhall after last term, it appeared that the plaintiff had supplied Evan Evans with gold from the date of the guarantie to the end of December 1826, when he became insolvent, being indebted to the plaintiff in the sum of 63*l.* for gold; that, in the course of their dealings, the plaintiff had discounted bills for Evan Evans (some of which were not indorsed by the latter), giving him half in cash and the other half in gold, for which gold he charged the usual trade price, with an additional shilling per ounce per month beyond the money price for the time the bills had to run, and also charging interest on the money advanced at the rate of 5*l. per cent.* It was proved that this progressive increase of price for the extension of credit was usual in the trade, and that all the gold supplied to Evan Evans by the plaintiff was used by him in the course of his trade.

It was thereupon contended, on the part of the defendant, that the transactions as to the discount of the bills, were usurious, and that the dealing between the plaintiff and Evan Evans was not according to the intention of the guarantie; but that the gold delivered was merely delivered as part of the purchase-money of the bills.

His Lordship told the jury, that, if the plaintiff had charged more for the gold than he would have done had no money

been advanced on the bills, or, if the gold had been procured by Evan Evans, and sold directly, and not used by him in his trade, then the dealing would have been in fraud of the guarantie; but that, as it appeared that all the gold was really used by Evan Evans in the course of his trade, the plaintiff was entitled to recover.

The jury accordingly returned a verdict for the plaintiff—Damages 50*l*.

Mr. Serjeant Wilde, on a former day in this term, obtained a rule nisi that this verdict might be set aside, and a new trial had. He submitted—

First, that the dealing was usurious; as to which he cited the case of *Davis v. Hardacre*, where it was held, that, in an action on a bill of exchange, if it appear that the plaintiff discounted it for the defendant, and required him to take the whole or any part of the amount in goods, the *onus* lies upon the plaintiff to prove that the goods were of the value at which they were estimated; for the purpose of rebutting the presumption that the transaction was usurious; and Lord Ellenborough said (1)—“Where a party is compelled to take goods in discounting a bill of exchange, I think a presumption arises that the transaction is usurious. When a man goes to get a bill discounted, his object is to procure cash, not to incumber himself with goods. Therefore, if goods are forced upon him, I must have proof that they were estimated at a sum for which he could render them available upon a resale, not at what might possibly be a fair price to charge to a purchaser, who stood in need of them.”

Secondly, that the course of dealing was essentially different from that contemplated by the guarantie; that the parties meant that Evan Evans should be supplied with such gold as was absolutely necessary to him for the purposes of his trade, and not that the defendant should be liable for gold delivered out of the ordinary course of business.

The Court thought that there was no pretence for saying that the transaction was usurious; but granted the rule on the latter point.

Mr. Serjeant Taddy shewed cause.—Whether bills were given or not, the gold was furnished at the same price; in either case the credit was the same. The bills, in fact, placed the defendant in a better situation, as there were then other parties who might have been called upon to pay. As, therefore, there can be no question but that the sale of the gold to Evan Evans was *bond fide*, it clearly falls within the meaning of the guarantie.

Mr. Serjeant Wilde, in support of his rule.—The discount is the purchase of a bill of exchange. In this case, the plaintiff bought the bills with all their attendant risks and remedies; the price was paid for them in cash and gold. The bills then ceased to be the property of the seller and went to the purchaser. If there be a previously-existing debt, and a bill of exchange is given in payment, then, in default of payment of the bill, the holder will be remitted to his original demand against his debtor; but, where no debt is existing, the discount is clearly a mere sale of the bill, and, in the absence of indorsement by the party selling it, an absolute and definitive sale. In *Ex parte Isbester*, Lord Eldon said (2)—“There is a great difference between transferring a bill without putting your name to it, and indorsing it; in the one case it is a sale, and in the other a discount; subject, however, to the question of intention, whether the transfer was intended to take effect as a sale, or by way of discount.” In *Ex parte Shuttleworth* (3), it was held, that a person giving cash for a bill without the indorsement of the person from whom he takes it, cannot prove it under his commission. In *Emly v. Lye* (4), where one of two partners drew bills of exchange in his own name, which he procured to be discounted by a banker, through the medium of the same agent who procured the discount of other bills drawn in the partnership firm, by the same banker—it was held, that the latter had no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills, though the proceeds

(2) 1 Ross, B. C. 23.

(3) 3 Ves. 368.

(4) 15 East, 7.

(1) 2 Campb. 376.

were carried to the partnership account; the money being advanced solely on the security of the parties whose names were on the bills, *by way of discount*, and not by way of *loan* to the partnership, though the banker conceived at the time that all the bills were drawn on the partnership account. Mr. Justice Le Blanc there said—"A discount is a purchaser of the bill." Here, the gold being thus supplied by the plaintiff to Evan Evans on the discount of bills, to some of which Evan Evans was no party, he not having indorsed them, the transaction amounted to no more than a sale of the bills, and not to a delivery of gold within the meaning of the guarantie.

Lord Chief Justice Best.—I am now convinced that I took a wrong view of this case at Nisi Prius. There ought to be a new trial. The question is, whether the gold advanced by the plaintiff to Evan Evans, together with the money, for the discount of certain bills of exchange was gold sold or supplied within the meaning of this guarantie. I think it was not. The guarantee only became bound to pay for such gold as was *sold* by the plaintiff to Evan Evans. If it was not *sold*, the defendant is not responsible. The evidence clearly establishes that this gold was not sold in the ordinary course of business. The distinction has been well taken by my Brother Wilde, between the case of a bill of exchange given for a by-gone credit, and gold given for the purchase or discount of a bill. Guaranties ought to be construed most strictly. He who seeks to make one man accountable for the debt of another, should bring himself clearly within the terms and spirit of the instrument by which he seeks to charge him: a guarantie ought not to be carried further than its language strictly warrants.

Mr. Justice Park.—The doctrine of *remitter* has been accurately stated by my Brother Wilde. If a party sell goods and take a bill of exchange in payment, if the bill be dishonoured, he is remitted to his original debt; but, if the goods be delivered on the discount of a bill, he becomes the purchaser of the bill; and, if the bill be not indorsed by the party who thus disposes of it, he who receives it does so at

his risk. I agree with what Mr. Justice Le Blanc says in *Emly v. Lye* (5) — "Where another security is not required, the party who discounts a bill of exchange stands in the situation of a purchaser of the bill; and, therefore, according to the case of *The Bank of England v. Newman* (6), cannot recover against the person with whom he discounts it, and whose name is not on the bill, the money advanced by way of discount." That doctrine, however, cannot apply to this case.

The rest of the Court concurring—

Rule absolute (7).

1829. { TERRINGTON, SURVIVING ASSIG-
May 22. { NEE OF PULLAN, A BANKRUPT,
 { v. HARGREAVES AND ANOTHER.

Bankrupt Act—Construction of.

The 82nd section of the statute 6 Geo. 4. c. 16, applies as well 'n payments made before, as to payments made since, the passing of that act.

This was an action of assumpsit brought by the plaintiff, in Trinity term, 1827, as surviving assignee of one Richard Pullan, a bankrupt. The declaration contained the usual money counts, stating promises by the defendant to the bankrupt before his bankruptcy, and to the plaintiff and one William White, deceased, as his assignees, and also promises to the plaintiff as surviving assignee since the bankruptcy. The defendants pleaded the general issue.

At the trial, before Lord Chief Justice Best, at the Sittings at Guildhall after last Michaelmas term, the jury found the following special verdict:—

"That Richard Pullan, the bankrupt, on the 26th of June 1822, was, and for some time before that day had been, a trader within the meaning of the bankrupt laws, at Leeds, in the county of York—

(5) 15 East, 12.

(6) 1 Lord Raym. 442; s. c. Com. Rep. 57.

(7) Lord Chief Justice Tindal, on the second trial, (see 1 Moo. & Malk. 471), left it to the jury to say, whether the transaction between the parties was, in substance, a *bond fide* sale of gold, or whether merely colorable, and the real transaction a mere discount of the bills. They found for the plaintiff.

that, on that day, he was indebted to the plaintiff Terrington, the petitioning creditor under the commission afterwards issued against him, in the sum of 1,100*l.* and upwards—that, being such trader, and being so indebted to Terrington, afterwards, on the said 26th of June 1822, Pullan became a bankrupt within the true intent and meaning of the statutes then in force concerning bankrupts—that a commission of bankrupt was issued against him, dated the 15th of May 1823, under which he was duly declared a bankrupt, and the plaintiff and White (whom the plaintiff hath survived) became and were the assignees of the estate and effects of the said bankrupt, according to the force, form, and effect of the said statutes, and the said plaintiff now is assignee of the said estate and effects—that Pullan was insolvent in the month of February 1822, and remained so insolvent until the issuing of the commission of bankrupt—that the defendants, on the 4th of August 1822, received from Pullan the sum of 165*l.* 7*s.* 6*d.*, being the first instalment of a debt due to them, for which they with other creditors had, on the 21st of March preceding, agreed to take Pullan's notes payable at four, eight, twelve, and sixteen months—and that, at the time when they so received the said sum of 165*l.* 7*s.* 6*d.*, they knew that Pullan was insolvent, but did not know that he had committed an act of bankruptcy. But whether &c., and if it should seem to the Court that the defendants did undertake and promise in manner and form as the plaintiff had complained, the jury assessed his damages at 165*l.* 7*s.* 6*d.*”

The case now came on for argument.

Mr. Serjeant Wilde, for the plaintiff.—The only question is, whether or not this case is affected by the 82d section of the 6 Geo. 4. c. 10. That clause enacts, “that all payments really and *bonâ fide* made, or which shall hereafter be made by any bankrupt, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed.” In *Churchill*

v. Crease (1), the Court were of opinion that the words “payments made,” in the 82nd section, referred equally to payments made before as to payments after the time of the passing of the act. There, the commission did not issue until more than a month after the passing of the act; but here, the commission was sued out long before the passing of the act, and the payment made by the bankrupt after he had committed an act of bankruptcy, cannot therefore be within the protection of that clause. In that case, too, it did not appear that the creditor knew of the insolvency of his debtor at the time he received the money; whilst here, it is found as a fact in the case, that the defendants did know, at the time they received the money from him, that the bankrupt was in insolvent circumstances. A law is never construed to be *ex post facto*, unless the Court be imperatively called upon so to construe it. The 135th and 136th sections of the 6 Geo. 4. c. 16, serve to shew the extent to which the legislature intended the act to be construed retrospectively; the 135th enacts “that nothing in this act contained shall render invalid any commission now subsisting, or which shall be subsisting at the time this act shall take effect, or any proceedings which may have been had thereunder, except as herein is specifically enacted;” and the 136th, which provides that the act shall not take effect before the 1st of September 1825, expressly excepts all enactments relating to certificates of conformity, which were to take effect upon the passing of the act. The 112th, 123rd, and 131st sections also are evidently meant to operate retrospectively. But the general enactments, and, among others, that now under discussion, are all exclusively prospective.

Mr. Serjeant Merremether, for the defendant.—There is no pretence for the distinction that has been contended for between the case of *Churchill v. Crease* and the present. It is true that the words of an act of parliament have not a retrospective or *ex post facto* operation, unless such be the declared intention of the legislature. Many of the clauses of this act were clearly

(1) 2 Moore & P. 415; s. c. 5 Bing. 177; *Ante*, 68.

meant to be construed retrospectively. In *Churchill v. Crease*, Lord Chief Justice Best said (2)—“If the expression ‘payments made’ does not refer to payments at the time of the passing of the act, the words ‘or which hereafter shall be made’ would be altogether nugatory. It seems to me, therefore, to be absurd, to say that the legislature did not contemplate all payments really and *bond fide* made at the time of the passing of the act, or that such payments only were to be protected which were to be made after it came fully into operation;” and Mr. Justice Park said (3)—“The words in the 82nd section, that ‘all payments made, or which hereafter shall be made,’ are extremely strong, if not conclusive, to shew that the legislature intended to protect all payments actually made at the time of the passing of the act. ‘All payments made’ must be considered to refer to payments *theretofore made*; and, more particularly so, as they are followed by the words ‘or which hereafter shall be made.’” Upon the authority of that case, as well as upon the words of the section in question, it is clear that *bond fide* payments, whether made before or after the passing of the act, are equally within its meaning.

Mr. Serjeant Wilde was heard in reply.

Lord Chief Justice Best.—This case has been brought before us on a special verdict. I entertain the same opinion I did when *Churchill v. Crease* was brought before the Court. That case is not distinguishable from the present. It has been admitted, that, unless there are words in an act of parliament indisputably shewing that it is to be construed retrospectively, it ought to be held to be prospective only. That position I fully accede to; but I think there are words here to shew that this section is retrospective: no sense can be made of it without putting this construction upon it. The words are—“that all payments really and *bond fide* made, or which hereafter shall be made by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such

payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.” The words “payments really and *bond fide* made” must be held to relate to payments made at and before the time of the passing of this act, otherwise they will be insensible. This was what I said in *Churchill v. Crease*. I am clearly of opinion that this clause was intended to have a retrospective operation. It has been said that the words are ambiguous, and may be explained by a reference to the 135th section. I admit that the language is not very clear; but I think the 135th section has no bearing whatever upon the 82nd. To give it this effect, it would be necessary to engraft upon it new words. I agree, that, if there was a vested interest in the assignees under the old act, the new one would not take it away. Upon the whole, I am of opinion that the defendants are entitled to our judgment.

Mr. Justice Park.—This particular clause has been under the consideration of this Court before. I do not feel disposed to alter the opinion I gave in *Churchill v. Crease*.

Mr. Justice Gaselee and *Mr. Justice Burrough* concurring—

Judgment for the defendants.

1829. } HOVILL AND ANOTHER V. STE-
May 25. } PHENSON AND ANOTHER.

Evidence.—Of subscribing witness subsequently acquiring an interest in the deed.

In an action on a charterparty, the attesting witness having subsequently, by agreement with the plaintiff, acquired an interest in the proceeds of the voyage:—Held, that he was not a competent witness to prove the exe-

(2) 2 Moore & P. 481.

(3) *Ibid.* 484.

cution of the charterparty, nor was evidence of his handwriting admissible.

This was an action of covenant on a charterparty, by the plaintiffs, ship-owners, against the defendants, the freighters, for non-payment of freight.

At the trial, before Mr. Justice Park, at Guildhall, at the Sittings after last Michaelmas term, the plaintiffs called the attesting witness to prove the execution of the charterparty. On his being asked by the defendant's counsel whether he had not, since the execution of the instrument, acquired an interest in the proceeds of the voyage, he admitted that he had, and refused to release his interest. It was thereupon objected that he was not a competent witness, he having an interest in the event of the suit. The learned Judge allowed the objection. Evidence was then offered to prove his handwriting, which was also objected to and rejected. The plaintiffs were accordingly nonsuited.

Mr. Serjeant Taddy, in the last term, obtained a rule *nisi*, that this nonsuit might be set aside and a new trial had, on the grounds that the testimony of the witness, or the proof of his handwriting, had been improperly rejected. He submitted, that, inasmuch as both parties had concurred in making him the attesting witness, the defendants could not, by objecting to his competency on the footing of an interest which he had acquired in the proceeds of the voyage, shut the plaintiffs out from the benefit of his testimony; or that, at all events, the plaintiffs had a right to give secondary evidence of the execution of the charterparty, by proving his handwriting, in the same manner as they might have done had his subsequent incapacity arisen from any other circumstance. He referred to—*Swire v. Bell* (1), where the subscribing witness was interested in the instrument *at the time of the attestation*, and therefore was not allowed to prove its execution—*Godfrey v. Norris* (2), where the subscribing witness to a bond having afterwards become the administrator of the obligee, in an action on the bond, proof of his handwriting was allowed—*Goss v. Tracy* (3), where the de-

positions of a witness disinterested at the time of making them, were allowed to be read in a cause in which he was afterwards plaintiff—*Buckley v. Smith* (4), where it was held, that, where a witness to an instrument becomes incapacitated, proof of the handwriting is admissible—and *Barlow v. Vowell* (5), where it was ruled by Lord Chief Justice Holt, that, where a person makes himself a party in interest, after a plaintiff or defendant has an interest in his testimony, he cannot by this deprive them of the benefit of his testimony.

Mr. Serjeant Wilde, on a former day in this term, shewed cause.—This is not the case of an interest accruing to a witness by operation of law, or without the knowledge or agency of the parties; but that of an interest created by the parties who seek to avail themselves of his testimony. The question is whether a plaintiff can put a defendant in this situation—to have a witness who is become, by the act of the plaintiff, interested in the event of the suit, or else to be unable to call the subscribing witness at all; and then the plaintiff be allowed to prove his handwriting. In *Goss v. Tracy*, the subscribing witness to the bond afterwards became the executor of the obligee; he thus became interested by operation of law. In *Godfrey v. Norris*, the subscribing witness to the bond afterwards became the administrator of the obligee. In *Swire v. Bell*, it was held, that, if the subscribing witness to the bond be interested therein, as well at the time of the attestation as at the trial, he cannot be examined as a witness to prove the execution; nor is proof of his handwriting sufficient for that purpose. Here, the witness was not interested at the time of the execution of the charterparty, but became so afterwards by the act of the plaintiffs themselves. In *Honeywood v. Peacock* (6), in an action by the sheriff on a bail-bond, the officer who made the caption was held to be a competent witness to prove the execution of the bond; the defendant having requested him to attest the execution, with full knowledge of the situation in which he stood. In *Phillipps on Evidence*, it is said (7), "that, if a deed or other written

(1) 5 Term Rep. 371.

(2) 1 Str. 34.

(3) 1 P. Wms. 288.

(4) 2 Esp. Rep. 697.

(5) Skin. 586.

(6) 3 Campb. 196.

(7) Vol. 1. (5th edit.) 471.

instrument is attested, but none of the witnesses are capable of being examined, the course then is, to prove an attesting witness's handwriting; and this will be a sufficient proof of the execution: as, where the attesting witness is dead, or blind, or incompetent to give evidence, either from insanity, or from infamy of character, or from interest acquired after the execution of the deed." But this refers to the case of an interest acquired by some *bonâ fide* act of the parties; not by a fraud, as here. The first and second underwriters upon a policy of assurance, who have paid the loss, upon an undertaking made to them by the assured to repay the money in case they failed in an action brought by them against a subsequent underwriter, seem not to be competent witnesses for the defendant in that action, to prove that one of the assured, when he effected the policy, misrepresented to them that it was a summer instead of a winter risk. *Forrester v. Pigou* (8). There is no case to be found where the testimony of a witness has been held admissible where he has acquired an interest in the subject-matter, through the act of the party who seeks to avail himself of his evidence.

Mr. Serjeant Taddy, in support of his rule.—The defendant is hardly in a situation to complain that he is shut out from evidence. In *Godfrey v. Norris* the same objection was urged that has been made here; for it was contended that the plaintiff might have let another person take out letters of administration: but Lord Chief Baron Parker held that proof of the handwriting of the plaintiff was good evidence; and he likened it to the case of a will, where the witness happens to be a devisee under the will; in which case, if there be no other witness, proof of his handwriting is allowed. In *Buckley v. Smith*, the incapacity of the attesting witness arose out of the act of the plaintiff himself, he having married her; and yet Lord Kenyon admitted proof of the handwriting of the maker of the note. In *Snire v. Bell*, the Court did allude to some such distinction as is here contended for; but the cause was ultimately decided on another point. In *Barnes v. Trompowsky* (9), Lord Kenyon said—"The

case of *Snire v. Bell* went on the ground that the subscribing witness was interested at the time of the execution, and also at the time of the trial;"—and Mr. Justice Grose said—"Where there is a subscribing witness, the parties thereby agree that the proof of their handwriting shall be made through that medium." The plaintiffs required no more in this case. In *Forrester v. Pigou*, there were other witnesses than the underwriters on the policy, who could have proved the fact; but here the subscribing witness alone could prove the execution of the charterparty. The modern practice attaches less value to the testimony of the subscribing witness than it was formerly thought to possess.

Cur. adv. vult.

Lord Chief Justice Best now delivered the judgment of the Court:—

This was an action upon a charterparty. At the trial, before my Brother Park, it appeared, that, after the execution of the instrument, the attesting witness entered into an agreement with the plaintiffs, by which he was admitted to a share of the profits which the plaintiffs expected to derive from their bargain. Upon this, an objection was taken to the competency of the witness, and his evidence was rejected, he having refused to release his interest. It was then proposed to prove his handwriting, which was also objected to, and the objection allowed; and the plaintiffs, not being able to prove the execution of the charterparty, were nonsuited. A motion was made in the last term to set aside this nonsuit, against which cause was shewn on a former day in this term. My Brother Burrough was absent during the argument; but the rest of the Court think that this evidence was properly rejected. There are several cases where a subscribing witness has acquired an interest after the execution of an instrument attested by him, in which it has been decided that proof of his handwriting may be received to establish such instrument; for instance, the handwriting of a subscribing witness who has been appointed an executor or administrator, or has married the person to whom the instrument was given, has been allowed to be proved. We do not dispute the authority of any of those decisions; on the contrary, we should be disposed to extend the prin-

(8) 1 Mau. & Selw. 9.

(9) 7 Term Rep. 267.

principle established by them to the case of a man entering into partnership, and becoming interested in instruments by acquiring a share in the credits, and taking upon himself the responsibilities of the firm of which he becomes a member. Necessity requires that in all these cases such evidence should be received; as, otherwise, parties must lose the rights secured by the instruments attested, or forego the accepting of situations which might be most important to their welfare. It would be a great hardship if the law were to say that a man should not become an executor or administrator, or accept a beneficial partnership, without giving up his right to debts due to the estates in which he has acquired an interest. But, in the present case, the witness had only obtained an interest in the contract arising under the instrument which he was called on to prove, and that interest he derived immediately from the plaintiffs themselves, who proposed to call him. They, therefore, cannot complain that their witness is disqualified, when they have been the cause of his disqualification. That the interest was considered by the witness to be so valuable as to be likely to affect his testimony, is evident by the circumstance that he refused to release it. It would be improper to allow a plaintiff to give such an interest to a person in the particular transaction in which he is obliged to call him as a witness as is likely to bias his testimony. A learned writer (10), who has devoted too much of his time to the theory of jurisprudence to know much of the practical consequences of the doctrines he has published to the world, has said that interest should only operate against the credit, and not be a ground of objection to the competency of a witness. This doctrine, however, is contrary to our law, according to which a direct interest to the smallest amount in any person will prevent him from being examined as a witness. This rule does not stand upon the principle that Mr. Starkie supposes, viz. that there is no difference, or that the law can make no distinction, between the degrees of interest (11): but upon this—that, if the party declines to release his interest, whatever

may be its amount, it seems that he considers it to be of importance to him, and therefore he ought not to be trusted as a witness in a suit instituted for the recovery of a sum in which he has an interest. A feeling of interest will, in spite of the utmost efforts of the most conscientious man, often so warp his mind as to prevent him from giving an accurate account of any transaction in which he is himself concerned. Considering the interest of parties, and, that which is of still more importance, the interests of the public, and of religion, which require that every possible means should be used to prevent false evidence, the law cannot be now too strict in excluding the testimonies of interested witnesses. It is true, that prejudices will frequently operate upon, and influence the mind of a witness as much as interest; but this is an evil that cannot be remedied. If we want the testimony of witnesses, we must be content to take it subject to all the defects that the infirmities of those who give it may occasion. We may require a witness to release his interest, but we cannot compel him to release himself from his prejudices; but, because we cannot do all we wish, we should not fail to do all we can, to arrive at truth. The case of *Forrester v. Pigou* is stronger than this; for there the plaintiff gave the witness an interest after the cause of action accrued, without the privity of the defendant; and yet the Court would not allow the defendant to call him. If a plaintiff, in such a case as this, had a right to say that he must either be allowed to call, to support his claim, a witness whom he himself had rendered interested, or be allowed to prove his handwriting, it would put the defendant under the necessity of having a case proved against him by an interested witness, or giving up the opportunity of obtaining a knowledge of any circumstances that occurred at the time of the execution of the instrument, by the cross-examination of the attesting witness.

The rule for setting aside the nonsuit must, consequently, be—

Discharged.

(10) Jeremy Bentham—Treatise on Judicial Evidence by Dumont, 247. Joy, St. Paul's Church-Yard, 1825.

(11) See Starkie, on Evidence.

1829. }
May 25. } JONES v. BRIGHT AND OTHERS.

Warranty—on the sale of goods.

A manufacturer who sells an article for a particular purpose, impliedly warrants it to be fit for that purpose. Where, therefore, the defendants, copper-manufacturers, sold to the plaintiff copper for sheathing the bottom of a vessel, which in a short time became corroded and unfit for use, and the jury found the decay to have arisen from an intrinsic defect in the quality:—Held, that the defendants were liable for the breach of this implied warranty, that the copper was fit and proper for the purpose of sheathing the vessel.

This was an action on the case for deceit and for breach of warranty on the sale of copper sheathing supplied by the defendants to the plaintiff for the purpose of sheathing the bottom of the plaintiff's ship, *Isabella*.

The declaration contained twelve counts—the six first (which were abandoned at the trial) for the deceit—the remainder for the breach of warranty.

The seventh count was in substance as follows:—That the plaintiff, at the special instance and request of the defendants, bargained with the defendants to buy of them, and the defendants agreed to sell to the plaintiff, divers, to wit, one thousand sheets of copper, *for the purpose of sheathing the bottom of a certain bark or vessel called the Isabella*; and that the defendants, by falsely and fraudulently warranting the said sheets of copper, *which had been made and manufactured by the defendants, to be copper of a superior quality, and reasonably fit and proper for the purpose aforesaid*, sold the said sheets of copper to the plaintiff, at and for a large sum of money, to wit, the sum of 313*l.* 15*s.* 6*d.*, which was afterwards paid by the plaintiff to the defendants for the same: whereas, in truth and in fact, the said sheets of copper were not, at the time of the said warranty and sale thereof as aforesaid, reasonably fit or proper for the purpose aforesaid; but, on the contrary thereof, the said sheets of copper were, at that time, of an inferior quality, and wholly unfit and improper for the purpose aforesaid: whereby the said sheets of copper afterwards, to wit, on &c.,

at &c., became and were of little or no use or value to the plaintiff; and so the defendants, by means of the premises, falsely and fraudulently deceived the plaintiff on the sale of the said sheets of copper as aforesaid.

The eighth count stated the copper to be warranted to be made of the purest and best ore, and to be fit and proper for the purpose aforesaid.

The ninth, that the sheathing had been made and manufactured by the defendants of the best copper ore.

The tenth (the count relied on), that the defendants warranted the copper, *which had been made and manufactured by the defendants, to be reasonably fit and proper for the purpose aforesaid*.

The eleventh and twelfth were in substance the same as the tenth.

The defendants pleaded the general issue.

At the trial, before Lord Chief Justice Best, at the Sittings at Guildhall after last term, it appeared that the plaintiff was a ship-owner, and the defendants manufacturers of copper and copper sheathing. One Fisher, a sail-maker, who was called as a witness on the part of the plaintiff, stated, that, the plaintiff being in want of sheathing for his ship *Isabella*, he (the witness) went with him to the defendants' counting-house, and introduced him, saying—"Mr. Jones (the plaintiff) is in want of copper for sheathing a vessel, and I have pleasure in recommending him to you, knowing you will sell him a good article;" whereupon Smith, one of the defendants, said—"You may depend upon it we will supply him well," or—"I will take care that he is well supplied;" and that the price and time of credit were then agreed on. The plaintiff then proved that his ship-wright afterwards went to the defendants' warehouse and selected the copper, which was sent on the plaintiff's account to Bristol, where the *Isabella* was then lying, and with which she was sheathed. The invoice, which was put in, described the copper as "sheets of copper, and nails, for the ship *Isabella*." It was further proved, that the *Isabella* proceeded to Sierra Leone, whence she returned in November 1827; and that, when she sailed thence, which was about five months after

she was sheathed with the copper in question, it was discovered that the copper was corroded and full of holes, and totally unfit for further service.

Messrs. Percival and George Johnson, two assayers of metals, who had assayed the copper in question, stated, that good copper should contain $\frac{97}{100}$ of pure ore; that, in this copper, the proportion was only $\frac{96}{100}$; that copper readily imbibes oxygen; that this was partly in a state of oxyde; that, when so, copper is more soluble; that copper with a large proportion of oxyde would dissolve from the action of salt water; that the quantity of oxyde in this copper ($\frac{1}{100}$) would produce that effect; that the excess of oxyde was attributable to an improper mode of manufacture; that means may be used to obtain copper free from oxyde, by subjecting it to a process to extract the oxygen; and that copper decays very differently from extrinsic causes. The secretary to the British Copper Company also stated that the defect in this copper had probably arisen from overheating it in the manufacture; and that, of late, the competition in the trade had induced the manufacturers to hasten the process, much to the detriment of the article. It was also proved that good copper sheathing usually lasts five or six years.

On the part of the defendants, several witnesses stated, that the corrosion of the copper might have been occasioned by a variety of extrinsic causes; that it decays sooner in some climates than in others; that the holes in the sheathing might have been produced by barnacles, whilst the ship was lying in the river at Sierra Leone, where they abound; that, in fact, barnacles were found on the ship's bottom on her return to this country; and that the quality of copper might be easily ascertained from its appearance and its malleability: and it was contended, that, if the copper had been defective at the time of the sale, the plaintiff's ship-wright must have discovered it when he sheathed the vessel.

The price charged was admitted to be the market price for good merchantable copper sheathing.

His Lordship left it to the jury to say, whether the decay in the copper arose from any intrinsic defect in it, or from any extrin-

sic cause; and, if it arose from an intrinsic defect, whether such defect was occasioned by the want of due care or skill in the manufacture, or from the use of an improper and inferior material.

The jury found "that the decay in the copper arose from some intrinsic defect in the quality of the copper; but that no satisfactory evidence had been given to shew how that defect was occasioned."

A verdict was accordingly entered for the plaintiff—the amount of damages to be referred; and leave was reserved to the defendants to move that this verdict might be set aside and a nonsuit entered, or a verdict for the defendants, in case the Court should be of opinion that the declaration was not supported by the evidence.

Mr. Serjeant Ludlow, on a former day in this term, accordingly obtained a rule nisi to that effect. He referred to *Gray v. Cox* (1), where, he observed, Lord Chief Justice Abbott, who differed from the rest of the Court, threw out extrajudicially something favourable to the maintenance of this action, which was overruled by the other Judges; and also to the case of *Parkinson v. Lee* (2).

Mr. Serjeant Wilde and *Mr. Serjeant Russell* shewed cause.—The tenth count is fully supported by the evidence. It alleges that the defendants warranted the copper, which had been made and manufactured by them, to be fit for the purpose to which it was to be applied. The evidence clearly made out that allegation. The defendants are the manufacturers of the article. It is not an article sold for general purposes, but, if useful at all, must be fit for the particular purpose for which it was intended, viz. the sheathing of vessels. It is enough, that, from the general circumstances attending the sale, sufficient appears whence may be inferred the intention of the parties: no precise form of words is necessary to constitute a warranty. The facts of this case are abundantly sufficient to raise an implied warranty. The general doctrine of implied warranty is thus laid down by *Mr.*

(1) 1 Car. & P. 184; s. c. 4 B. & C. 108; 6 D. & R. 200.

(2) 2 East, 314.

Justice Blackstone(3)—“A second class of implied contracts, are such as do not arise from the express determination of any court, or the positive direction of any statute; but from natural reason, and the just construction of law. Which class extends to all presumptive undertakings or assumpsits; which, though never, perhaps, actually made, yet constantly arise from this general implication and intention of the courts of judicature, that every man hath engaged to perform what his duty or justice requires.” Suppose the defendants had brought an action for the price of the copper, and it appeared that it had been sold for copper warranted to last four or five years, and it was proved to have lasted only as many months, might not the plaintiff have shewn that the article was not worth the price charged for it, and reduced the damages to its actual value? I admit, that, if the plaintiff (as in *Fisher v. Samuda*) had had reasonable means of ascertaining the actual value of the copper at the time of payment, he would not now be in a situation to agitate the question in another shape. But here there was no knowledge or means of knowledge in the plaintiff of the quality of the copper; the jury have found the decay to be the result of an intrinsic defect. In *Gray v. Cox*, there was no actual decision on this point. The defendants there were not the manufacturers of the copper, but sellers only. Lord Chief Justice Abbott, on making absolute the rule for a new trial in that case, said (4)—“At the trial, it occurred to me, that, if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. I am still strongly inclined to adhere to that opinion, but some of my learned Brothers think differently. Supposing, however, my opinion to be correct, still the plaintiffs have not declared on a warranty or promise of that nature, but upon a general warranty; and we are all of opinion that such a general warranty does not arise, nor can be implied in law, from such a contract of sale as the present.” The declaration here is precisely adapted to the opinion expressed by

his Lordship in that case. There, too, there was an entire absence of every circumstance whence it could be inferred that the seller had any more knowledge of the quality of the article than the buyer. *Caveat emptor* can only apply to cases where the means of knowledge are express. In cases of insurance of goods, the warranty of the ship's sea-worthiness is a condition precedent to the assured's right to recover for a loss. So, in life-assurances. So, in contracts for victuals, it is implied that they are fit and proper for the food of man. Here, the goods sold are such as are applicable to a given purpose only, and were bought for that purpose. The warranty of a horse is necessarily different in its circumstances from a warranty on the sale of goods. But, in the case of a horse sold without any express warranty, where it is said, at the time of the sale, to be wanted for a particular purpose, as, for a lady, a child, or an invalid, there there is an implied warranty that he is fit for that purpose. In *Laing v. Fidgeon* (5), it was held, that, in every contract to supply manufactured goods, however low the price, it is an implied term that the goods shall be merchantable. In *Gardiner v. Gray* (6), where the defendant sold twelve bags of *waste silk* at 10s. 6d. per pound, which, on its arrival at its place of destination, was found to be of a quality not saleable under the denomination of *waste silk*—Lord Ellenborough said—“The purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness; but the intention of both parties must be taken to be, that it shall be saleable in the market, under the denomination mentioned in the contract between them.” In *Fisher v. Samuda*, Lord Ellenborough seems to have entertained no doubt as to the implied warranty; but the question there was, whether the plaintiff had not so conducted himself as to waive

(3) 3 Bl. Com. 161.

(4) 4 Barn. & Cross. 115.

(5) 4 Campb. 169; s. c. 6 Taunt. 108.

(6) 4 Campb. 144.

his right to complain. He says (7)—“It is the duty of the purchaser of any commodity, immediately upon discovering that it was not according to order, and unfit for the purpose for which it was intended, to return it to the vendor, or to give him notice to take it back.” In *Okell v. Smith* (8), in assumpsit to recover the price of copper pans, which the seller had engaged should be sound, and made of the best materials, and the purchaser, after trial, found them to be unsound and unfit for the purpose for which they were intended; Mr. Justice Bayley said—“The plaintiff certainly is not entitled to recover the full price stipulated for by the contract, according to which he was bound to furnish pans capable of answering the purposes for which they were ordered.” *Bluett v. Osborne* (9) must be mis-reported. There, the plaintiff had sold the defendant a bowsprit, which at the time of the sale appeared to be perfectly sound, but which afterwards turned out to be rotten—it was held; that, in the absence of fraud, the plaintiff was entitled to recover what the bowsprit was apparently worth at the time of the delivery; and Lord Ellenborough is reported to have said—“A person who sells impliedly warrants that the thing sold shall answer the purpose for which it is sold:” and afterwards—“What the plaintiff deserves is the apparent value of the article at the time of delivery!” In *Jones v. Bowden* (10); Mr. Justice Heath mentioned a case tried before him, where on a sale of sheep sold as stock, the evidence was, that, by the custom of the trade, stock were understood to be sheep that were sound, whereupon he told the jury that this amounted to an implied warranty that they were sound. In *Yeats v. Pim*, Lord Chief Justice Gibbs said (11)—“Where a party undertakes that he will supply goods of a certain description, he must execute his engagement accordingly.” In *Bridge v. Wain* (12), where goods sold were described in the invoice as scarlet cuttings, Lord Ellenborough said, “that an undertaking that

they were such must be inferred; that, to satisfy an allegation that they were warranted to be of any particular quality, proof must be given of such a warranty; but that a warranty was implied that they were that for which they were sold.” In *Pasley v. Freeman*, Mr. Justice Buller said (13)—“It was rightly held by Lord Chief Justice Holt, and has been uniformly adopted ever since, that an affirmation at the time of a sale, is a warranty, provided it appear in evidence to have been so intended.” The decision in *Prosser v. Hooper* (14) turned upon the conduct of the vendee, he having kept the article, and sold a part. The case of *Parkinson v. Lee* (15) is very distinguishable from the present; there the vendors were not the growers of the hops.

Mr. Serjeant Ludlow, in support of his rule.—If this verdict be sustainable at all, it can only be on the ground of an implied warranty, which can hardly arise from the facts proved at the trial. There is an uniform series of decisions in the books with reference to actions of deceit, and in all of them the rule *caveat emptor* has been held to apply, except there was fraud, or an express contract of warranty. The plaintiff must recover *secundum allegata et probata*; the contract must be truly and accurately stated. Not one of the counts of this declaration points at any relation between the parties as manufacturer and purchaser; but simply as buyer and seller; the plaintiff's contract with the defendants is not made with them *quā* manufacturers, but *quā* vendors only. The jury have undoubtedly found that the decay arose from an intrinsic defect in the copper; negating, however, that it was owing to either of the two cases in which his Lordship said the defendants would be liable. There is, in fact; in this case, neither warranty nor any pretence for charging the defendants with fraud. In *Fitzherbert's Natura Brevium* (16), it is said—“If a man sell unto another man a horse, and warrant him to be sound and good, &c., if the horse be lame, or diseased, that he cannot

(7) 1 Campb. 193.

(8) 1 Stark. N.P.C. 107.

(9) *Ibid.* 384.

(10) 4 Taunt. 847.

(11) 2 Marsh. 143.

(12) 1 Stark. N.P.C. 504.



(13) 3 Term Rep. 57.

(14) 1 B. Moore, 106.

(15) 2 East, 314.

(16) Tit. "Writ de Trospass sur le best," 94.

work, he shall have an action upon the case against him; and so, if a man bargain and sell unto another certain pipes of wine, and warrants them to be good, &c., and they are corrupted, he shall have an action upon the case against him. But, note, it behoveth that *he warrant* it to be good, and the horse to be sound, otherwise the action will not lie; for, if he sell the wine or horse without such warranty, it is at the other's peril, and his eyes and his taste ought to be his judges"—*Year Book*, 26 H. 6, 35. There can be no implied warranty unless connected with deceit on the part of the party charged. There is nothing in this case to lead to the implication of a warranty. The invoice is the only evidence of the contract, and there the article is merely described as "copper for the ship *Isabella*." In the case of an express warranty, the judgment of the buyer is not called into action; but where there is no warranty, and the purchaser has an opportunity of inspecting the goods, it is his own fault if he is deceived. Here, the seller was as innocent as the buyer, and there was no fraud or misrepresentation at the time of the sale. In *Chandelor v. Lopus* (17), the declaration stated that the defendant, having skill in jewels, had a stone which he affirmed to be a bezoar stone, and sold it as such to the plaintiff; judgment was arrested because it was not averred that the defendant knew it *not* to be a bezoar stone, or that he warranted it to be one. In *Selwyn's Nisi Prius* (referring to *Chandelor v. Lopus*), it is said (18), that, in actions on the case in nature of deceit on an implied warranty, which are grounded merely on the deceit, it is essentially necessary that the knowledge of the party, or, as it is technically termed, the *scienter*, should be averred in the declaration, and proved. In *Rolle's Abridgment* (19), it is said, "If a taverner sell wine (*conant ceo destre corrupt*) to another, as sound, good, and not corrupt, without any express warranty, yet an action of deceit lies against him; for this is a warranty in law. So, if I come to a tavern to eat, and the taverner gives and sells me meat

and drink corrupted, whereby I am made sick, an action lies against him, without any express warranty; for there is a warranty in law—*Year Book*, 9 Hen. 6, 53. But, if a man sell me a horse without warranting him to be sound, if he be distempered in his body, yet no action lies against him—*Year Book*, 20 Hen. 6, 35, *contrà*." But, on reference to the *Year Book*, it will be found that there is merely a loose *dictum* to that effect by Paston J.; and, so far from that case being in fact an authority *contrà*, it is there expressly held that, to make him liable, the seller must be "*sachant luy estre malade*." The same doctrine is laid down by all the ancient text writers. Lord Coke says (20)—"By the civil law, every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty either in deed or in law; for *caveat emptor*." Mr. Justice Blackstone lays the rule down thus (21)—"By the civil law (Ff. 21. 2. 1.), an implied warranty was annexed to every sale, in respect to the title of the vendor; and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose (Cro. Jac. 474—1 Roll. Abr. 90). But, with regard to the goodness of the wares so purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound and good (F.N.B. 94), or unless he knew them to be otherwise, and hath used any art to disguise them (2 Roll. Rep. 5.), or unless they turn out to be different from what he represented to the buyer." In *Noy's Maxims* (22), it is said—"A bargain is perfect by the delivery of the article bargained for, and *caveat emptor*." In *Wood's Institutes* (23)—"Every one will affirm that his wares are good, that the horse which he sells is sound; yet, if he does not *warrant* them to be so, though it was false, no action lies." It is incumbent on the plaintiff to shew an express warranty, or a deceit in the seller, in order to charge him for a latent defect. Insurance cases are not at

(17) Cro. Jac. 4.

(18) 4th Edit. vol. 1. p. 622.

(19) Tit. "Action disceit en nature dun case," (P.) vol. i. p. 90.

Vol. VII. C.P.

(20) Co. Litt. 102, a.

(21) 2 Bl. Com. 451, Hovenden's ed.

(22) 6th Edit. 107.

(23) 3rd Edit. 539.

all applicable to this; the ship is by custom warranted a "good ship." The whole argument on the other side merely rests upon two *dicta*, the one of Lord Ellenborough in *Bluet v. Osborne*, the other of Lord Tenterden in *Gray v. Cox*. In the former, there was a latent defect in the article, of which the seller could have no knowledge; in the latter, the other Judges differed in opinion from Lord Tenterden. With every respect for that very learned Judge's opinion, that is a mere *obiter dictum*, which will not warrant the Court in overturning a long series of decisions on the rule of *caveat emptor*. If a person purchase articles at an auction, or of a puffing advertiser, he cannot complain that he has been imposed upon, although the articles prove to be of inferior quality, and were at the time of the sale, or in the advertisement declared to be of the best materials. In *Okell v. Smith*, the copper pans were directed to be made for the party, and for a particular purpose, viz. the manufacture of vitriol. *Bridge v. Wain* was a case of deceit. In *Gardiner v. Gray*, Lord Ellenborough seems to admit, that, where there is an opportunity of inspecting the commodity, the maxim of *caveat emptor* does apply. In *Parkinson v. Lee*, it is clearly laid down that there must be either an express warranty, or proof of fraud. Mr. Justice Grose there said (24)—"If an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties. But, if there be no such warranty, and the seller sell the thing such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact." Mr. Justice Lawrence (25)—"I know of no authority which makes the seller liable for a latent defect, where there is no fraud, and no representation was made by him on the subject to induce the buyer to take the thing."

Lord Chief Justice Best.—It is the duty of Courts of Justice to endeavour to lay down rules that are calculated to prevent fraud in all cases, and to protect persons who are necessarily ignorant of the quality

of commodities they purchase, against those who manufacture and sell, and are consequently fully aware of the nature of the article they offer for sale. This action is brought by the plaintiff to recover from the defendants damages for the insufficiency of certain copper sheathing which he had purchased of them for a known purpose, viz. the sheathing of a ship. It has been insisted, for the defendants, that the invoice is the only evidence of the contract; and that that is altogether silent upon the subject of warranty. The invoice, however, is not the only evidence of the contract. An invoice is frequently not sent until long after the contract has been completed; it is not like a broker's note, which is the only evidence of the contract between the parties. But, looking at the invoice, we find that the copper was expressly sold for the purpose of sheathing the bottom of the ship *Isabella*. Upon the authority of a case not cited at the bar, viz. *Kain v. Old*, I am of opinion, that we are to look at the whole of what passes at the time of the contract. That was an action for the breach of the warranty of a ship. Lord Chief Justice Abbott, in delivering the judgment of the Court, said (26)—"Where the whole matter passes in parol, all that passes may sometimes be taken together, as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination." In that doctrine I fully concur. In contracts of this description, it is not necessary that the vendor should expressly use the words "I warrant;" it suffices if he say that the article is of a particular quality, or that it is fit for a particular purpose. The witness Fisher stated that he introduced the plaintiff to the defendants, and that, when he said that the plaintiff was in want of copper for sheathing a vessel, one of the defendants made answer—"I will take care that he is well supplied." That was a warranty, that the plaintiff should have a good article. The jury found that this was not a good article, but contained a latent defect. I am clearly of opinion, that, where a man sells an article, he thereby

(24) 2 East, 321.

(25) *Ibid.* 322.

(26) 2 B. & C. 634; 4 D. & R. 61; 2 Law Journ. K.B. 102.

impliedly warrants it to be of some use. In *Laing v. Fidgeon*, it was held, that, in every contract to furnish manufactured goods, however low the price, it is an implied term that they shall be merchantable. By a merchantable article, I understand a thing fit for some purpose. When a man makes and sells an article for a particular purpose, he warrants it to be fit for that purpose. There is no decision to the contrary of that. We have been referred to cases touching the warranty of horses. But there is a wide distinction between a warranty of a horse, and that of a manufactured article. The owner may be ignorant of an inherent or latent defect in the horse; but a manufacturer may guard against defects in the articles he manufactures, by the exercise of an ordinary degree of care, and by providing materials of proper quality. This distinguishes the case of *Bluett v. Osborne* from the present; in that case, the seller could not by any exertion of human skill have guarded against what proved to be a latent defect in the timber out of which he formed the bowsprit. But a person who manufactures copper sheathing, may, by using a proper proportion of pure ore, and by not suffering it to imbibe too large a quantity of oxygen in the process of manufacture, or by distributing it (as he may) properly over the whole surface, thereby render it more likely to resist the influence of salt water, than it will be if these necessary precautions are not carefully observed. On the sale of a horse, if the seller do not warrant it to be sound, and it turns out to be unsound or restive, the buyer cannot recover against the seller; but, if the purchaser ask for a horse of a particular description, as, a carriage horse, or a horse for a lady or a timid or infirm person, does not the dealer undertake that it is fit for the purpose to which it is intended to apply it? A conversation of that nature is an affirmation amounting to a warranty. In *Chandelor v. Lopus*, where the defendant sold as a bezoar stone, a stone which was not a bezoar, Mr. Justice Anderson said, "that the deceit in selling it for a bezoar, whereas it was not so, was a cause of action." So, in the case of *Fisher v. Samuda*, where the plaintiff purchased beer from the defendants, to be shipped for Gibraltar, the sale was an affirmation by the vendor that

the beer was fit for the voyage. Where an article has been sold for a particular purpose, the sale is an undertaking that it is fit and proper for that purpose. In the case of puffing to which allusion has been made, I should hold the seller liable for defects. In this case I fully expected the jury to find that the sheathing was not properly manufactured. The evidence of two scientific witnesses who were called for the plaintiff, clearly proved that. They stated that its defectiveness was occasioned by the want of due care in the manufacture, whereby it had been suffered to imbibe too great a proportion of oxygen; or, by its being got ready for sale too quickly. The question is, was this copper equal to its purpose. I think not; for, the jury have expressly found that there was an inherent defect in it. The defendant was bound to exclude all defects, and he has not complied with his warranty. Many old cases have been cited; among others, that of *Chandelor v. Lopus*; but that case does not appear to me to bear upon the question: all that the Court decided there was, that, in order to render the vendor liable, there must be either a warranty or a false representation. It does not, however, follow that there must be an express warranty; an implied warranty would do. The same answer may be given to all the earlier authorities. In *Parkinson v. Lee*, this point was not decided. There, the Court only held, that a warranty that hops sold should equal the sample, was satisfied by shewing that they did so, although they were not perfectly merchantable. *Expressio unius est exclusio alterius*. That too, was a defect in a production of nature, unknown to the sellers; here, the article was the production of human art, and the defendants themselves were the manufacturers. Mr. Justice Grose there said (27)—"The question is, whether, in the case of a sale made under the present circumstances, there be any implied undertaking in law that the commodity be merchantable. The mode of dealing is, that the plaintiff buys hops from the defendant, *whom he knows is not the grower*, by samples taken from the pockets, in which the commodity is close-packed."—(28)—"The defendant merely sold

(27) 2 East, 321.

(28) Ibid. 322.

what he had before bought upon the same mode of examination." That must be taken to apply to the particular warranty. That case was decided in 1802, and although not referred to in the case of *Laing v. Fidgeon*, which came before this Court in 1815, and where this very point was decided, it cannot be supposed that Lord Chief Justice Gibbs, who then presided, was unacquainted with it. The plaintiff declared in the last-mentioned case, that, in consideration that he would buy of the defendant divers goods, at and for reasonable prices to be paid by the plaintiff, the defendant undertook to sell and deliver to the plaintiff such goods of a good and merchantable quality, and to charge a fair and reasonable price for the same. The evidence was, that the goods were made of inferior materials, and were useless and unmerchantable—the Court held, that, although there was no express contract that the articles should be merchantable, it resulted from the whole transaction that the articles were to be so; that the defendant (the seller) might have rejected the order; but, having accepted it, he ought to furnish a merchantable article. This last case decided, that, if a man sell goods generally, he undertakes that they are fit for some purpose; and, if he sell them for a particular purpose, he tacitly and impliedly warrants that they are fit for the purpose for which they are bought. I am, therefore, of opinion that the plaintiff is entitled in this case to retain his verdict. This decision will operate as a caution to manufacturers. It will tend to protect ignorant purchasers from their imposition. The principal object of the law is, the protection of the ignorant.

Mr. Justice Park.—I fully concur in what has fallen from my Lord Chief Justice. I entertain no doubt whatever on the subject. I make a strong distinction between the case of a manufacturer, and that of a mere seller of goods. The *tenth* count, on which the verdict is taken, states that the plaintiff had bargained with the defendants to buy, and they had agreed to sell to him, one thousand sheets of copper for the purpose of sheathing the bottom of a vessel; and that the defendants, by falsely and fraudulently warranting the copper, which had been made and manufactured by them, to

be reasonably fit and proper for the purpose aforesaid, sold it to the plaintiff for a large sum of money, which was afterwards paid by him for the same: whereas the copper, at the time of the sale, was wholly unfit and improper for the purpose, and became of little or no use to the plaintiff. When an article is bought for a particular purpose, is it not reasonably implied that it is fit and proper for the purpose for which it is purchased? It has been said that there is no case to be found where there was not an express warranty, or an averment of fraud or deceit, in which it has not been held to be incumbent on the purchaser to aver and prove that the seller *knew* the article to be not such as he represented it. But how can we know whether, in the cases that have been referred to, the warranties were express or implied? The main reliance has been upon the authority of the case of *Gray v. Cox*, where Lord Chief Justice Abbott, at *Nisi Prius*, said (29)—“Where a commodity is sold for a particular purpose, it must be understood that it is reasonably fit and proper for that purpose.” The rest of the Court appear to have differed from his Lordship, after argument in *banc*. But, in delivering the judgment of the Court, he said (30)—“At the trial, it occurred to me, that, if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. I am still strongly inclined to adhere to that opinion, but some of my learned Brothers think differently. Supposing, however, my opinion to be correct, still the plaintiffs have not declared on a warranty or promise of that nature, but upon a general warranty; and we are all of opinion that such a general warranty does not arise, nor can be implied in law from such a contract of sale as the present. For this reason, we think that the opinion expressed by me at *Nisi Prius* was incorrect.” The Court there only held that the evidence did not go the length of supporting the declaration. In *Fisher v. Samuda*, the plaintiff had paid for beer, after an action had been brought against him for the price, and after he knew that it was of a bad quality. In

(29) 1 Car. & P. 186.

(30) 4 Barn. & Cross. 115.

Laing v. Fidgeon, Lord Chief Justice Gibbs concurred with the rest of the Court in holding, that, although there was no express contract that the article should be merchantable, such a warranty necessarily resulted from the whole transaction. In *Gardiner v. Gray*, Lord Ellenborough lays down the same rule. He says—"A purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply." In *Bluett v. Osborne*, his Lordship also said, that, "A person who sells, impliedly warrants that the thing sold shall answer the purpose for which it is sold." I am decidedly of opinion that the defendants in this case were bound to furnish sheathing applicable to the purpose for which they agreed to sell it.

Mr. Justice Burrough.—I also think there is no ground to disturb this verdict. The question is entirely one of fact—whether the declaration is supported by the evidence. The tenth count, in substance, states, that the defendants, "by falsely and fraudulently warranting the copper, which had been made and manufactured by them, to be reasonably fit and proper for the purpose aforesaid (that is, for the purpose of sheathing the bottom of the plaintiff's vessel), sold it to the plaintiff for a large sum of money, which was afterwards paid by him for the same: whereas the copper, at the time of the sale, was wholly unfit and improper for the purpose." In the case of *The King v. Boyall* (31), which was an indictment on the 29 Car. 2. c. 12. s. 9, for not sending a cart and men to the six days' highway labour, pursuant to an order from the overseers, it was objected, after verdict, that two persons named in the indictment were not sufficiently alleged to be surveyors of the highways, it being only averred that "they, being surveyors, &c.", without stating by whom or when they were appointed—Lord Mansfield held the averment sufficient. In this case, the defendants knew for what purpose the copper was wanted. The whole of the tenth

count was, in my opinion, proved, with the exception of the word "fraudulently." No authority, however, is needed to shew that the evidence was sufficient to support that count; the question is concluded by the finding of the jury—"that the decay of the copper arose from some intrinsic defect in its quality."

Mr. Justice Gaselee.—Without entering into the question whether this was an express or an implied warranty, I concur in the decision that has been pronounced by the Court. I fully agree with the doctrine of my Lord Chief Justice Abbott, in *Gray v. Cox*, viz. that, where goods are sold for a particular purpose, the law implies a warranty that they are fit for that purpose. It has been said that this verdict cannot be sustained on either of the counts of this declaration, as it discloses upon the face of it no contract of warranty. But you cannot draw a count upon a warranty, shewing upon the face of it whether the warranty be express or implied. In the case of a promise, it does not appear in the declaration whether the promise be in writing or not. The case of *Read v. Nash* (32) expressly decided that it is not necessary to aver the promise on which the action is founded to be in writing.

Rule discharged.

1829.
May 25.

{ ASHBY AND ANOTHER, EXECUTORS OF ELIZABETH ASHBY, DECEASED, v. ASHBY AND ANOTHER.

Account stated—Evidence in support of.

In assumpsit on the money counts, and an account stated, it appeared that the plaintiffs' demand arose on a promissory note for 150l. given by the defendants to the plaintiffs' testatrix, written on a receipt stamp. Evidence was given of an acknowledgment by the principal defendant, that he owed the deceased 150l. The consideration for the note was goods sold, but the declaration contained no count for goods sold:—Held, that the defendants' acknowledgment of the debt was sufficient to support the account stated.

This was an action of assumpsit. The declaration contained the common money counts and an account stated.

Pleas—the general issue, and the statute of limitations.

At the trial, before Mr. Justice Burrough, at the last Assizes for the county of Rutland, it appeared that the plaintiffs were the executors of one Elizabeth Ashby deceased. The following written instrument (signed by the defendants) was produced in evidence:—

" May 9, 1816.

" Received of Mrs. Elizabeth Ashby, £150, which we jointly and severally promise to pay on demand, with lawful interest for the same."

This paper was stamped with a two and sixpenny receipt stamp. It was thereupon objected for the defendants that it was not evidence, as it ought to have had a four and sixpenny promissory note stamp, as required by the 55 Geo. 3. c. 184, sched. part 1.

A witness who was called, proved that the note was given to the testatrix for sheep and beasts sold by her to the defendant Ashby, the other defendant signing the note as surety for Ashby. Another witness stated, that, within six years of the commencement of the action, the defendant had admitted that he owed Mrs. Ashby, the testatrix, 150*l.*, and that two years' interest had been paid on the note.

It was then contended for the defendants, that, as the declaration contained no count for goods sold, which was the consideration for which the note was given, and as the account stated could only be proved by the note itself, which, not being properly stamped, was not admissible in evidence, the plaintiffs must be nonsuited.

A verdict was however taken for the plaintiffs, for 180*l.*, the amount of the note, and interest; with liberty to the defendants to move to enter a nonsuit.

Mr. Serjeant Jones having on a former day in this term, obtained a rule nisi—

Mr. Serjeant Adams now shewed cause.—There was sufficient evidence of an acknowledgment that 150*l.* were due from the defendant Ashby to the testatrix, coupled with the fact, that two years' interest on that sum had been paid, to entitle the plain-

tiffs to recover on the account stated, without reference to the note. In *Wilson v. Kennedy* (1) it was held, that, where a promissory note is void for want of a stamp, the plaintiff may give evidence of the consideration. The same point was determined in *Wade v. Beasley* (2). In *Manley v. Peel* (3), where a promissory note was given without a stamp, and the maker wrote upon it a memorandum of his having paid a certain sum for interest, Lord Ellenborough held, that such memorandum might be read as an admission that there was a principal sum due which would yield so much interest.

Mr. Serjeant Jones, in support of his rule.—The evidence offered, having reference to a paper which could not itself be given in evidence by reason of its not being properly stamped, was clearly not admissible. In *Castleman v. Ray* (4), where there was an acknowledgment of the drawee, at the bottom of an unstamped draft, that a third person had paid the money mentioned in it for the use of the drawee, it was held that such acknowledgment could not be received in evidence without giving effect to the draft. Here, the very circumstance of the party's talking of interest, must shew it to have reference to the note. To be evidence under an account stated, the evidence must be of a clear ascertained sum. The verdict has been taken for the amount of the note and interest, and the declaration contains no count for interest; the verdict therefore must, at all events, be reduced.

Mr. Justice Park (5).—The objections urged on the part of the defendant are most unjust. Still we must give effect to them if any rules of law come in the way. There appears, however, to have been a clear admission of a debt of 150*l.*, without any reference to the note. The plaintiffs are therefore entitled to recover on the account stated; but, the verdict being taken for interest as well as for the amount of the

(1) 1 Esp. Rep. 245.

(2) 4 Esp. Rep. 7.

(3) 5 Esp. Rep. 121.

(4) 2 Bos. & Pul. 383.

(5) The Lord Chief Justice was at Chambers.

debt, and the declaration not containing a count for interest, it must be reduced to 150*l*.

The rest of the Court concurring—

Rule discharged (6).

1829. }
May 27. } EVERETT v. DESBOROUGH.

Insurance—on lives—Effect of misrepresentation on.

The plaintiff being about to effect an insurance on the life of one H., and being applied to by the agent of the insurance-office for information as to the state of health &c. of H., said he knew nothing of him, but directed the agent to get the necessary information wherever he could. The agent accordingly applied to the life, who made a false representation as to the medical man who usually attended him:—Held, that the plaintiff was bound by the misrepresentation of the life, though made without his knowledge; and that the policy was void.

This was an action of assumpsit against the defendant, the secretary of the Atlas Insurance Company, on a policy of assurance effected for the plaintiff on the life of one James House.

The declaration stated, that, on the 22d of April 1828, the plaintiff caused to be made a certain policy of assurance, whereby, after reciting that he was desirous to effect an insurance with the Atlas Company on the life of House, for the term of one year from the 13th of April 1828, and that the plaintiff had accordingly paid at the Company's office at Warminster, in the county of Somerset, 37*l*. 17*s*. 6*d*., as a premium for such insurance for one year, three of the directors of the company, whose hands were subscribed to the policy, relying upon the truth of a certain declaration made by the plaintiff on the 22d of March 1828, in compliance with the conditions on the policy indorsed, did agree with the assured, that they, the directors, would, in case House should happen to die at any time within the term of one year

(6) See *Brown v. Watts*, 1 Taunt. 353; *Farr v. Price*, 1 East, 58.

commencing from the said 18th of April, pay out of the stock and funds of the company to the assured, within three months after the decease of House should have been notified to the directors of the company, the sum of 1000*l*.; provided always, that the policy and the assurance thereby effected should at all times and under all circumstances be subject to such conditions and stipulations as were contained in the printed proposals indorsed thereon, in the same manner as if the same were wholly and actually repeated and adapted to the present case. The plaintiff then alleged the payment of 37*l*. 17*s*. 6*d*. as a premium for the insurance of the said sum of 1000*l*.; and, after averring mutual promises, in fact, said, that the declaration in the policy mentioned, in compliance with the conditions thereon indorsed, was, and is, a certain declaration as follows (that is to say):—

"I (the plaintiff), being desirous to make an assurance with the directors of the Atlas Assurance Company, in the sum of 1000*l*., upon the life of James House, born at &c., on &c., but now residing at Warminster, in the county of Somerset, do hereby declare to the best of my belief, that the age of the said James House does not exceed forty-four years, that he has had the small-pox, that he has not had the gout, that he has not suffered a spitting of blood, and that he is not, and has never been afflicted with asthma, or fits, or any other disorder which tends to shorten life. I do hereby agree, that this declaration shall be the basis of the contract between me and the company; and that, if any untrue averment is contained in this declaration, in setting forth the age, state of health, or other circumstances, relative to the said James House, all monies which shall have been paid to the company upon account of the insurance so made by me, shall be forfeited. Dated, &c."

It was then averred, that, in the printed proposals mentioned and referred to by the policy, it was expressed and declared that persons proposing to effect life assurance would be required to state the following particulars, viz. "name and residence of the party by whom the proposal was made—name, residence, and profession of the person whose life was to be

assured and, in case of an assurance upon survivorship, the name, residence, and profession of each party—place and date of birth, and age next birthday—sum to be assured, and the term—whether afflicted with the gout, asthma, fits, spitting of blood, or any other disorder which tends to shorten life—whether the party has had either the small-pox or cow-pox;—whether the party would attend personally, either at the office in London, or before one of the company's agents—whether employed in the military or naval service—the names and residences of two gentlemen to be referred to respecting the present and general state of health of the life to be assured—one to be the usual medical attendant of the party. A declaration as to all the above points will be considered as the basis of the contract between the assured and the company. If the above declaration should not be in all respects true, then the policy would become void, and the premium that might have been paid, would be forfeited."

It was then averred, that the declaration so referred to in the policy, and so made by the plaintiff, was in all respects true; that, on the 15th of June 1828, House died, and that his decease was duly certified to the company, and proofs of his death afterwards adduced; and that, although the plaintiff had in all things conformed himself to, and observed, performed, fulfilled, and kept all things in the policy, and conditions, and stipulations contained, on his part and behalf to be observed and performed, according to the form and effect of the policy, and of the said proposals and conditions; yet, that the defendant would not pay the plaintiff the said sum of 1000*l.*, so by him insured as aforesaid, but altogether refused and neglected so to do.

Then followed the usual money counts.

The defendant pleaded the general issue, and paid the amount of the premium into court, upon the count for money had and received.

The cause was tried, before Mr. Justice Gaselee, at the last Assizes at Salisbury. The plaintiff proved the execution of the policy. The conditions indorsed on the back of the policy were declared to be as much a part of the policy, as if they had been repeated in the body of it. A witness

of the name of Lye stated that he was agent to the Atlas Insurance Company, at Warminster, near which place the plaintiff and House lived; that the plaintiff, who held a leasehold estate determinable on the death of House, had agreed to effect an insurance with the Atlas Company to the amount of 1000*l.* on his life, but he told the witness that, as he had never seen House, and knew nothing of the state of his health or of his habits of life, he (the witness) was to make the necessary inquiries respecting him wherever he pleased; that the witness Lye accordingly called at House's mother's near Warminster, with whom House had been living for some months, managing her farm; that he appeared in perfect health, and was leading a sober and temperate life; that, on Lye's asking House who was his usual medical attendant, he made answer, "I have never had occasion for a doctor; sometimes I have taken Harvey's quack pills: but Mr. Vickery of Warminster knows as much of me as any man;" that the witness shewed the plaintiff the declaration required by the policy, and was about to read it to him, when he said, "I dare say it is all correct."

Mr. Vickery was called. He stated that he was a surgeon and apothecary practising at Warminster; that he had known House from his birth, and had attended different members of his family, but had not attended *him* professionally for twenty years; and that he never saw a more robust or healthy-looking man.

Several other witnesses proved, that, when House resided at Bath, he was much addicted to drinking; that sometimes he would be in a continued state of intoxication for a fortnight or three weeks together; that when he became sober, he always sent for a Mr. Harvey, a quack doctor at Bath, who bled him and gave him strong laxatives; that, shortly before the insurance was effected, House left his mother's and went to Bath; that he had another drunken fit, and when a little recovered returned again to his mother's, where he died in a few weeks. It did not appear that the plaintiff was aware of the intemperate habits of House, nor of the fact that Dr. Harvey had attended him at Bath.

Mr. Vickery, being recalled, stated that he saw House a short time before the policy was effected; and that, whatever his habits might previously have been, no visible effect was thereby produced on his person or constitution.

It was insisted, on the part of the defendant, that the fact of the frequent intoxication of House at Bath, and his having been attended there by Harvey, ought not to have been concealed from the office; and that a true representation as to the name of House's usual medical attendant had not been made, in compliance with the conditions indorsed on the policy.

For the plaintiff, it was contended, that the conditions only pointed at disorders tending to shorten life, amongst which habits of intemperance could not be reckoned; that House was not the agent of the plaintiff, and therefore that he ought not to be affected by any misrepresentation or suppression of fact made by House, without his knowledge.

The learned Judge left it to the jury to say—first, whether or not House was an insurable life at the time of effecting the policy—secondly, whether or not there had been a concealment of any circumstance which it was material that the insurance company should know—thirdly, whether Lye had acted as the agent of the plaintiff, or of the insurance-office, or of both.

The jury found that House was an insurable life; that there was no concealment by him of any material circumstance; and that Lye was the agent of the company only. They accordingly returned a verdict for the plaintiff, and leave was given to the defendant to move that this verdict might be set aside and a nonsuit entered, in case the Court should be of opinion that the objections taken were sustainable.

Mr. Serjeant Merewether, accordingly, on a former day in this term, obtained a rule nisi—citing *Maynard v. Rhodes* (1), where an insurance was effected on the life of A. for the benefit of B., and the insurance-office acted upon A.'s own representation as to the state of his health, and it

turned out that he was not an insurable life—it was held that B. could not maintain an action on the policy, although he was not privy to the misrepresentation—*Morrison v. Muspratt* (2), where a female on whose life it was proposed to effect an insurance was represented to the office by a medical man as enjoying ordinarily a good state of health, and the insurance was effected accordingly; but it appeared that she had a short time previously been ill of a pulmonary attack, and was attended by another medical adviser: no disclosure of these facts having been made to the assurers—this Court held, that the jury ought, under the circumstances, to have been directed to consider whether the illness and the attendance of the other medical man should not have been disclosed at the time of effecting the policy—and *Lindenau v. Desborough* (3), where the Court of King's Bench held, that, if the assured, at the time of effecting the policy, conceal from the assurers anything that it is material for them to know, the policy is void.

Mr. Serjeant Wilde now shewed cause.—The declaration indorsed on the back of the policy is the basis of the contract between the assured and the assurers. The conditions referred to, precede the execution of the policy. When once the policy is underwritten, the question of compliance with the conditions cannot arise. The plaintiff and House were utter strangers to each other; the plaintiff merely happened to be the purchaser of a lease in which House's name appeared as one on whose life the term depended. The policy is a valid policy, either by an actual performance of the conditions on which it was to be effected, or by a qualified performance accepted by the persons underwriting. The question is, whether the declarations of *cestui que vie* amount to declarations by the assured. It must be admitted, that, if the plaintiff himself, or any agent acting on his behalf, made a misrepresentation as to the medical attendant of *cestui que vie*, the policy would be void. In the cases of *Maynard v. Rhodes*, *Morrison v. Muspratt*,

(1) 1 Car. & P. 360; s. c. 5 D. & R. 266; 3 Law Journ. K.B. 64.

(2) 4 Bing. 60; s. c. 5 Law Journ. C.P. 63.

(3) 8 B. & C. 586; s. c. 3 M. & R. 45; 7 Law J. K.B. 42.

and *Lindenau v. Desborough*, the persons making the representations were the agents of the assured; here, all the inquiries are made by the agent of the office, and made of the life himself. In *Lindenau v. Desborough*, the decision turned on the circumstance of the assured having omitted to communicate to the assurers a material circumstance *within his own knowledge*, or that of his agent, viz. the state of the mental faculties of the party whose life was insured. Mr. Justice Littledale there said (4)—“It is the duty of the assured, in all cases, to disclose all material facts within their knowledge.” *Morrison v. Muspratt* went on the ground of the exclusion of the medical man who had more knowledge of the state of the life than the one selected. The only inference to be drawn from that case is, that the assured is bound to give all the necessary information that is within his knowledge. Here, the communications of House were not the act of the plaintiff. In *Maynard v. Rhodes*, too, there was a wilful concealment of a most material fact, a disease of long standing, which ultimately proved fatal.

Mr. Serjeant Merewether, in support of his rule.—The misrepresentation made by House as to his usual medical attendant, renders the policy void; the plaintiff is bound by it, for House was *quoad hoc* his agent. *Maynard v. Rhodes* is expressly in point. There, it was decided, that, if misrepresentations are made by the party whose life is insured, as to the state of his health, the policy will be void, although the assured was not privy to those representations. Mr. Justice Bayley there said (5)—“The representation made by Mr. Lyon (the life) as to the state of his health, must be incorporated in the policy as a condition, making the instrument void or binding according as the condition should or should not be broken. It can make no difference as to the result, in point of law, whether the insurance is for the benefit of the party whose life is insured, or for the benefit of a third person. The truth of the representation is equally a condition in both cases.” Mr. Justice Holroyd—“It

was a conditional policy, and the party for whose benefit it was effected must stand to the consequences.”

Lord Chief Justice Best.—No longer ago than the case of *Morrison v. Muspratt*, this Court held, that, in the case of a life insurance, if reference be made to a person who *had been* the medical attendant of the assured, but was not so *at the time the insurance was effected*, the omission to refer to the *actual* medical attendant was such a misrepresentation or undue concealment as would vacate the policy. In the subsequent case of *Lindenau v. Desborough*, Lord Tenterden said that he considered our decision in *Morrison v. Muspratt* a guide for his direction to the jury in that case. It is true that, in *Morrison v. Muspratt*, the reference was made by the assured, whereas here it was made by the life. The question is, whether the assured is bound by misrepresentations made by the life. *Maynard v. Rhodes* decided that very point. There, Mr. Lyon, on whose life the policy was effected for the benefit of the plaintiff, in conformity with the regulations of the insurance-office, attended to give the usual information as to the state of his health. But, a few months afterwards, Mr. Lyon died of a disorder of long standing, the existence of which he omitted to disclose to the office at the time the policy was effected. Lord Chief Justice Abbott, who tried the cause, told the jury, that, if they were satisfied that the representation made by Mr. Lyon was not substantially true at the time the policy was effected, it must be considered as a condition incorporated in the policy, by which the plaintiff would be bound, although he himself was not privy to the falsehood of the representation. A motion being afterwards made for a new trial, on the ground of misdirection, Mr. Justice Bayley said—“I am of opinion that the direction of the Lord Chief Justice to the jury was correct in point of law”—Mr. Justice Holroyd—“If the jury were satisfied that the representation, though made by Mr. Lyon himself, was untrue, it can make no difference in the legal result, whether the policy was effected for his benefit or not. It was a conditional policy; and the party for

(4) 8 Barn. & Cress. 592.

(5) 5 Dowl. & Ry. 267.

whose benefit it was effected must stand to the consequences"—Mr. Justice Little-dale concurred. This is a very recent decision on this very point. It is true, however, that in that case the concealment was of a more important fact than in the present case. It has been admitted by counsel for the plaintiff, that the principal is bound by any thing said by his agent. I think the plaintiff here did make House his agent. He told Lye, the agent of the insurance company, he might make inquiry where he pleased. To whom could Lye have gone to make inquiry with more propriety than to House himself; for, who could give him more satisfactory information upon the subject? House, when applied to, improperly referred to Mr. Vickery of Warminster, as his usual medical attendant. By suffering the statement to be transmitted to the office, the plaintiff adopted that reference. Was that reference a proper one? Mr. Vickery stated at the trial, that he had not attended House for several years. There was another medical man who could have spoken to his general state of health and habits of life. Thus, the usual medical attendant of the life was not referred to, agreeably to the conditions indorsed on the policy. The first count of the declaration states the policy and the conditions. One of those conditions ran thus:—"The names and residences of two gentlemen to be referred to respecting the present and general state of health of the party to be assured; one to be the usual medical attendant of the party." All that the policy refers to must be considered as part of the policy. The contract was not confined to the body of the policy, but embraced also the conditions indorsed on the back of it. I think that House was the agent of the plaintiff, and that he was bound by his representations; and therefore that there should be a nonsuit.

Mr. Justice Park.—It is necessary that in all policy cases the strictest good faith should prevail. I think there is nothing in the point made. The plaintiff refers the agent of the office generally to any person from whom he could get information as to the health and habits of the life to be insured. That necessarily includes a re-

ference to the life himself, as being the best person to give such information. The plaintiff must therefore be held bound by the representations made by this person as to his state of health, and the medical man by whom he was usually attended. When asked as to this latter fact, House said that Mr. Vickery of Warminster knew as much of him as any man. But that proved to be untrue; for Mr. Vickery had not been his medical attendant for twenty years. Dr. Harvey attended him. The case of *Maynard v. Rhodes* appears to me to be exactly in point. There, the assured was as innocent of fraud as is the plaintiff in this case; yet the Court held him answerable for the misrepresentations of the life. The misrepresentation as to the usual medical attendant, was a misrepresentation in a most material fact; and one that the plaintiff himself felt to be so, for he has in his declaration averred performance of the very condition that requires it. According to *Jones v. Barkley* (6), a plaintiff may aver a discharge from the performance of that which it is his duty to do.

Mr. Justice Burrough.—It is very difficult to frame a declaration on a policy of this sort. I am of opinion that we cannot get over the case of *Maynard v. Rhodes*. There, there was a material concealment. There was the like in this case—the omission to refer to the proper medical attendant. One (amongst others) of the declarations required by the conditions to be made previously to the policy being effected, was this—"The names and residences of two gentlemen to be referred to respecting the present and general state of health of the life to be assured; one to be the usual medical attendant of the party:" and it is provided that "a declaration as to all the above points will be considered as the basis of the contract between the assured and the company. If the declaration shall not be in all respects true, then the policy will become void." That stipulation formed part of the policy, and it was not kept. I therefore also think that the plaintiff should be nonsuited.

(5) 2 Doug. 684—See also *Kington v. Preston*, *ibid.* 689.

Mr. Justice Gaselee.—I am of the same opinion. The only particular wherein *Maynard v. Rhodes* differs from the present is this—there, it was necessary that the person whose life was to be insured should attend personally at the office to give the usual information; and here, the information was obtained by the agent of the company going to the life.

Rule absolute.

1829. }
May 30. } KNOWLES v. BLAKE AND SAYERS.

Distress—*Damage feasant*—*Abandonment of.*

The plaintiff having taken the defendant's cattle damage feasant, and suffered them to escape, and to remain in the defendant's own field, whilst he went to the defendant to demand satisfaction for the damage done:—Held, that this was an abandonment of his right of freshly following.

This was an action on the case for a rescue of cattle taken *damage feasant*.

At the trial before Mr. Baron Garrow, at the last assizes for the county of Sussex, it appeared that the plaintiff occupied a field sowed with tares adjoining a field belonging to the defendant Blake; that, in August 1827, a person seeing three of Blake's horses in the plaintiff's field, went to inform the plaintiff; that the plaintiff immediately came to the field and there found the defendant Sayers driving the horses away, whereupon he (the plaintiff) said that Sayers should not take them, as they had been in his field before, and that he could bear it no longer; that, in the meantime the horses ran from the plaintiff's field into a close of the defendant, called the Nursery; that the plaintiff then went to Blake's house for the purpose of obtaining compensation for the injury done by the horses to the tares, and was absent half an hour, during which time the horses remained in the Nursery; and that Blake having refused to make the plaintiff any compensation, the plaintiff and his son went to the Nursery and took the horses away to his farm-yard and there im-

pounded them for five hours, when they were rescued by the defendant Sayers, and driven back to Blake's field, whence they had originally strayed.

The defendant Sayers suffered judgment by default. On the part of Blake, it was contended that this was no rescue, because, even admitting the distress to have been in the first instance well taken, the plaintiff had abandoned it by allowing the horses to escape from his field into the Nursery.

The jury returned a verdict for the plaintiff—damages 5*l.*; and leave was reserved to the defendant Blake to move that it might be set aside, and a nonsuit entered, or a verdict for him, if the Court should deem the objection tenable.

Mr. Serjeant Cross, on a former day in this term accordingly obtained a rule nisi.

Mr. Serjeant Andrews afterwards shewed cause.—The distress was complete when the horses were in the plaintiff's field, by his saying that he would not let them go. No precise form of words is necessary to constitute a valid distress.—*Clement v. Milner* (1), *Wood v. Nunn* (2). *Lord Coke* says (3)—“If the lord come to distrain cattle which he seeth then within his fee, and the tenant or any other, to prevent the lord to distrain, drive the cattle out of the fee of the lord, into some place out of his fee, yet may the lord freshly follow, and distrain the cattle; and the tenant cannot make rescous, albeit the place wherein the distress is taken is out of his fee; for now, in judgment of law, the distress is taken within his fee, and so shall the writ of rescous suppose.” The distress was clearly not waived by the cattle getting afterwards into the defendant's own field.

Mr. Serjeant Cross, in support of his rule.—It does not appear that the plaintiff, whilst the horses were in his field, indicated any intention to distrain them. *Lord Coke* draws a distinction between a distress for rent, and a distress taken *damage feasant*. He says (4)—“If the lord, coming to distrain, had no view of the cattle within his

(1) 3 *Exp. Rep.* 95.

(2) 2 *Moore & P.* 27; s.c. 6 *Law J. C.P.* 198.

(3) *Co. Litt.* 161 a.

(4) *Ibid.*

fee, though the tenant drive them off purposely, or if the cattle of themselves after the view go out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distress, then cannot the lord distrain them out of his fee; and, if he doth, the tenant may make rescous. If a man come to distrain for *damage feasant*, and see the beasts in his soil, and the owner chase them out, of purpose, before the distress is taken, the owner of the soil cannot distrain them; and, if he doth, the owner of the cattle may rescue them; for the beasts must be *damage feasant* at the time of the distress: and so note a *diversitie*."

Cur. adv. vult.

Lord Chief Justice Best now delivered the judgment of the Court:—

One of the defendants has suffered judgment by default. As to the other defendant, Blake, two points have been made—first, that there was no sufficient distress in the first instance—secondly, that, if sufficient at first, it had been afterwards abandoned. We are, however, of opinion (my Brother Burroughs dissenting) that there was a sufficient distress in the first instance. No precise form of words is necessary to constitute a legal distress; neither is the distrainer bound to lay his hands on the cattle; it is enough if he endeavour to prevent their escape from the *locus in quo*. The distress for *damage feasant* is a matter of strict right. If the cattle are through negligence allowed to escape, the right to distrain is gone. It appears upon the facts of this case, that the cattle did not merely go out of the plaintiff's custody for an instant. If that had been so, he might, on the authority of Lord Coke, have taken them again. His Lordship says (5)—"A rescous in law is, where a man hath taken a distress, and the cattle distrained, as he is driving of them to the pound, go into the house of the owner, if he that took the distress demand them of the owner, and he deliver them not, this is a rescous in law." But here the horses were allowed to remain in the Nursery for half an hour. That was clearly an aban-

donment of the right of freshly following, and, consequently, of the distress. Lord Coke again says—"If the cattle, of themselves, after the view, go out of the fee, then cannot the lord distrain them." In *Vasper v. Eddows*, Lord Chief Justice Holt says (6)—"If a distress for *damage feasant* dies in pound, or escapes, the party shall not distrain *de novo*; but, if it were for rent, in either case he may destrain *de novo*." If the cattle are allowed to escape, the case is stronger than that mentioned by Lord Chief Justice Holt.

We are therefore of opinion that the rule for entering the verdict for the defendant Blake must be made absolute; and that the damages must be assessed against the other defendant, who has suffered judgment by default.

Rule absolute accordingly.

1829. { ARMITAGE v. N. BERRY, ADMIN-
May 30. { NISTRATRIX OF J. BERRY, DE-
CEASED.

Stamps—on Promissory Notes.

A promissory note thus—"On demand, we jointly and severally promise to pay I. G. or order, the sum of 100l. &c." requires a 3s. 6d. stamp only; the larger stamp in the 55 Geo. 3. c. 184, sched. part 1, being only necessary where the note is payable, on demand, to the bearer.

This was an action of assumpsit against the defendant, as administratrix of her late husband, to recover the amount of a promissory note on which the deceased was a surety.

The note was as follows:—

"Deighton, near Huddersfield,
March 9, 1816.

"On demand, we jointly and severally promise to pay Mr. Joseph Gummersall, or order, the sum of 100l. of lawful money of Great Britain, with lawful interest for the same from the date hereof, value received.

"As witness our hands,

Wm. Jackson.
Joshua Berry.
Wm. Dyson."

(6) Holt's Rep. 257; s. c. *nomine Vasper v. Edwards*, 12 Mod. 658.

By an order of Lord Chief Justice Best of the 13th of April last, all matters in dispute in this cause were referred to an arbitrator, who, on the 23rd instant, found that there was due to the plaintiff upon the above note 46*l.* 6*s.* 1*d.*, which sum he awarded to be paid by the defendant, as administratrix, to the plaintiff, together with the costs of the action and of the reference. The arbitrator then stated, at the request of the defendant, that, when the note was produced in evidence before him, it was found to be stamped with a 3*s.* 6*d.* stamp, whereupon it was objected on the part of the defendant that it ought to have had an 8*s.* 6*d.* stamp, as coming within the first class of promissory notes mentioned in the statute 55 Geo. 3. c. 184, sched. part 1 (1); and that the case of *Keates v. Whieldon* (2) was relied on as an authority for the objection; but that, after attentively reading that case, he the arbitrator overruled the objection, conceiving that it did not apply, because the note in question, being payable to order, and transferrable only by indorsement, could not be re-issued after having been once paid; and it being the uniform practice of the profession and of merchants to use, and of the stamp-distributors to give out, stamps of the second class for promissory notes of this description, he the arbitrator considered the note properly stamped. But he stated the above circumstances, in order that the opinion of the Court might be had upon the subject.

Mr. Serjeant Jones now moved for a rule nisi that this award might be set aside, on the ground urged before the arbitrator. He

(1) By which, a promissory note for the payment, to the bearer, on demand, of any sum of money exceeding 50*l.* and not exceeding 100*l.* is required to be stamped with an 8*s.* 6*d.* stamp—and a promissory note for the payment, in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight, of any sum of money exceeding 50*l.* and not exceeding 100*l.* with a stamp of 3*s.* 6*d.*—The former may be re-issued as often as shall be thought fit; the latter not re-issuable.

(2) 8 B. & C. 7; s. c. 6 Law Journ. K.B. 226; s. c. *nomine East v. —*, 2 M. & R. 8. In the two latter reports, it is made to appear (as the fact was) that the bill was payable, "on demand to the bearer;" in the report in 8 B. & C., it is stated as a note payable "to the plaintiff on demand."

relied on the 14th section of the 55 Geo. 3, and contended that the case fell within the principle of *Keates v. Whieldon*.

But the Court were of opinion, that there was no ground for the objection; and that the note fell within the second class of notes mentioned in the act.

The learned Serjeant, therefore, took nothing.

1829. } MILLS v. COLLETT, CLERK.

Magistrates—Committal for Felony—Framing of Depositions—Notice of Action.

Where a person is charged, on oath, with an offence amounting to felony, and a magistrate issues his warrant; and, on the party being brought before him, the charge is proved, and he is committed to prison,—the magistrate is not liable in trespass for false imprisonment, although the charge turns out to be unfounded. Where, therefore, a party was charged with cutting down a tree adjoining a dwelling-house, under the statute 7 & 8 Geo. 4. c. 30. s. 19, and committed to gaol, but the person who laid the information did not prosecute:—Held, that the magistrate was not liable in trespass, although the party charged was the occupier of the land on which the tree grew.*

Magistrates should not allow depositions to be framed so as to meet the enacting words of a statute.

In a notice of action to a magistrate, the residence of the plaintiff's attorney was described, at the foot of the notice, as Half Moon-street, Piccadilly, London. Quære—whether it was sufficient, Half Moon-street being in Middlesex.

[This case, establishing the above point, will be found in 7 Law Journ. Mag. Cases, p. 97.]

* For the construction of this act, as to what will constitute an offence under ss. 19 & 20, and as to the consequences of a magistrate not exercising a proper discrimination, in regard to whether the party charged is, or is not, guilty of an offence under the same—see *Rex v. Jenner*, Mag. Cases, post, 79.

1829. }
June 1. } ELLIS v. SCHMÆCK AND THOMAS.

Joint Stock Company—*Liability of shareholders.*

The defendants had been shareholders in a joint stock mining company, but had parted with their shares. They had attended meetings of the company, but had not signed the deed of trust by which the affairs of the company were to be regulated:—Held, that they were liable for goods furnished to the company. Sed vide, contra, *Fox v. Clifton*, post, vol. 8.

This was an action of assumpsit for goods sold and delivered. The case was tried, before Mr. Justice Gaselee, at the Sittings at Guildhall after Trinity term 1827. The plaintiff, an upholsterer, had supplied furniture for a counting-house, &c., in Lombard-street, for the Cornwall and Devonshire Mining Company. The defendant Schmæck was one of the original subscribers. The other defendant purchased his shares after several of the articles had been supplied. Both the defendants had received from the secretary of the company certificates of their having paid the deposit upon their shares, and had taken scrip receipts accordingly. *Neither of them had signed the deed, and both had transferred their shares before the commencement of this action.* Both were present at two general meetings of the company, in August 1825, and July 1826; but nothing transpired at those meetings on the subject of the plaintiff's demand. No order had been personally given by the defendants, neither did it appear that they knew anything of the goods being supplied by the plaintiff. 100*l.* had been paid on account.

It was objected for the defendants, that, as they had not signed the deed, but had transferred their shares, and thus ceased to be shareholders previously to the commencement of the action, they could not be liable to the plaintiff. The case of *Lawler v. Kershaw* (1), was cited—there the defendant had executed the deed.

The learned Judge gave no opinion as to whether or not the defendants were partners in the company.

(1) 1 Mood. & M. 95.

The jury found that the defendants formed part of the company, and that the company originated in fraud, but acquitted both plaintiff and defendants of any participation in the fraud; and they returned a general verdict for the plaintiff, for the whole of his demand.

Mr. Serjeant Wilde, in Michaelmas term, 1827, obtained a rule nisi, that this verdict might be set aside, and a nonsuit entered, or that the damages might be reduced to the amount of the goods supplied subsequently to the purchase of shares by the defendant Thomas.

Mr. Serjeant Taddy and Mr. Serjeant Spankie shewed cause—citing, as to the question of partnership, the cases of *Vice v. Lady Anson* (2), *Perring v. Hone* (3), *Neale v. Turton* (4), *Rex v. Dodd* (5), *Crawshay v. Collins* (6), *Bloxham v. Pell* (7), *Ex parte Langdale* (8), *Ex parte Hamper* (9), *Ex parte Hodgkinson* (10), and *Ex parte Watson* (11).

Mr. Serjeant Merewether, in support of the rule, referred to—*Harrington v. Fry* (12), and *Nockels v. Crosby* (13).

Cur. adv. vult.

Mr. Justice Park now delivered the judgment of the Court:—

We are of opinion that the plaintiff in this case is entitled to judgment. The action was for goods sold and delivered to the Cornwall and Devonshire Mining company. The jury have found that the defendants formed part of the company, and that the company was founded in fraud, though they have acquitted both the plaintiff and defendants of any participation in the fraud. This case seems to us to approach very nearly to that of *Perring v. Hone*. There

(2) 1 Mood. & M. 97; s. c. 3 Car. & P. 19; 7 B. & C. 409; 1 M. & R. 113; 6 Law Journ. K.B. 24.

(3) 4 Bing. 28.

(4) Ibid. 149.

(5) 9 East, 516.

(6) 15 Ves. 218.

(7) 2 Sir W. Bl. 999, n.

(8) 18 Ves. 301.

(9) 17 Ves. 403.

(10) 19 Ves. 291.

(11) Ibid. 461.

(12) 9 B. Moore, 344; s. c. 2 Bing. 179; 3 Law Journ. C.P. 244.

(13) 3 B. & C. 814; s. c. 5 D. & R. 751.

Sir John Perring, the plaintiff, had entered his name in a book, together with those of several other persons, as subscribers to a projected company; and he took scrip receipts, but sold them before the deed which was to regulate the company was executed, not having signed that deed: but, as he had attended several meetings of the company, we held him to be a partner in the concern. The case of *Vice v. Lady Anson*, does not appear to us to touch this, because, although she had taken scrip receipts, and had in conversations with the members of her own family, and in the circle of her private friends, talked of being a subscriber to the company; yet it did not appear that she had attended any meetings, or in any respect held herself out to the world as a partner, or taken any share in the scheme. Here, however, the defendants appeared at two

meetings. We therefore think that the plaintiff is entitled to retain his verdict. But, as it appears that part of the goods were furnished by the plaintiff before one of the defendants (Thomas) had anything to do with the company, the damages should be apportioned. The 100*l.* paid on account must be applied in discharge of the first part of the account.

Rule discharged (14).

(14) In this case, it has been thought unnecessary to do more than merely refer to the authorities cited in argument, inasmuch as the case is entirely superseded by that of *Fox v. Clifton* (which is in course of reporting, and will appear in the next volume), where Lord Chief Justice Tindal delivered a most luminous and comprehensive judgment, embracing all the points that could arise in cases of this nature; and holding, in opposition to this case, and to the case of *Perring v.hone*, that subscribers (not being directors) *not signing the deed*, are not partners.

CASES ARGUED AND DETERMINED

IN THE

Court of Common Pleas,

IN

TRINITY TERM, 10 GEO. IV.

1829. }
June 20. } SMITH'S BAIL.

Bail—*In Error.*

In a writ of error, until the transcript of the record is carried over and filed, the names of the parties are not reversed; therefore, a notice of justification of bail in error should contain the names of the plaintiff and defendant as in the original writ.

The justification of bail in error in this cause was opposed by *Mr. Serjeant E. Lanes*, on the ground of the notice of bail, containing the names of the plaintiff and defendant in the original action.

Mr. Serjeant Wilde, on behalf of the bail, contended that this was the ordinary practice.

The Clerk of the Errors stated the practice to be thus—After a writ of error brought and allowed, the names of the parties in the original action are continued in the notices of bail and exceptions, and in the rule to certify, until the transcript of the record is carried over and filed, when the names are reversed.

Allowed.

VOL. VII. C.P.

1829. }
June 22. } STEAD V. YATES.

Bail—*Bankruptcy of Principal.*

The defendant having become bankrupt since the commencement of the action, the Court enlarged the time for his bail to render him, until a fortnight after his final examination.

Mr. Serjeant Jones, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why the time for the defendant to render in discharge of his bail should not be enlarged until one month after his last examination under a commission of bankrupt issued against him since the commencement of this action, which examination was fixed for the 28th instant.

Mr. Serjeant Cross shewed cause.—He submitted that the prayer of the application could not be granted, inasmuch as the commissioners might adjourn from time to time, and the final examination might thus be so long delayed, that, in the interim the bail also might become bankrupt.

The Court thought a month an unreasonable time. They referred to the cases of

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Crump v. Taylor (1), where, under similar circumstances, the Court of Exchequer granted a fortnight—*Glendining v. Robinson* (2), where the application was for a week's time—*Narres v. Glossop* (3), where the Court required an affidavit that the motion was made by the bail—and *Shaw v. Cash* (4), where the motion was rejected, the affidavit omitting to state the residence of the commissioners, or the place where the commission was sued out.

They therefore directed that the defendant should have a fortnight to render after the day of his last examination.

Rule absolute accordingly.

1829. }
June 25. } SNELL v. ANDERTON.

Affidavit to hold to bail—Sufficiency of.

An affidavit to hold to bail, stating the defendant to be indebted to the plaintiff in a certain sum, "for goods sold and delivered to the defendant, and at his request"—not alleging that they were sold and delivered by the plaintiff—is insufficient.

The defendant was held to bail on the following affidavit:—

"Thomas Snell, of &c., maketh oath and saith that Peter Anderton is justly and truly indebted unto this deponent in the sum of 50*l.* for goods sold and delivered to the said Peter Anderton, and at his request."

Mr. Serjeant E. Lawes, on a former day in this term, obtained a rule nisi, that the defendant might be discharged on entering a common appearance, on the ground of the insufficiency of the above affidavit, it not stating that the goods were sold and delivered by the plaintiff. He cited *Fenton v. Ellis* (1), where the point was decided.

Mr. Serjeant Marewether now shewed

cause.—In *Hulton v. Eyre* (2), it was held to be unnecessary, in an affidavit for money paid to the use of the defendant, to state that it was so paid at the request of the defendant. In *Symons v. Andrews* (3), an affidavit stating that the defendant was indebted to the plaintiff for money paid and wages due to him for his services on board the defendant's ship, without explicitly stating that the debt was due from the defendant, was held sufficient. In *Coppinger v. Beaton* (4) it was held to be enough to state that the defendant was indebted to the plaintiff in a certain sum for money had and received on account of the plaintiff, without adding, by the defendant. The Court there said, that no precise form of words was required to be used in an affidavit to hold to bail; that it was sufficient to allege that the defendant was indebted to the plaintiff in a certain sum, specifying the cause of action. In *Tidd's Practice* (5), it is said, that an affidavit by a married woman, that the defendant was indebted for the rent of lodgings, and for money lent by her to the defendant, was held to be sufficient, although it did not state to whom the lodgings were let, and the person making the affidavit was herself incapable of lending money, for that she might have lent it as agent to her husband (6). Here, the plaintiff has sworn positively that the defendant is indebted to him. The affidavit is sufficiently certain to support an indictment for perjury, in case it should turn out that the goods were not delivered by or on account of the plaintiff.

Mr. Serjeant E. Lawes, in support of the rule, was stopped by the Court.

Lord Chief Justice Tindal.—The case of *Fenton v. Ellis*, which was decided in this Court, is precisely in point. It was there held, that an affidavit stating the defendant to be indebted to the plaintiff in a certain sum for goods sold and appraised to the defendant, without saying by the plaintiff

(1) 1 Price, 74.

(2) 1 Taunt. 380.

(3) 2 Chit. Rep. 101.

(4) 4 Bing. 80.

(5) 1 Marsh, 535; a.c. 6 Taunt. 192.

(2) 1 Marsh, 315; a.c. *nom.* Eyre v. Hulton, 5 Taunt. 704.

(3) 1 Marsh, 317; a.c. 5 Taunt. 751.

(4) 8 Term Rep. 338.

(5) 9th Edit. vol. 1. 184.

(6) T. T. 40 Geo. 3. K.B.

(precisely the form adopted here), was insufficient. That authority stands unimpeached.

Rule absolute (7).

1829. }
June 23. } *Ex parte* LAMBERT.

Attorney—Admission of.

Where a notice of application to be admitted an attorney of this court, had been left by mistake at the chambers of one of the Judges of the King's Bench, instead of at those of the Lord Chief Justice of this Court—on affidavit of the fact being made, the party was admitted.

Mr. Serjeant Storks moved that the applicant might be admitted one of the attorneys of this court, notwithstanding the omission to fix up at the chambers of the Lord Chief Justice the notice of his intention to apply for admission, as required by the rule of the court (1).

The motion was founded on the affidavit of the party, stating that the proper notice had been affixed on the outside of the court, and also in the Common Pleas office, and that such notices had remained so affixed during the whole of the last term; that a like notice had been fixed up in the chambers of each of the Judges of the court, with the exception of those of the Lord Chief Justice, the notice intended to have been fixed up there, having by mistake been left at the chambers of Mr. Justice Bayley (one of the Judges of the Court of King's Bench), without any intention of fraud, or to evade any rule of this court.

The Court, considering that the affidavit sufficiently explained the mistake—

Granted the motion.

(7) See *Perks v. Severn* (7 East, 194)—*Cathrow v. Hagger* (8 East, 106)—*Taylor v. Forbes* (11 East, 315)—*Balbi v. Batley* (6 Taunt. 25)—*Brown v. Garnier* (6 Taunt. 389; 2 Marsh. 83).

(1) Trin. Term, 31 Geo. 3.

1829. }
June 23. } GORING v. EDMONDS, THE ELDER.

Surety—Liability of.

A surety is not discharged by the creditor's neglecting to sue, or giving time to the principal debtor, even though the principal should in the interim become bankrupt.

This was an action of assumpsit on a guarantie, on an agreement entered into by the defendant's son for the purchase of timber from the plaintiff.

The agreement was as follows:—

"Agreement between Charles Goring, esq., and Thomas Edmonds, jun.

"I, Thomas Edmonds, of Steyring, agree to purchase so many oak trees as are marked and shall be marked by us at Oldbourne and East Grinstead, at the price of 10*l.* per load, girth measure of fifty feet by the load. But should Mr. Markwich, when he measures the same, consider the sum of 10*l.* per load not a sufficient price, he is to fix such price as he considers it to be worth. And I hereby agree to pay the price he shall fix upon, though it shall exceed 10*l.* per load. And further, I agree not to remove the timber or bark without the consent in writing of Charles Goring, esq., from off the said estates where the said timber shall be cut; and whatever securities I may give to Charles Goring, esq., to induce him to consent to the timber and bark being taken away, shall be taken up and discharged, half at Michaelmas, and the other at Christmas next, at furthest.

"Thomas Edmonds, jun."

The guarantie was as follows:—

"In the event of my son, Thomas Edmonds, jun. not paying Charles Goring, esq., I hold myself liable, and hereby engage to fulfil the said payments according to the above conditions.

"Thomas Edmonds."

"April 20, 1825."

At the trial, before Lord Chief Justice Tindal, at the sittings at Westminster after last term, it appeared, that, shortly after this agreement was signed, all the timber was removed by Edmonds the younger,

without any further security being required by the plaintiff. On the 19th of December 1825 Edmonds the younger paid in to the plaintiff's bankers two bills of exchange for 200*l.* each, drawn by him upon and accepted by one Alexander, which were duly honoured on the 14th and 28th of March 1826 respectively. A sum of 486*l.* 16*s.* then remained due to the plaintiff for the timber. Repeated applications were made to Edmonds the younger for payment; and on the 1st of October 1827 he gave the plaintiff a bill of exchange for 200*l.*, at two months date, drawn by himself upon one Williams, which was dishonoured when due, in December 1827. The plaintiff kept the bill and did not give the drawer notice of its dishonour. Shortly after this bill became due, the younger Edmonds became bankrupt, and on the 27th of December 1827, the plaintiff's attorney for the first time made an application to the defendant for the payment of the balance remaining due for the timber, pursuant to his guarantie. The defendant on that occasion admitted his liability; but he was not informed, nor had he any knowledge that his son had given the plaintiff the bills accepted by Alexander and Williams, or that the latter's acceptance had been dishonoured, and remained unpaid in the hands of the plaintiff.

It was contended, on the part of the defendant, that he was discharged from liability by the plaintiff's having taken the bills from his son, and his having kept the surety in ignorance of the fact of the timber not having been paid for. The case of *Payne v. Ives* (1) was cited.

His Lordship told the jury that the giving time to the principal debtor does not discharge the surety, unless the creditor remits for the time his right of suing the debtor (2); and he left it to them to say, whether, under the circumstances, time had been given by the plaintiff to Edmonds the younger to the detriment of the defendant as surety: and he observed that the defendant had admitted his liability on the guarantie at the time the application was made to him by the plaintiff's attorney.

The jury found a verdict for the plaintiff, for the balance due—486*l.* 16*s.*

Mr. Serjeant Russell now moved for a rule nisi that this verdict might be set aside and a new trial had, or that the damages might be reduced by 200*l.*, on the ground of misdirection.—

Although the mere neglect of the plaintiff to call upon the principal debtor will not of itself operate a discharge of the surety, yet, if the surety be necessarily prejudiced thereby, he is discharged. If a creditor give time to the principal debtor, without the knowledge of the surety, or otherwise vary the nature of the security, the surety is discharged (3). In *Peel v. Tallock* (4) it was held that delay in calling upon a party who guarantees the debt of another, does not exonerate the surety, unless it be shewn that he is prejudiced thereby. Here, however, more than two years had elapsed from the time the guarantie was given, before any application was made to the surety; and, during all that time, the principal debtor was solvent. The surety was only called upon when his principal had become bankrupt. The delay of the plaintiff was therefore clearly injurious to him, inasmuch as it deprived him of the opportunity of obtaining reimbursement from his principal. In *Rees v. Berrington*, Lord Eldon says (5)—“It is the clearest and most evident equity, not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs (for they are as much his as your own), without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement.” In *Payne v. Ives*, the defendants gave the following guarantie—“We undertake to indorse any bill or bills Mr. John Stubbs may give to Messrs. Payne & Co. (the plaintiffs) in part payment of an order for lace which is now being executed for him: Messrs. Payne & Co. to allow 5*l.* per cent. on the amount of the said bills for the said guarantie.” The goods were delivered to Stubbs, who paid the plaintiffs 500*l.* in money and wine,

(1) 3 D. & R. 664.

(2) See the judgment of the Court in *Philpot v. Briant*, 1 M. & P. 754; a. c. 4 Bing. 717; 6 Law Journ. C.P. 182.

(3) See Fell, on Guaranties (2nd edit.) 160.

(4) 1 Bos. & Pul. 419.

(5) 2 Vesey, 543.

and in June following accepted a bill drawn on him by the plaintiffs for the remainder (337*l.*) at eighteen months. The plaintiffs retained the bill without making any application to the defendants to indorse it, for more than seventeen months, when, finding Stubbs to be insolvent, they applied for the first time to the defendants for their indorsement—it was held, that the plaintiffs were concluded by their laches, and that the defendants were not liable on their guarantie. Lord Chief Justice Abbott said—“The general rule of law upon such subjects is clear, viz. that the demand must be made within a reasonable and convenient time. But, for the plaintiffs to forbear their demand for seventeen months out of eighteen, was neither reasonable nor convenient. Besides, here, the plaintiffs lie by until they learn that Stubbs is insolvent, and until they discover that the indorsement is the only means by which they can secure their debt; and, but for that discovery, they probably never would have applied at all. That, I think, they were not entitled to do under the agreement, and consequently that they ought not to have recovered in this action.” Mr. Justice Bayley said—“The option given to the plaintiffs ought to have been made in a reasonable time, and, at any rate, before that event occurred, of which, if the defendants had known, they never would have given the guaranty.” And Mr. Justice Holroyd—“The plaintiffs did not exercise their option till within a few days of the bill becoming due, and till they knew of the insolvency of the acceptor. I think they were not justified in such delay, and that is the only question in the cause. With respect to bonds, it is laid down by Lord Chief Baron Comyns, that, where a condition is to do a transitory thing, without limiting the time, it ought to be done immediately, that is, in a convenient time.” In the case of bills of exchange, a promise to pay, by an indorser or other party, if made without knowledge of the laches of the holder, will not be binding, or make such party liable—*Blesard v. Hirst* (6). In *Goodall v. Dolley* (7), it was held, that, if the indorsee of a bill not due, present it for acceptance, which is refused,

and delay giving notice to his indorsee, the latter will be discharged; and that a subsequent proposal by him to pay the bill by instalments, made without knowledge of the laches of the indorsee, is no waiver of the want of notice. Mr. Justice Heath was of opinion at the trial, that, as this proposal was made in ignorance of all the circumstances of the case, which it was material for the defendant to know, he was discharged by the laches of the plaintiff; and the Court afterwards confirmed that ruling.

At all events, the plaintiff cannot be entitled to retain his verdict for the entire balance, inasmuch as his taking the bill for 200*l.* accepted by Williams, operated as a discharge *pro tanto*. By retaining that bill, the plaintiff made it his own, and fraud alone could avoid the transaction; for, the death, bankruptcy, or known insolvency of the drawer (8), or his being in prison (9), form no excuse for neglecting to give due notice of non-acceptance or non-payment.

Lord Chief Justice Tindal.—I am of opinion that this is not a case for a new trial. It has been suggested that the jury were misdirected on two points. The first contention is, that mere laches by the creditor to enforce his demand against his debtor will operate a discharge to the surety. But there is no case which goes to that extent, whilst there are several to shew that laches alone will not discharge the surety. There may, undoubtedly, be an extreme case of laches, amounting in fact to fraud, and fraud would be an answer to an action against the surety; but not mere negligence. In the case of *The Trent Navigation Company v. Harley* (10), the laches of the obligees in a bond (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees), in not properly examining his accounts for eight or nine years, and not calling upon the principal for payment, so soon as they might have done, for sums in arrear and unaccounted for, was held not to be an estoppel at law in an action against

(6) See *Russel v. Langstaffe*, Doug. 514—*Esdaille v. Sowarby*, 11 East, 114.

(9) Per Lord Alvanley, in *Haynes v. Birks*, 3 Bos. & Pul. 601.

(10) 10 East, 34.

(6) 5 Burr. 2670.

(7) 1 Term Rep. 712.

the sureties. One of the grounds of defence taken at the trial there, was, that the sureties were discharged by their not having received notice of their principal being so much in arrear in his accounts, and by the plaintiffs' suffering him to run so in arrear. But the learned Judge who tried the cause (Mr. Baron Wood) ruled this to be no defence at law; and, on the motion for a new trial, Lord Ellenborough said (11)—"The only question is, whether the laches of the obligees in not calling upon the principal so soon as they might have done if the accounts had been properly examined from time to time, be an estoppel at law against the sureties. I know of no such estoppel at law, whatever remedy there may be in equity." In *Payne v. Ives* the guarantie was founded upon an executory promise by the defendants to indorse any bills which their principal might give in payment for lace, and no application was made to the sureties to indorse the bill until nearly eighteen months after it was given. In the case of an executory contract, that delay might so alter the state of things as to conclude the holder of the bill by his laches; but it will not govern the case of a guarantie.

The second objection is, that the mere giving of time to the principal, discharges the surety, and that the plaintiff, by having taken the bill on Williams, and retained it without giving the drawer notice of its dishonour, had thereby made it his own and discharged the defendant. But, in *English v. Darley* (12) it was held, that merely giving time would not discharge the surety; "for," said Lord Eldon, "as long as the holder of a bill is passive, all his remedies remain, and, if any of the parties be discharged by the act of law, as, by an Insolvent Debtors' Act, that operation of law shall not prejudice the holder." The question I left to the jury was, whether, under the circumstances, time had been given to the principal debtor, so that the plaintiff's right to sue him was suspended. It seems to me that they have found correctly.

Mr. Justice Park.—I fully concur with my Lord Chief Justice. In the case of

The London Assurance Company v. Buckle (13), a bond of £,000*l.* was executed by an insurance broker, as the principal obligor, and by two sureties, conditioned, that, if they should pay the obligors certain premiums which should become due for assurances on ships at sea as should be made with the obligees by the principal, and that within six months after the making of the insurances, the bond was to be void. The principal became bankrupt, being indebted to the obligees in a large sum for premiums due for three years before the bankruptcy, the sureties not having been called upon in the meantime—it was held, that they were not discharged by the laches of the obligees in suffering the credit of the principal to run on so long beyond the six months stipulated for by the bond. Lord Chief Justice Dallas said (14)—"This appears to me to be the common case of a party becoming surety for another; and yet it has been said, that, as the principal has not been called on (although time was given him to pay the premiums), at the expiration of six months, the sureties are discharged. But no case has ever decided this position, nor will any principle of the common law carry it to so great a length." I entirely concur in the doctrine there laid down, and I think this verdict ought not to be disturbed.

Mr. Justice Burrough concurred.

Mr. Justice Gaselee.—A surety is bound to inquire into the nature of the transactions between his principal and the creditor. In *Orme v. Young* (15), Lord Chief Justice Gibbs held, that the neglect of the obligee of a bond to give notice to the surety that the principal had made default, did not discharge the surety. That case and *Peel v. Tallock* appear to me to be in point.

Rule refused.

(13) 4 B. Moore, 153.

(14) *Ibid.* 160.

(15) *Holt's N.P.C.* 84.

(11) 10 East, 40.

(12) 2 Bos. & Pul. 61.

1829. } WILLIAM MAY SIMONDS AND
July 3. } GILES LODER v. HODGSON.

Insurance—on Bottomry.

The master of a vessel having borrowed money at a foreign port for her repair, gave a bond obliging himself, his heirs, &c. and the ship (whether she arrived or not), to the re-payment of the money advanced, with 12l. per cent. bottomry premium, eight days after his arrival in London. The obligees effected an insurance on their interest, describing it in the policy as an insurance on bottomry:—Held, that this was a fatal misdescription.

Assumpsit on a bottomry insurance.

The first count of the declaration was as follows:—

“Whereas, heretofore, to wit, on the 29th of March 1823, in parts beyond the seas, to wit, at Copenhagen, in the kingdom of Denmark, to wit, at London, one William Adams, then and there being commander of a certain schooner brig called the *Clarence*, of Bristol in Great Britain, according to the custom of merchants, made his certain writing obligatory, or bottomry bond, sealed with the seal of the said William Adams; which said writing obligatory the said plaintiffs now bring here into court, the date whereof is the day and year aforesaid, and the tenor as follows:—‘I, the underwritten William Adams, commander of the schooner brig *Clarence*, of Bristol in Great Britain, lying in the harbour of Copenhagen, having on my passage from St. Petersburg to London had the misfortune to run the said schooner brig on shore upon Fosterborne Reef, Coast Sweden, where she received considerable damage, and being unable to proceed in that state on her voyage, was compelled to put into this port to discharge and repair the damage; to pay the charges and expenses attending the said repairs, unloading and reloading, and putting the said ship in a state to proceed on her voyage, being loaded with a cargo of tallow, &c., I have borrowed and received from Messrs. Belfour, Ellah, Rainalls & Co., of Elsinour, the sum of 1077l. 17s. 9d. sterling, to pay for the above-mentioned repairs, together with labourage, commissions, and other adherent expenses proceeding from the said misfortune, without which having been paid and

done the said schooner brig could not proceed on her destined voyage to London; and, having received in hand the above-mentioned sum of 1077l. 17s. 9d. sterling, I bind myself, my heirs, administrators and assigns, particularly the above-mentioned schooner brig *Clarence*, together with all the apparel, tackle, boats, and stores of every kind belonging to the said schooner brig, as well as her present freight and cargo, consisting of tallow, lathwood, &c., thankfully to consent and pay to the said Messrs. Belfour, Ellah, Rainalls & Co., aforesaid, or their attorneys or assigns, the above-mentioned sum of 1077l. 17s. 9d. sterling, with 12l. per cent. bottomry premium, all postages and reasonable charges attending recovering the same: and, putting aside all and every detention of law, arbitration, or reference, I do further hereby bind myself, said schooner brig *Clarence*, her freight and cargo of every kind, to the full and complete payment of said sum, with all charges thereon, in eight days after my arrival at the afore-mentioned port of London; and I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above-mentioned port of London, in preference to all other debts and claims: declaring hereby that the said vessel is at present free from all incumbrances whatsoever, and that this pledge or bottomry has now and must have preference to all other claims and charges in any shape or manner, until such sum of 1077l. 17s. 9d. sterling, with 12l. per cent. bottomry premium, making together 1207l. 4s. 8d. sterling, with lawful interest, and all charges, are duly paid in money of Great Britain, or until the said Messrs. Belfour, Ellah, Rainalls, & Co., of Elsinour, or their assigns, have declared themselves in writing fully satisfied with security given for such payment;’ as by the said writing obligatory, reference being thereunto had, fully appears. And whereas the said Messrs. Belfour, Ellah, Rainalls & Co., in the said writing obligatory mentioned, did, at the time of the making of the said writing obligatory, to wit, on &c., at &c., as the agents of and on account and behalf, and at the request of the said plaintiffs, lend and advance to the said William Adams, the said sum of 1077l. 17s. 9d. of the monies of them the said plaintiffs, on

bottomry, in manner and for the purposes and on the conditions in the said writing obligatory specified: and whereas the said writing obligatory was made and executed to the said Messrs. Belfour, Ellah, Rainalls & Co., as such agents of the said plaintiffs, and on their behalf, and for their use and benefit, whereof the said William Adams then and there had notice: and whereas, after the making of the said writing obligatory, and after the lending and advancing of the said sum of 1077*l.* 17*s.* 9*d.*, to wit, on &c., at &c., the said William May Simonds, on behalf of himself and the said Giles Loder, according to the usage and custom of merchants, caused to be made a certain writing or policy of assurance, containing therein that the said William May Simonds, by the name and addition of W. M. Simonds, esq., as well in his own name as for and in the name and names of all and every person or persons to whom the same did, might, or should appertain in part or in all, did make assurance, and cause himself and them and every of them to be insured, lost or not lost, at and from Elsinour to London, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the good ship or vessel called the *Clarence*, &c. (in the usual form) continuing the adventure until the said ship, &c., with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever should be arrived at London, and until she had moored at anchor twenty-four hours in good safety, &c.; and that the said ship, &c., goods and merchandizes, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were and should be valued at —*l.* on bottomry, free from average, and without benefit of salvage: as by the said writing or policy of assurance, reference being thereunto had, will more fully appear: of all which said premises the said defendant, afterwards, to wit, on &c., at &c., had notice: and thereupon, afterwards, to wit, on &c., at &c., in consideration that the plaintiffs, at the special instance and request of the defendant, had then and there paid to him a large sum of money, to wit, the sum of 1*l.* 11*s.* 6*d.*, as a premium and reward for the assurance of 200*l.* of and

upon the premises in the said writing or policy of assurance mentioned, and had then and there undertaken, and to the defendant faithfully promised to perform and fulfil all things in the said writing or policy of assurance contained, on the part and behalf of the assured to be done, performed and fulfilled, the defendant undertook, and to the plaintiffs then and there faithfully promised that the defendant would become and be an assurer to the plaintiffs for the sum of 200*l.*, of and upon the premises in the said writing or policy of assurance mentioned, and would perform all things in the said writing or policy of assurance contained, on his part and behalf, as such assurer of the said sum of 200*l.*, to be performed and fulfilled; and the defendant then and there became an assurer to the plaintiffs, and then and there duly subscribed the said writing or policy of assurance as such assurer as aforesaid, to wit, at &c.: And the plaintiffs further say, that the ship or vessel in the said policy mentioned is the same ship or vessel in the said writing obligatory mentioned, and that the sum of 200*l.* insured by the said policy was by way of insurance of part of the said sum of 1207*l.* 4*s.* 8*d.* in the said writing obligatory mentioned; and that the said bottomry in the said policy mentioned is the same bottomry in the said writing obligatory mentioned; and that heretofore, to wit, on &c., the said ship or vessel, with her cargo, in the said writing obligatory mentioned, in the prosecution of her said voyage from St. Petersburg to London, in the said writing obligatory mentioned, departed and set sail from Copenhagen aforesaid, and in the course of that voyage arrived at Elsinour in the said policy mentioned; and, on &c., the said ship and cargo were in good safety, to wit, at Elsinour therein mentioned; and that the plaintiffs, at the time of making the said insurance, and continually afterwards, until and at the time of the loss hereinafter mentioned, were interested in the said bottomry in the said insurance to a large value and amount, to wit, to the value and amount of all the monies by them ever insured or caused to be insured thereon; and that the said policy was made on the said bottomry to and for the use and benefit and on the account of the said plaintiffs, to wit, at &c. And

the plaintiffs further say, that, afterwards, to wit, on &c., the said ship, with the said cargo on board thereof, in the prosecution of her said voyage from St. Petersburg, departed and set sail from Elsinour aforesaid on her said intended voyage in the said policy mentioned; and afterwards, and whilst she was proceeding on the said voyage, and before she arrived at London aforesaid, to wit, on &c., was, by and through the force of stormy and tempestuous weather, and by the perils and dangers of the seas, wrecked, stranded, driven on shore, and wholly lost, and never did proceed on the same or any other voyage, and never did arrive at London aforesaid; and the said cargo thereby became and was spoiled, damaged, destroyed, and wholly lost; and the said freight also in the said writing obligatory mentioned became and was by reason of the premises wholly lost, to wit, at &c., whereof the said defendants afterwards, to wit, on &c., there had notice. By reason whereof the said defendant then and there became and was liable to pay, and ought to have paid the said sum of 200*l.* so by him insured as aforesaid, according to the meaning and effect of the said writing or policy of insurance, and of his said promise and undertaking so by him made as aforesaid, to wit, at &c."

To this count the defendant demurred.

The plaintiffs joined in demurrer.

The case now came on for argument.

Mr. Serjeant Wilde, in support of the demurrer.—The bond in question is not in fact a bottomry-bond. The declaration cannot be supported, on two grounds—first, it misdescribes the bond—secondly, unless the bond be a bottomry-bond, the declaration discloses no insurable interest. Bottomry is only where money lent is hazarded on the ship's bottom, and is payable only on her arrival at her port of destination. Here, the master binds himself personally, his heirs, &c. The payment of the money, therefore, did not depend on the contingency of the ship's arrival. Besides, the contract is without benefit of salvage and free from average. The plaintiff's money was never put in hazard.

Mr. Serjeant Stephen, contra.—According to the definition given by *Mr. Justice*

Blackstone(1)—"Bottomry is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*pars pro toto*) as a security for re-payment: in which case it is understood, that, if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest." There must, undoubtedly, be a degree of risk, but there is no certain measure of risk. These bonds vary in form. In *Abbott on Shipping* (2), there is a form of a bond very like the present. The statutory definition in the preamble of the 6 Geo. 1. c. 18, also embraces this. In Denmark and Spain, policies on bottomry contain the same condition as is introduced here, "without benefit of salvage, and free from average." *Bush v. Fearon* (3), *Walpole v. Ewer* (4). So, in *respondentia* bonds, on East India voyages, by the 19 Geo. 2. c. 37. There is sufficient contingency in this case to render the contract one of bottomry.

Mr. Serjeant Wilde, in reply.—The essence of the bottomry contract is the risk on the ship's bottom. Here there is no risk of that nature; for, even if the ship were lost, the money might still be recovered if the master arrived. The form in *Abbott* is that of an East India bond, which differs from an ordinary bottomry-bond.

Lord Chief Justice Tindal.—I am of opinion that the defendant should have judgment. The defendant, when he entered into a contract in which the interest of the assured was described as an interest on bottomry, no doubt expected that it was what is ordinarily termed bottomry interest. That, however, appears to be a misdescription. The claim of the plaintiff does not depend on the risk of the voyage, but exists whether the ship arrive at her port of destination or not.

Mr. Justice Park.—*Glover v. Black* (5) decided, that, where the interest to be

(1) 2 Bl. Com. 459.

(2) Append. No. 2.

(3) 4 East, 325; s. c. 1 Smith, 103.

(4) Park on Insurance (4th edit.) 423.

(5) 3 Burr. 1394.

insured is an interest on bottomry or *respondentia*, it must be so described. The interest in this case is neither of these. *Walpole v. Ewer* did not give satisfaction at the time it was decided, and it was overruled by Lord Ellenborough in *Power v. Whitmore* (6).

The rest of the Court concurring—

Judgment for the defendant.

1829. } HALL AND FIELDING v. CECIL
June 26. } AND JOHN RIX.

Evidence—*Interested Witness.*

A witness admitting himself to be jointly liable with the defendant, was held to be incompetent, inasmuch as he, being liable to contribution, was interested in defeating the action or lessening the damages.

This was an action of assumpsit by the plaintiffs, school-mistresses, for teaching and instructing the defendants' sisters.

At the trial, before Mr. Justice Park, at the Sittings at Westminster after last term, the plaintiffs having proved their case, the defendants called their brother George Rix as a witness; but, on his stating that himself and John Rix had jointly undertaken the responsibility of their sisters' education independently of Cecil, the learned Judge rejected his testimony, on the ground that, as he admitted himself to be a co-contractor, he had consequently an interest in the event of the suit.

The jury returned a verdict for the plaintiffs—damages 41*l.*, the balance due.

Mr. Serjeant Andrews, in the last term obtained a rule *nisi* that this verdict might be set aside, and a new trial had, on the ground that the testimony of George Rix had been improperly rejected, the admission made by him being adverse to his own interest.

Mr. Serjeant Wilde now shewed cause.—The witness was properly rejected, for, although the admission that he was liable jointly with his brother John for the education of the sisters, might ultimately be

against his interest, yet, as he was liable to contribution for the debt and costs, he had an immediate interest in the event of the suit—in defeating the action altogether, or lessening the damages. In *Jones v. Brooke* (1), in an action by an indorsee against the acceptor of a bill of exchange which had been accepted for the accommodation of the drawer, it was held that the latter was not a competent witness for the defendant, to prove that the holder took the bill for an usurious consideration. In *Goodacre v. Breame* (2), in assumpsit for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant and one J. S., who were partners in trade, Lord Kenyon held that J. S. could not be a witness for the defendant, to prove that the goods were sold to himself, and that the defendant was not concerned in the purchase except as the servant of J. S., "for," said his Lordship, "by discharging the defendant, he benefits himself, as he will be liable to pay a share of the costs to be recovered by the plaintiff." In *Simons v. Smith* (3), which was an action for the non-performance of a contract, against one of several partners, Lord Chief Justice Abbott said that one partner could not release another, for the purpose of making him a competent witness in a particular action. So, in *Cheyne v. Koops* (4), in the action for a debt due by several partners, one of them, who had not been joined in an action, was held not to be a competent witness for the defendant, by any release from him. Lord Alvanley said—"The partners were all bound in equity to contribute, and the witness would of course be subjected to his share."

Mr. Serjeant Andrews was heard in support of his rule.

Lord Chief Justice Tindal.—I am of opinion that the witness George Rix was properly rejected. When he said that he was liable jointly with his brother John, one of the defendants, he admitted himself to be a co-contractor, and as such would be liable to contribute to the costs of this action in the event of the plaintiffs' obtaining a ver-

(1) 4 Taunt. 464.

(2) Peake's N.P.C. (3rd. edit. 332,) 173.

(3) 1 Ry. & Mood. 29.

(4) 4 Esp. Rep. 112.

(6) 4 Manl. & Selw. 141.

dict. Parties liable to the costs have an immediate interest in the result of the suit, and therefore are incompetent.

The rest of the Court concurring—

Rule discharged.

1829. } HENLEY v. THE MAYOR AND
June 27. } BURGESSES OF LYME REGIS.

Amendment—*of Postea.*

A verdict having been taken at the trial (by consent) on two counts of the declaration, both containing in substance the same cause of action, the Court allowed the plaintiff to amend the postea by entering up judgment on the first count only, though the Judge who tried the cause declined to interfere.

Action on the case charging the defendants with negligence in the repair of sea walls.

The first count of the declaration stated, that on the 20th of June, 10th Charles 1, to wit, at the parish of Lyme Regis, in the county of Dorset, our said late sovereign, by his certain letters patent, duly sealed in that behalf, after reciting as therein was recited, did, for himself, his heirs and successors (amongst other things), give, grant, and confirm to the mayor and burgesses of Lyme Regis, and their successors, the borough or town of Lyme Regis, and also all that the building called the pier, quay, or cob of Lyme Regis, with all and singular the liberties, privileges, profits, franchises, and immunities to the same town, or to the said pier, quay, or cob, in anywise howsoever belonging or appertaining—to have, hold, and enjoy the aforesaid borough or town; and also all that the building &c., with &c., to the only and proper use of them the same mayor and burgesses of the borough aforesaid, and their successors, in fee farm for ever, yielding of fee farm to our said late King Charles the First, his heirs and successors, as in the said letters patent in that behalf mentioned; and our said late sovereign King Charles the First did further, for himself, his heirs, and successors, pardon, remise, and release to the same mayor and burgesses, and their successors for ever, twenty-seven marks, parcel of thirty-two

marks of the farm of the said borough and the liberties thereof, anciently by letters patent or in any other manner due, and did direct that the aforesaid mayor and burgesses, and their successors, all and singular the buildings, banks, sea-shores, and all other mounds and ditches within the aforesaid borough of Lyme, or to the aforesaid borough in anywise belonging or appertaining, or situate between the same borough and the sea, and also the said building there called the pier, quay, or the cob, at their own costs and expenses, thenceforth, from time to time for ever should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient; and further did grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor of the same borough for the time being, for ever thereafter, should be clerk of the market within the borough or town aforesaid, and the liberties and precincts of the same; so, nevertheless, that the clerk of the market of our said late King Charles the First's household for the time being, together with the aforesaid mayor for the time being, might exercise the office abovesaid, and intronit when he would to do anything which pertained to the office of clerk of the market there, in the borough aforesaid, and the liberties and precincts of the same: and further, our said late King Charles the First, for himself, and his heirs and successors, did, by his said letters patent, give and grant to the said mayor and burgesses of the borough and town aforesaid, and their successors, all and singular the fines, amer-ciements, and sums of money before the said clerk of the market of the town or borough aforesaid, or the clerk of the market of the said late King Charles the First, or his deputy, by either or any of the inhabitants of the borough or town aforesaid, after the date and making of the said letters patent, forfeited, or thereafter to be forfeited and assessed in the same borough—to have and enjoy to the same mayor and burgesses of the borough aforesaid, and their successors, without account or any other thing for the same to our said late King Charles the First, his heirs or successors, in anywise howsoever to be rendered or paid, and to be levied by their own servants and ministers, without estreats thereof

to be sent to the Exchequer of our said late King Charles the First: and moreover, our said late King Charles the First did will, and, by letters patent, did, for himself, his heirs and successors, give and grant to the said mayor and burgesses of the borough aforesaid, and their successors, full power, authority, and licence, from time to time, for ever, to dig stone and rocks in any places whatsoever within the borough and parish of the town aforesaid, out of the sea and on the sea shore, in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid, called the pier, quay, or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the building aforesaid; and, our said late King Charles the First did also, by his said letters patent, will and grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the same mayor and burgesses and their successors, should have, hold, use, and enjoy, and might and should be able, fully, freely, and entirely to have, hold, use, and enjoy for ever, all the liberties, free customs, privileges, authorities, acquittances, and licences aforesaid, according to the tenor and effect of the said letters patent, without the let or impediment of the said late King Charles the First, his heirs or successors whomsoever, our said late King Charles the First willing not that the same mayor and burgesses, and inhabitants of the borough or town aforesaid, or either or any of them, by reason of the premises, or either or any of them, should be thereof hindered, molested, aggrieved, or vexed, or in anything disturbed by him the said late King Charles the First, or by his heirs, or his or their justices, sheriffs, escheators, or other the bailiffs or ministers of the said late King Charles the First, his heirs or successors whomsoever; which said letters patent, the mayor and burgesses of the borough aforesaid, afterwards, to wit, on &c., at &c., in &c., duly accepted, and the same thence hitherto have been and still are one of the governing charters of the said borough, to wit, at Lyme Regis aforesaid. And the plaintiff further said that the said mayor and burgesses, from the time of their acceptance of the said letters patent, hitherto,

have had, held, received, and enjoyed all the benefits, profits, and advantages granted to them by such letters patent as aforesaid; that, before, and at the time of the committing of the grievances by the defendants as thereafter next mentioned, the plaintiff was lawfully possessed of and in divers, to wit, five messuages, &c., with the appurtenances, situate and being in the county aforesaid, to wit, in the borough of Lyme Regis aforesaid; that, before and at the time of the committing of the grievances by the defendants as thereafter next mentioned, divers, to wit, five other messuages, &c., with the appurtenances, situate and being in the county aforesaid, to wit, in the borough of Lyme Regis aforesaid, were in the possession and occupation of divers persons as tenants thereof respectively to the plaintiff, the reversion thereof then and still belonging to the plaintiff, to wit, at &c., all which said several messuages, &c. with the appurtenances, before and at the time of the committing of the several grievances by the defendants as thereafter next mentioned, were abutting on or near the sea-shore there, to wit, at the borough aforesaid, in the county aforesaid; that, before and at the time of the sealing of the said letters patent, and the acceptance thereof as aforesaid by the said mayor and burgesses, and also at the time of the committing of the several grievances by the defendants as thereafter next mentioned, divers, to wit, ten buildings, ten banks, ten sea-shores, and ten mounds, had been, and were then respectively standing and being within the borough of Lyme Regis aforesaid, and divers, to wit, ten other buildings, &c., had been, and respectively were belonging and appertaining to the said borough, and divers, to wit, ten other buildings, had been, and were at those times respectively standing and being situate between the said borough and the sea, to wit, in the borough aforesaid, in the county aforesaid; all which said buildings, banks, and sea-shores, and mounds respectively, at the times of the committing of the several grievances by the defendants as thereafter next mentioned, were near to, and then and there constituted and formed and were a protection and safeguard, and still of right ought to form and be a protection and safeguard to the said several messuages, &c., of the plaintiff, with

the appurtenances aforesaid, and then and there have hindered and prevented, and still of right ought to hinder and prevent, the sea, and the waves and waters thereof, from running or flowing on, upon, against, or over the said several messuages, &c. last aforesaid; and all which buildings, banks, sea-shores, and mounds, the defendants, at the times of the committing of the several grievances by them as thereafter next mentioned, were, under and by virtue and in pursuance of the aforesaid letters patent, and the acceptance thereof as aforesaid, liable to, and ought, at their own proper costs and charges, well and sufficiently to have repaired, maintained, and supported, and still are liable to, and ought, at their own proper costs and charges, well and sufficiently to repair, maintain, and support, when and so often as it should or might have been, or shall or may be necessary or expedient so to do, so as to prevent damage or injury to the said messuages, &c. of the plaintiff, by the sea, or the waves or waters thereof, to wit, at the borough aforesaid, in the county aforesaid: Yet, the defendants, well knowing the premises, and not regarding the said letters patent, or their duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure, prejudice and aggrieve the plaintiff, and to deprive him of the use and benefit of his several messuages, &c., first above mentioned; and also to injure, prejudice, and aggrieve him, the plaintiff, in his reversionary interest of and in the said messuages, &c., above-mentioned, so being in the possession and occupation of the said persons as tenants thereof to him the plaintiff as aforesaid, in which he, the plaintiff, was so interested as aforesaid, theretofore, to wit, on the 1st of January 1821, and from thence for a long space of time, to wit, continually until the commencement of this suit, to wit, at the borough aforesaid, in the county aforesaid, wrongfully and unjustly suffered and permitted the said buildings, banks, sea-shores, and mounds, to be and continue, and the same, during all the time aforesaid, were ruinous, prostrate, fallen down, washed down, out of repair, and in great decay, for want of due, needful, proper and necessary repairing, maintaining and supporting the same, to wit, at the borough aforesaid, in the county aforesaid: by means of which

said several premises, the sea, and the waves and waters thereof, afterwards, to wit, on the said 1st of January 1821, and on divers other days and times between that day and the commencement of this suit, to wit, at the borough aforesaid, in the county aforesaid, ran and flowed with great force and violence, in, upon, under, over, and against the said several messuages, cottages, buildings, and closes of the plaintiff, and in which he was so interested as aforesaid, and thereby then and there greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said several messuages, cottages, and buildings, and the materials of the same messuages, cottages, and buildings, together with divers, to wit, ten thousand cart-loads of the earth and soil, and divers, to wit, five acres of the said several closes, were washed and carried away, to wit, at the borough aforesaid, in the county aforesaid. By means of which said several premises, the plaintiff not only lost and was deprived of the use, benefit and enjoyment of his said messuages, cottages, buildings, &c., in that count first above-mentioned, but was also thereby then and there greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said messuages, cottages, buildings, and closes in that count secondly above-mentioned, so being in the possession and occupation of the said persons as tenants thereof to the plaintiff as aforesaid, and in which the plaintiff was so interested as aforesaid; and the plaintiff had been and was, by means of the premises aforesaid, otherwise greatly injured and damaged, to wit, at the borough aforesaid, in the county aforesaid.

The second count stated, that Charles the First, by his letters patent, after reciting as therein is recited, and after, among other things, giving and granting to the mayor and burgesses of the said borough certain privileges and advantages, *did direct* that the said mayor and burgesses, and their successors, should from time to time, for ever, when it was necessary or expedient, repair, at their own costs, all the buildings, banks, sea-shores, and other mounds, to the borough belonging or appertaining, or situate between the borough and the sea; which said last-mentioned letters patent, the de-

fendants afterwards, to wit, on the said 20th of June, at the borough aforesaid, in the county aforesaid, duly accepted; that the plaintiff, before and at the time of the committing of the grievances by the defendants as thereafter mentioned, was lawfully possessed of divers, to wit, five other messuages, five other cottages, five other buildings, and twenty other closes of land, with the appurtenances, and that divers, to wit, five other messuages, five other cottages, five other buildings, and divers, to wit, twenty closes of other land, were in the possession and occupation of divers tenants to the plaintiff, the reversion thereof being in the plaintiff, all which messuages, cottages, &c. were abutting on or near the sea-shore, &c. (as in the first count).—It was then averred, that, before and at the time of the sealing of the said letters patent, and the acceptance thereof by the said mayor and burgesses, divers, to wit, ten buildings, ten banks, &c., had been and were respectively standing and being within, and belonging and appertaining to the said borough, and which buildings, banks, &c., constituted and formed and were a protection and safeguard to the messuages, &c., of the plaintiff, and hindered and prevented, and still of right ought to hinder and prevent the sea, &c. from running or flowing on or over the said several messuages, &c.; all which buildings, banks, &c., the defendants, at the time of the committing of the several grievances by them as thereafter next mentioned, were, under and by virtue and in pursuance of the aforesaid letters patent, and the acceptance thereof as aforesaid, liable to, and ought at their own proper costs and charges, well and sufficiently to have repaired, maintained, and supported, and still are liable, and ought, at their own proper costs and charges, well and sufficiently to repair, when and so often as it should or might be necessary or expedient so to do. The second count concluded by assigning a breach by the defendants' suffering and permitting the buildings, banks, &c. to be ruinous and out of repair, as in the first count.

The third and fourth counts charged the defendants with liability to repair the walls by prescription—the fifth, *ratione tenuræ*.

The defendants pleaded the general issue.

At the trial, before Mr. Justice Littledale, at the Spring Assizes, at Dorchester, 1828, after the evidence on the part of the plaintiff was closed, the learned Judge intimated an opinion that he could not recover on the three last counts; whereupon it was agreed by the counsel on both sides, that a verdict should be entered for the plaintiff on the two first counts, which charged the defendants under the charter; and as to the other counts, the jury were discharged.

Mr. Serjeant Merewether, on the part of the defendants, in Easter term 1828, moved in arrest of judgment.

Mr. Serjeant Wilde, in the Trinity term following, shewed cause, and the rule was ultimately discharged.

The second count being afterwards found to be defective,

Mr. Serjeant Wilde, in the last term obtained a rule *nisi* that the verdict might be entered on the first count only.

Although it is usual to apply to the Judge who tried the cause for his concurrence, yet the Court alone has authority to apply the verdict to any particular count—*Eliot v. Skyppe* (1), *Hankey v. Smith* (2), *Newcombe v. Green* (3), *Spencer v. Goter* (4), *Petrie v. Hannay* (5), *Williams v. Breedon* (6). The rule is, that, where various counts disclose the same cause of action, the verdict may be entered on any one to which the evidence applies. Here, the two counts upon which the verdict has been taken are in substance the same; no evidence could have been given under the second, which would not equally apply to the first. The agreement entered into at the trial cannot have any effect upon the amendment prayed.

Mr. Serjeant Taddy and *Mr. Serjeant Merewether* afterwards shewed cause.—Admitting the rule to be generally as stated, yet there is no case where the Court has permitted that to be done which is prayed

(1) Cro. Car. 338.

(2) Barnes, 449.

(3) 2 Str. 1197; s. c. 1 Wils. 53.

(4) 1 H. Blac. 78.

(5) 3 Term Rep. 659.

(6) 1 Bos. & Pul. 329.

by this rule, without the assent of the Judge who presided at the trial, or where the verdict has been by the mutual agreement of the parties taken on particular counts. In *Richardson v. Mellish* (7), the Court amended the *postea* by entering up judgment upon a single count only with the concurrence of the Judge who tried the cause, and, he having left the court, they required a certificate from him. *Eddowes v. Hopkins* (8) is an authority to shew, that, where the cause of action arises on a tort, if there be any evidence that could apply to an insufficient count, the *postea* cannot be amended by entering the judgment upon a good count.

Mr. Serjeant Wilde, in support of this rule, referred to the case of *Lee v. Muggridge* (9), where the Court compelled the plaintiff to elect in the term after the trial, upon which count he would enter up a verdict taken generally.

Cur. adv. vult.

Lord Chief Justice Tindal.—The plaintiff in this case has moved that the verdict may be entered on the first count of the declaration only, although, by agreement entered into at the trial of the cause, the verdict was then taken upon the two first counts. Looking at this agreement, we think we are not precluded from allowing the plaintiff to enter up judgment on the first count. If, indeed, on the second count damages might have been given which could not have been given on the first count, we should not perhaps, without the concurrence of the Judge who presided at the trial, grant the application; but it appears that both these counts disclose precisely the same cause of action; they only set it out rather differently in form. We therefore think, that, by allowing this motion, we shall give effect to the agreement of the parties. The only consequence of our refusing to do this, would be to put the parties to the expense of another trial, in case a *venire de novo* should be awarded upon a writ of error.

Rule absolute.

(7) 3 Bing. 334; s. c. 4 Law J. C.P. 68.

(8) Doug. 376.

(9) 5 Taunt. 36.

1829. }
June 27. } PARTINGTON v. WYATT.

Costs—On rule for judgment as in case of a nonsuit discharged on a peremptory undertaking.

On a rule for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice, discharged on a peremptory undertaking, the defendant is not entitled to costs unless mentioned in the rule.

A rule for judgment as in case of a nonsuit for not proceeding to trial in this case, had been discharged on Saturday, May 30, upon the plaintiff's giving a peremptory undertaking to try at the next assizes. This rule made no mention of costs. On the following Monday, therefore, the rule was, by consent, drawn up as follows:—

"Upon reading a rule made in this cause on Friday the 22nd instant, and the affidavit of William Partington, the plaintiff in this cause, and upon hearing counsel for both parties, it is ordered, that the said rule be, and the same hereby is discharged, the plaintiff, by his counsel, undertaking peremptorily to proceed to the trial of this cause at the Sittings after next Trinity term, to be holden at Guildhall, in and for the city of London: and it is further ordered, that the said plaintiff do and shall pay to the said defendant, or his attorney, costs, to be taxed by one of the Prothonotaries of this court, for the plaintiff's not proceeding to the trial of this cause at the Sittings after Hilary term 1827, and also at the Sittings after Michaelmas term last, pursuant to notice given, unless the said plaintiff, after notice of this rule to be given to his attorney or agent, shall shew sufficient cause to the said Prothonotary to the contrary at the time of such taxation.

The Prothonotary, having heard the case, refused to allow the defendant the costs of his attendance with his witnesses during six days at the Sittings, at the expiration of which the plaintiff had withdrawn his record, or the costs of the briefs delivered at those Sittings.

Mr. Serjeant Taddy, on a former day obtained a rule *nisi*, that the Prothonotary might be directed to review his taxation in this respect.

Mr. Serjeant Bompas, who shewed cause, contended that, as, by the terms of the rule, the costs were in the discretion of the Prothonotary, his adjudication was conclusive; and that costs of attendance at the Sittings could not be given on a rule for judgment as in case of a nonsuit discharged on a peremptory undertaking; but only on a rule for costs for not proceeding to trial pursuant to notice.

Mr. Serjeant Taddy, in support of his rule.—The Prothonotary was to exercise his discretion, not on the right of the defendant to costs, but only on the *quantum*. By a rule of this court (1), it is provided, that, "where notice is given of the execution of a writ of inquiry, and not countermanded in time, the defendant shall be entitled to costs from the plaintiff for not executing such writ of inquiry, in the same manner as the defendant, by the course of the court, is now entitled to costs from a plaintiff who does not proceed to the trial of an issue joined after notice given." In *Kettle v. Bromsall* (3) and in *Jones d. Wyat v. Stephenson* (3), costs were allowed. In *Impey* (4), it is said that "it has been determined, and is now the practice of this court, that, if the defendant obtains a rule for costs for not going to trial, he shall not have a rule for judgment as in the case of a nonsuit—*Ogle v. Moffat* (5); but, if any subsequent laches is made, a judgment as in case of a nonsuit may then be applied for; and, as those costs are always allowed in the latter rule, there does not seem any necessity even to move for the former one."

Per Curiam.—By the terms of the second rule, the costs were left in the discretion of the Prothonotary, who has, upon hearing the parties, refused to allow the defendant the costs prayed. There is, therefore, no ground for the interference of the Court.

Rule discharged.

- (1) T. T. 13 Geo. 2.
- (2) Barnes, 230.
- (3) Ibid. 316.
- (4) C. P. Practice.
- (5) Barnes, 133; s. point 316, *noting Moffat*.

1829. }
June 29. } PHILPOT V. DOBBINSON.

Avowry—Form of.

In replevin the defendant made cognizance as bailiff of W. G. T. for rent in arrear under a demise at the yearly rent of 170l. The evidence was, that the premises were conveyed to W. G. T. by two of three trustees only, the third not having executed the conveyance:—Held, a variance.

This was an action of replevin.

The defendant made cognizance as bailiff of W. G. Tate, because the plaintiff, for three quarters of a year next before and ending on &c., and from thence until and at the time when &c., enjoyed the dwelling-house in which &c., as tenant thereof to the said W. G. Tate, by virtue of a demise thereof to him the plaintiff before then made, at the yearly rent of 170l., payable quarterly, and 127l. 10s. were due for three quarters.

The plaintiff pleaded *non tenuit* and *riens en arriere*.

The cause was tried, before Lord Chief Justice Tindal, at the Sittings at Westminster after last term. The rent in question was claimed by W. G. Tate, as heir of W. Tate. The plaintiff had held under a lease granted by one Bradney, by whom the property was devised to three trustees, in trust for sale. After Bradney's death, the trustees sold the premises to W. Tate, but only two of the trustees had executed the conveyance.

It was thereupon objected for the plaintiff, that, inasmuch as by the above-mentioned conveyance W. Tate only took two thirds, he being therein tenant in common with the third trustee who had not executed the deed, the cognizance for the whole rent was not supported.

A verdict was taken for the defendant, subject to a motion on this point.

Mr. Serjeant Wilde, on a former day, obtained a rule nisi. He cited *Brown v. Sayce* (1) to shew that the holding was not correctly described—*Littleton* (2), where it is said, that "tenants in common must

- (1) 4 Taunt. 320.
- (2) Sections 314, 317.

sever in avowry, unless the rent reserved be an hawk, an house, or the like, which cannot be severed"—and also, *Harrison v. Barnby* (3), *Pullen v. Palmer* (4), and *Viner's Abridgment* (5).

Mr. Serjeant Taddy and *Mr. Serjeant Merewether* now shewed cause.—Since the statute, 11 Geo. 2. c. 19, it is not necessary that the landlord's title should be set out with precision, it suffices if the avowry or cognizance be general. *Clayworthy v. Mitchell* (6), *Grills v. Mannel* (7). The case of *Pullen v. Palmer* was anterior to the passing of the 11 Geo. 2. c. 19. In *Forty v. Imber* (8), Lord Ellenborough said—"It is unnecessary to revert to cases before the statute 11 Geo. 2. c. 19. s. 22, which meant to relieve landlords from the difficulties which they before laboured under in making avowries for rent, and gives the avowry and cognizance in as general terms as possible; and there has been no case since the statute, where, if it turned out that less rent was due than the landlord had avowed for, he has not been holden to be entitled to recover so much rent as was due." *Hargrave v. Sherwin* (9), and *Page v. Chuck* (10), are to the same effect.

Mr. Serjeant Wilde, in support of this rule.—Although under the statute the defendant may avow generally, still he must avow truly. In *Clayworthy v. Mitchell*, *Hargrave v. Sherwin*, and *Forty v. Imber*, the question did not turn on the sufficiency of the avowries; and in *Page v. Chuck*, the plaintiff had merely underlet a part of the demised premises.

Lord Chief Justice Tindal.—I am of opinion that the verdict should be entered for the plaintiff. *Browne v. Sayce* is an authority to shew, that, if a defendant in replevin avow on a contract one rent, and prove another, the variance is fatal. The statute 11 Geo. 2. c. 19, was not meant to relieve the avowment from truly stating

the contract, but merely that it might be stated generally. The allegations essential to the contract must still be according to the fact. There is clearly in this case a variance between the contract alleged and that proved. If a second distress were made by the third trustee, for the whole rent, the judgment in the present case would be no bar. I therefore think that the rule should be made absolute.

The rest of the Court concurring—

Rule absolute.

1829. }
July 1. } DAY v. STUART.

Stock-jobbing—Bill for differences, in the hands of a bonâ fide holder.

A bill of exchange given for differences in stock-jobbing is not void in the hands of an indorsee for value, without notice.

This was an action of assumpsit by an indorsee against the drawer of a bill of exchange for 311*l.* 17*s.* 6*d.*

The cause was tried before Lord Chief Justice Tindal at the Sittings in London in the present term. The defence was, that the bill was accepted for the amount of differences in time bargains. This was not clearly proved; or, at all events, it was not proved that the plaintiff was privy to these transactions; but was a *bonâ fide* holder, for value.

The jury having found for the plaintiff—

Mr. Serjeant Taddy moved for a rule nisi that this verdict might be set aside and a nonsuit entered. He referred to *Steers v. Lashley* (1).

Lord Chief Justice Tindal.—In *Steers v. Lashley*, the plaintiff took the bill, with notice of its origin. In *Edwards v. Dick* (2), it was held to be no defence to an action on a bill of exchange, that it was accepted for a gaming debt, if it be indorsed over by the drawer for a valuable consideration, to a third person.

The rest of the Court concurring—

Rule refused.

(1) 1 Esp. Rep. 166; s.c. 6 Term Rep. 61.

(2) 4 Barn. & Ald. 218.

(3) 5 Term Rep. 246.

(4) 3 Salk. 207.

(5) Vol. 2, 59, tit. "Actions, Joinder," (C. 37.)

(6) Winch, 49.

(7) Willes, 378.

(8) 6 East, 434.

(9) 6 Barn. & Cress. 34; s.c. 9 D. & R. 20.

(10) 10 B. Moore, 264; s.c. 3 Law J. C.P. 124.

1829. }
July 2. } WILLANS v. TAYLOR.

Evidence—*In case, for malicious prosecution.*

In an action on the case for a malicious prosecution, where the circumstances of the case out of which the action arises were within the knowledge of the defendant, very slight prima facie evidence given on the part of the plaintiff, will throw on the defendant the onus of shewing that he had probable cause for the prosecution.

This was an action on the case for a malicious prosecution.

The cause was tried before Lord Wynford, at the Sittings at Westminster after last term. The facts were as follow :—

The plaintiff had brought a *qui tam* action against the defendant for penalties for illegal gaming, under the statute 9 Anne, c. 14. s. 8 (1). At the trial of that cause, the plaintiff swore that he had lost money seventeen times, and that he had played at the defendant's house on Good Friday. The defendant afterwards presented two bills for perjury against the plaintiff, at the Westminster Sessions, both which were ignored for default of the defendant's appearance. Subsequently another bill was found in the King's Bench on the evidence of the defendant, wherein the chief assignments of perjury were, that the plaintiff had not lost money seventeen times, and that there had been no play on Good Friday. The bill offered by the plaintiff were rejected, and he was otherwise harassed; and the indictment was kept suspended for three years, and the record was then taken down by the plaintiff; and when it was called on for trial, the defendant, though present in court and called, did not appear to give evidence; whereupon the plaintiff was acquitted.

At the trial of this cause, the defendant called witnesses to prove that his house was shut up on Good Friday, and that the plaintiff had not lost money seventeen times, as he had sworn.

On the part of the plaintiff, Mr. Gurney, the short-hand writer, was called to prove

that the defendant was in court at the trial of the indictment in the King's Bench; but he was not examined by the plaintiff's counsel, as he could not speak to the fact. The counsel for the defendant, however, cross-examined him, and caused him to read his notes of what passed on that occasion.

His Lordship said that this evidence should go for nothing; and he nonsuited the plaintiff, thinking that there was not sufficient evidence to shew a want of probable cause for the prosecution.

Mr. Serjeant Cross, on a former day, obtained a rule *nisi* that this nonsuit might be set aside and a new trial had, on the grounds, that there was sufficient evidence of a want of probable cause to go to the jury, and that Mr. Gurney had been improperly allowed to depose to the testimony of witnesses who ought themselves to have been called.

Mr. Serjeant Taddy and Mr. Serjeant Wilde shewed cause.—To maintain an action of this nature, both malice and the want of probable cause must concur; the existence of the latter cannot be implied, and it is incumbent on the plaintiff to establish the affirmative, *Sutton v. Johnstone* (2), *Arbuckle v. Taylor* (3), *Ingleton v. Berry* (4), *Wallis v. Alpine* (5), *Purcell v. Macnamara* (6). Here there was no evidence offered by the plaintiff to shew a want of probable cause, except his acquittal, which cannot be held conclusive, inasmuch as, although there might be ample cause for instituting a prosecution, the conviction may from a variety of causes become matter of uncertainty.

Mr. Serjeant Cross, in support of his rule.—There was abundant *prima facie* evidence of want of probable cause. In *Reed v. Taylor* (7), it was held, that if a plaintiff declares that the defendant maliciously and without probable cause preferred an indictment, the averment is proved if some charges in the indictment were maliciously and without probable cause preferred, although there was good

(1) See 3 Bing. 449; 11 B. Moore.

(2) 1 Term Rep. 493, 545.

(3) 3 Dow's P.C. 160.

(4) 1 Campb. 203, n.

(5) Ibid. 204, n.

(6) 9 East, 361.

(7) 4 Taunt. 616.

ground for others of the charges. *Farmer v. Darling* (8) is to the same effect.

Lord Chief Justice Tindal.—It is true, that, to support an action of this nature both malice and the want of probable cause must concur. The substantiating the charge, however, is not absolutely necessary to exonerate the defendant; for there may be many legitimate causes for abandoning the prosecution, for instance, the death or the absence of witnesses, and various other causes. It is impossible to lay down any general rule as to the requisite combination of malice and want of probable cause: each case must depend upon its own circumstances. What shall be esteemed probable cause is a question for the Judge to determine upon the facts disclosed, as in questions touching the reasonableness of notice, and the like. It is undoubtedly for the plaintiff to shew *prima facie* the absence of probable cause; for, it is not to be presumed that the defendant has acted illegally. The question is, whether in this case there was sufficient evidence given on the part of the plaintiff to entitle him to call on the defendant to shew that he had probable cause. I think there was. Where the facts lie in the knowledge of the defendant himself he must shew probable cause (9). The conduct of the defendant at the trial was sufficient *prima facie* evidence of want of probable cause to throw on him the affirmative.

The evidence of Mr. Gurney, too, was improperly received.

I therefore think there ought to be a new trial.

Mr. Justice Park.—I am of the same opinion. The true distinction was laid down by Lord Mansfield in *Sutton v. Johnstone* (10)—“The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable or not probable are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law.” In *Purcell v. Macnamara*, Mr. Justice Le Blanc says—“An action for a malicious prose-

cution cannot, from the very nature of it, be maintained without proof of malice, either express or implied; and malice may be implied from the want of probable cause; but that must be shewn by the plaintiff.” Very slight evidence is sufficient to throw on the defendant the *onus* of shewing that he had probable cause. In this case the circumstances are amply sufficient to throw on the defendant the burden of proof.

The short-hand writer's notes should not have been allowed to be read.

The rest of the Court concurring—

Rule absolute.

1829. } ADAMS AND OTHERS V. BATESON.
July 2. }

Variance—between declaration and proof.

In debt on a joint and several bond, the condition set out was for payment by the defendant and R. and R., the bond being given in evidence, it was found to have been altered, one H. being substituted for R. in the condition:—Held, that this was a fatal variance.

This was an action on a bond in the penal sum of 2,000*l.*, against one of the obligors. The condition of the bond was, that, if Bateson (the defendant), Reay, and Robinson, any or either of them, should pay the plaintiff 1,000*l.* in manner and at the times therein mentioned, the bond should be void. The breach assigned was, that, on a certain day, 700*l.*, parcel of the 1,000*l.*, with interest, was due and payable from the defendant and Reay and Robinson, and remained unpaid.

The defendant pleaded the general issue.

The cause was tried at the sittings in London after Michaelmas term last, when the jury returned the following special verdict:—

“That the bond was a joint and several bond executed by Bateson, Reay, and one Hall—That the bond and the said condition, after the making, sealing, and delivery thereof by the defendant, were, by the direction of one Machell, (the borrower of the said sum of 1,000*l.* in the said condition mentioned, and for the payment

(8) 4 Barr. 1971.

(9) See Bull. N.P.C. 13, 14.

(10) 1 Term Rep. 545.

whereof the said bond was made and executed), altered and varied, in this, that the words following, to wit, 'John Hall, of Lancaster, spirit merchant,' were erased out of the said bond, and the words following, to wit, 'Thomas Robinson, of Liverpool, ship-broker and merchant,' substituted in lieu thereof, and also that the words following, to wit, 'John Hall,' were erased out of the condition of the said bond, and the words following, to wit, 'Thomas Robinson,' were substituted in lieu thereof; to which said alterations the plaintiffs assented previously to the said alterations, or any of them, being made; and that the said bond, subject to the said condition so altered as aforesaid, was thereupon signed, sealed, and delivered by the said Thomas Robinson, who was another and a different person from the said John Hall—That the aforesaid substitution of the name of the said Thomas Robinson for that of the said John Hall, in the said bond and the condition thereof, was made without the assent, knowledge, permission, or authority of the said defendant, and that he, the said defendant, had never re-executed the said bond—That the said defendant, since the making of the said alteration in the said bond and condition, and with full knowledge thereof, had assented thereto, by acknowledging his liability to pay the said sum of 1,000*l.*, with the said interest, in the said condition mentioned, and by the payment of certain of the instalments. And if, upon the whole matter, the Court should esteem it the bond of the defendant, they found for the plaintiff; if the Court should deem it otherwise, they found for the defendant."

The case came on for argument in the course of the last term.

Mr. Serjeant Taddy, for the plaintiffs, contended that the alteration was not material, or, if so, that the defect was cured by the subsequent assent of the defendant; that, as this was not a joint but a several bond, and the defendant was charged as a simple obligor, any alteration affecting another party did not alter the situation in which he stood. He referred to *Buller's Nisi Prius* (1)—*Zouch v. Clay* (2)—*Mark-*

ham v. Gonaston (3)—*Doe d. Lewis v. Bingham* (4)—*Waugh v. Russell* (5)—and *Pigot's case* (6); and he submitted that it would be too much to say that an alteration made by a stranger should have the effect of changing the rights of the parties, particularly as the bond had been assented to by the defendant after the alteration, and instalments had been paid thereon.

Mr. Serjeant Stephen, for the defendant, contended that the bond was avoided by the alteration (whether material or not) being made in it, with the privy of the obligee after the execution by the obligor, and without his knowledge; that it was impossible to say that this alteration was not material, inasmuch as it varied the contract. He also submitted that there was a material variance between the condition of the bond as set out in the declaration, and that appearing in evidence—the former being for payment by the defendant, *Reay*, and *Robinson*, the latter by the defendant, *Reay*, and *Hall*. He cited *Powell v. Duff* (7)—*Anonymous* (8)—*Baylis v. Dineley* (9)—*Pigot's case* (10)—*First Institute* (11)—and *Co. Litt.* (12).

Cur. ado. vult.

Mr. Justice Park (13), after reading the pleadings and special verdict, now delivered the judgment of the Court:—

Two points have been raised on the part of the defendant—first, that the bond was avoided by the alteration made therein—secondly, that there was a material variance between the condition set out in the declaration, and that which appeared on the bond being given in evidence. The opinion we have formed on the second point renders it unnecessary to consider the first. We think the variance fatal. The bond produced was not a bond conditioned

(3) *Cro. Eliz.* 626.

(4) 4 *Barn. & Ald.* 672.

(5) 5 *Traut.* 707.

(6) 11 *Rep.* 27—See these cases referred to in *Hudson v. Rerett*, *ante*, 145.

(7) 3 *Campb.* 181.

(8) *Moore*, 835.

(9) 3 *Mau. & Selw.* 477.

(10) 11 *Rep.* 27 *a.*

(11) *Page* 231, *n.*

(12) *Sec.* 374.

(13) Lord Chief Justice Best was not present at the argument.

(1) 7th Edit. p. 267.

(2) 2 *Lev.* 35; *a. c.* 1 *Vent.* 185.

for payment by the three persons named in the declaration, but by three persons, one of whom is not named in the declaration. We therefore think there must be—

Judgment for the defendant.

1829, }
July 6. } HETHERINGTON v. GRAHAM.

Dower—barred by adultery after separation.

Adultery committed by the wife after a separation by mutual consent, is a bar to her right to dower.

This was a writ of dower *unde nihil habet*.

The tenant pleaded in bar to the count, that the demandant, in the lifetime of her late husband, and during her coverture with him, voluntarily and of her own accord left her husband, and from thence until the time of his death, voluntarily and of her own accord lived away from him, and during her coverture with her said husband, continually, until the death of one William Coulson, of her own accord, and without the licence or consent and against the will of her husband, lived away from her said husband in adultery with the said William Coulson; and that the husband was not at any time after the demandant left his house, or after she lived in adultery with the said William Coulson, voluntarily or in any manner reconciled to her.

Replication—That, though true it was that the demandant voluntarily and of her own accord left her husband, yet that she left him with his consent for that purpose granted, and separated and parted from her husband; and that such separation continued, with their mutual consent, until the husband's death; and that, if any act of adultery took place, the same took place after such separation and parting from her husband, and during the period of such separation by their mutual consent.

The rejoinder merely re-asserted the fact that the demandant, of her own accord, and without the licence or consent of the husband, lived in adultery with the said William Coulson.

To this rejoinder there was a general demurrer.

Mr. Serjeant Wilde, in support of the demurrer.—The plea cannot be supported; the adultery, under the circumstances therein alleged, being no bar to the wife's right to dower. At common law, adultery was no bar to dower, it being an offence cognizable only by the ecclesiastical court. But the 13 Edw. 1. c. 54, enacted—"that, if a wife willingly leave her husband, and go away and continue with her adulterer, she shall be barred for ever of an action to demand her dower that she ought to have of her husband's lands, if she be convict thereupon." Statutes creating forfeitures must be construed strictly—*Kent v. Whitby* (1). The adultery will not of itself operate a forfeiture. The wife must go away and continue with the adulterer, and be convict thereupon. The plea does not aver these facts. In the ancient precedents, the leaving of the husband by the wife is stated to have been "with the adulterer" (2).

Mr. Serjeant Jones, in support of the plea.—All the circumstances mentioned in the statute need not concur. *Lord Coke* says (3)—"Albeit the words of this branch be in the conjunctive, yet if the woman be taken away, not *sponte*, but against her will, and after consent, and remain with the adulterer, without being reconciled, &c., she shall lose her dower; for, the cause of bar of her dower is, not the manner of the going away, but the remaining with the adulterer in avowtry without reconciliation, that is the bar of the dower." In *Paynell's case* (4), where the plea stated that the wife left her husband, and lived as an adulteress with Sir W. Paynell, and the replication took issue upon the fact, and the bar was held good, though there was no allegation that she left *with the adulterer*. In *Chambers v. Caulfield* (5), it was held that a husband may maintain an action for criminal conversation with his wife, although they lived separate under a deed. *Coot v. Berty* (6), and

(1) 4 Bro. P.C. 362.

(2) See *Haworth v. Herbert*, Dyer 106, b. Rastal, 230. Lib. Intrat. fo. 20. 9 Vin. Abr. tit. "Dower."

(3) 2 Inst. 434.

(4) Ibid. 435; and *Dyer*, 106 b.

(5) 6 East, 244.

(6) 12 Mod. 232.

Govier v. Hancock (7) decided, that a husband is not bound to receive his wife after she has committed adultery. The words of the act, "if she be convict thereupon," only refer to proof of the fact; the entries in no instance allege a conviction in form.

Mr. Serjeant Wilde, in reply, contended, that, according to the statute, elopement with the adulterer was essential to the forfeiture; and that, if the simple adultery as stated in the plea operated a forfeiture, the cases holding that a wife retains her dower notwithstanding adultery, must be overruled.

Cur. adv. vult.

Lord Chief Justice Tindal now delivered the judgment of the Court:—

The question raised upon the pleadings for the judgment of the Court is this—whether, under the statute 13 Edw. 1. c. 34, commonly called the Statute of Westminster the 2nd, the committing an act of adultery, and continuing with the adulterer, is any bar to the wife's right to dower, where she has previously left her husband with his consent, and is living apart from him with such consent at the time of the adultery; or, whether it is necessary, in order to satisfy the words of the statute, that the original leaving of her husband should be a leaving with the adulterer by his means or persuasion.

That the adultery of the wife was no bar to her dower at common law, is expressly laid down by Lord Coke in his reading on this statute, in the *Second Institute* (8). Indeed, it could not have been otherwise, as adultery is an offence of ecclesiastical jurisdiction only, and of which the Courts of common law took no cognizance. As well, however, for the purpose of preventing that offence, as more probably with the view of protecting the heir against the danger of introducing a supposititious offspring into the family, it is enacted by the thirty-fourth chapter of the statute—"That, if a wife willingly leave her husband, and go away and continue with the advowterer, she shall be barred for ever of an action to demand her dower that she ought to have of her hus-

band's lands, if she be convict there upon," except in an event which has not happened in this case, and to which it is therefore unnecessary to advert. It is somewhat singular that throughout the whole of this long statute, consisting of fifty chapters, this is the only one in the old law French, the whole of the others being in Latin; and even this chapter changes from the law French to Latin just at the place where this subject begins. The chapter, however, after making a distinction between the carrying away women without force and with force, and enacting a punishment for those offences, provides for the case now in question, viz. that of the woman leaving her husband willingly, and continuing with the adulterer, in the words above cited.

Now, it is contended, on the part of the demandant, that each part of the description of the offence contained in the act must be taken to be cumulative; so that the dower is not barred unless the wife has left her husband willingly with the adulterer; has gone away with him, and has also continued with him. Whilst, on the part of the tenant, it is insisted, that it is sufficient to bring the case within the statute if the wife has of her own consent left the society of her husband, and, after she has so left him, commit the act of adultery: and the Court is of the latter opinion.

It may be admitted, as the fact is, that, in all the ancient precedents, the leaving of the husband by the wife is stated to have been "with the adulterer" (9). But we think that this is not conclusive on the point; for, as there can be no doubt that the case is within the statute, where all these circumstances concur, so the pleader would of course insert them where the facts of the particular case warranted the insertion. And, on the contrary, there is a distinct authority that *all* the circumstances mentioned in the statute need not concur in form, provided they do so in substance; for, Lord Coke lays it down, in the *Second Institute* (10), that, "Albeit the words of this branch be in the conjunctive,

(7) 5 Term. Rep. 603.

(8) 2 Inst. 435.

(9) See Lib. Intrat. fo. 209; Rastal, 230; Dyer, 107.

(10) 2 Inst. 434.

yet if the woman be taken away, not *sponte*, but against her will, and *after* consent and remain with the adulterer, without being reconciled, &c. she shall lose her dower; for the cause of the bar of her dower is not *the manner of the going away*, but the remaining with the adulterer in avowtry without reconciliation that is the bar of the dower." And this appears more evident by the case of *Sir John Camoys*, cited in the *Second Institute* (11), where the plea states that the wife left her husband in his life, and lived as an adulteress with Sir W. Paynell, and the replication took issue, that she did not live as an adulteress with the said Sir W. Paynell, wherein the bar was held good, though there was no allegation that she left with the adulterer; and it ought not to be forgotten, that *Britton*, whose book was published immediately after the framing of this statute, speaking of a writ of dower brought against the heir and his guardian, says—"He may say she hath forfeited dower of her husband by her adultery; for she went from her husband to another bed after she had married him, and so forfeited her dower." Now, here, no mention is made of a leaving of the husband either willingly or with any particular person, but the plea states only, in substance, that the wife was living apart from her husband in adultery. The authorities, therefore, above referred to, place the forfeiture of the dower upon the fact of a living from the husband in adultery, and not upon the circumstances attending the elopement; and as we think the good sense and reason of the case concur with these authorities, we hold the proper construction of the statute to be what the words will well warrant—that, if a woman leaves her husband with her own free will, and afterwards lives in adultery, the dower is forfeited.

We therefore hold the plea in bar in this case to be sufficient, and give—

Judgment for the tenant.

(11) 2 Inst. 435.

1829. { DORR. HAMMOND, PETTY, MULES,
July 6. AND WOODLEY, v. COOKE AND
 ANOTHER.

Mortgage—Surrender of mortgage term, presumption of.

In ejectment, it appeared, that the premises were conveyed by deeds of lease and release for a term of six hundred years for raising a sum of money by mortgage, with a clause of cesser of the term on payment of the mortgage money and costs; and that in 1802, the Court of Chancery had decreed a sale of the mortgaged property for the payment of the money, under which decree some sales had taken place; but no evidence was given as to any further proceedings in the Chancery suit, nor of any title to the premises in the defendant. Under these circumstances—the Court refused to presume that the mortgage money was paid off, and that the term had either ceased under the proviso of cesser, or had been surrendered to the owner of the inheritance.

This was an action of ejectment brought upon several demises, against Joseph Cooke and John Newton. At the trial, the jury found a verdict for the defendant Newton, and for the plaintiff against Cooke, as to so much of the premises as were in his possession; and upon a motion being made to set aside the verdict and enter a nonsuit, on the ground that the legal estate was not in any of the lessors of the plaintiff, but was in certain trustees under the will of Mr. Middleditch, named Mangles and Taddy, in whom no demise was laid, the facts were directed by the Court to be stated in a special case.

The case stated, that the premises in question, amongst others, were conveyed by indentures of lease and release of August 1793, to the use of Lubbock and Clarke, for the term of 600 years, upon trust, by mortgage or sale, to raise the sum of 15,000*l.* or so much thereof as Mr. Middleditch should by deed or will direct, and, subject thereto, to certain uses therein mentioned, with the ultimate remainder in fee to the use of Mr. Middleditch and his heirs; the deed of release containing a clause of cesser of the said term of 600 years after full payment of the monies raised under it, and

of the costs and expenses of the trustees. And further, that, by a deed of assignment of the 25th of March 1794, Lubbock and Clarke, the trustees, by the direction of Middleditch, who was a party to the same, assigned the premises in question, amongst others, to Charles Hammond, to hold for the said term of 600 years, subject to a proviso for redemption on payment of the sum of 6,000*l.* and interest.

It was further proved, that Mr. Middleditch, by his will, dated in November 1798, devised all his real estates to Mangles and Taddy, their heirs, upon trust, to sell so much thereof as was necessary to pay all monies due upon mortgage of any part of his estate, and all his debts and legacies, and, as to the residue, in trust for the separate use of his wife, her heirs and assigns; and that he died in the year 1799.

One of the demises was laid in the names of Petty, Mules, and Woodley, the trustees named in the will of Mrs. Middleditch, afterwards Mrs. M'Kenzie; and one other demise was laid in the name of Elton Hammond, who was the personal representative of Charles Hammond, the mortgagee.

The defendant Cooke proved, that, in 1799, a suit was instituted in the Court of Chancery for carrying into effect the will of Mr. Middleditch; in which suit, amongst other persons, Charles Hammond, the mortgagee, was a party; and that, by certain decretal orders made in the years 1801 and 1802, it was ordered (amongst other things) that monies should be raised by sale or mortgage of the estate, and that what was found due on the mortgage should be paid to the mortgagee; and all further directions and costs were reserved until after sale of the estates.

No evidence was given as to any further proceedings in the Chancery suit, nor was any evidence given by Cooke of any title to the premises sought to be recovered, though it was proved that some sales took place under the decree, and that he, Cooke, had bought certain lots, not appearing, however, to form any part of the premises in question.

The case now came on for argument.

Mr. Serjeant Wilde, for the lessors of the plaintiff.—The Court is called upon to presume, on behalf of the defendant Cooke,

that the mortgage-money advanced by Hammond in March 1794 has been paid off, and that the term assigned to him to secure it has either ceased under the proviso of cesser, or has been surrendered to the owners of the inheritance so as to be merged in the fee now vested in Mangles and Taddy, the trustees under Mr. Middleditch's will. To raise this presumption, the defendant should at least have shewn payment. An outstanding term always enures to the benefit of the owner of the inheritance, or those who claim under him. *Cholmondeley v. Clinton* (1)—*Doe v. Wright* (2)—*Doe v. Hilder* (3)—*Aspinall v. Kempson* (4)—*Goodtitle v. Jones* (5)—*Doe v. Sybourn* (6)—*Ros v. Reade* (7)—*Emery v. Grocock* (8)—*Townsend v. Champenown* (9)—*Bartlett v. Downes* (10).

Mr. Serjeant Merewether, for the defendants.—Sufficient appears to justify the presumption of a surrender. The lessors of the plaintiff claim under the trustees of Mr. Middleditch, who merely held in trust to concur in the sales directed in the Chancery suit, to which the mortgagee himself was a party. In that suit the property was treated as vested in Mangles and Taddy. Sufficient ground therefore appears for the presumption of a surrender of the term, the payment of the mortgage money, and that the defendant purchased under the authority of the Court of Chancery.

Mr. Serjeant Wilde was heard in reply.

Cur. adv. vult.

Lord Chief Justice Tindal, after stating the case, now delivered the judgment of the Court:—

One of the demises was laid in the names of Petty, Mules, and Woodley, the trustees named in the will of Mrs. Middleditch, afterwards Mrs. M'Kenzie, and one other demise was laid in the name of Elton Ham-

(1) *Sugd. Vend. & Purch.* 444, ed. 1830.

(2) 2 *Barn. & Ald.* 710.

(3) *Ibid.* 782.

(4) *Sugd. Vend. & Purch.* 446, ed. 1830.

(5) 7 *Term Rep.* 47.

(6) *Ibid.* 2.

(7) 8 *Term Rep.* 118.

(8) 6 *Madd.* 54.

(9) 1 *Young & J.* 538.

(10) 3 *Barn. & Cress.* 616.

mond, who was the personal representative of Charles Hammond, the mortgagee.

It is obvious, therefore, that the objection taken by the defendant Cooke cannot prevail, unless it can be shewn that the term of 600 years created in 1794 had either ceased under the proviso of cesser, or had been surrendered to the owners of the inheritance; for, if the term is still outstanding, the plaintiff may recover on the latter demise.

In order to lay the foundation for a presumption that the term had so merged, the defendant Cooke proved, that, in 1799, a suit was instituted in the Court of Chancery for carrying the will of Mr. Middleditch into effect, in which suit, amongst other persons, Charles Hammond, the mortgagee, was a party; and that, by certain decretal orders, made in the years 1801 and 1802, it was ordered (amongst other things) that money should be raised by sale or mortgage of the estate, and that what was found due on the mortgage should be paid to the mortgagee, and all further directions and costs were reserved until after sale of the estates. No evidence was given as to any further proceedings in the Chancery suit, nor was any evidence given by Cooke of any title to the premises sought to be recovered, though it was proved that some sales took place under the decree, and that he, Cooke, had bought certain lots, not appearing however to form any part of the premises in question.

In this state of things, the Court is called upon to say, that the jury ought to have presumed that the mortgage money was paid off, and that the term had either ceased under the proviso, or had been surrendered to the owners of the inheritance, so as to be now merged in the legal estate vested in Mangles and Taddy, the trustees under Mr. Middleditch's will.

The question is, whether such presumption ought to be made. We are all of opinion, that, under the circumstances stated in this case, it ought not.

No case can be put in which any presumption has been made, except where a title has been shewn by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in point of form.

In such a case, where the possession is
VOL. VII. C.P.

shewn to have been consistent with the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed.

Thus, in *Lade v. Holford* (11), Lord Mansfield declared that he and many of the Judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but that they would direct the jury to presume it surrendered. So, in *England v. Slade* (12)—where the lessor of the plaintiff claimed under a lease from John Pym, and it appeared that the estate had been devised by John Pym's father to trustees, in trust to convey to John Pym on his coming of age, and in the meantime for his maintenance—it was held, that, though John Pym only came of age in 1788, and the trial took place in March 1791, the jury might presume a conveyance to John Pym from the trustees, which it was their duty to make, and what a court of equity would have compelled.

And, where the same facts arose in the case of *Doe d. Bowerman v. Sybourn* (13), Lord Kenyon said, that, in all cases where trustees ought to convey to the *beneficial owner*, he would leave it to the jury to presume, where such a presumption could reasonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a matter of form.

Again, in *Doe v. Hilder*, the surrender of a mortgage was directed to be presumed in favour of a judgment-creditor, who had seized the land in question under an *elegit* taken out upon a judgment obtained against the owner of the inheritance.

And, lastly, in *Doe v. Wright*, the presumption was in favour of the person who was proved to be heir-at-law, against the defendant claiming as, but failing in proving himself to be, the heir.

In all these cases, the presumption has been made in favour of the party who has proved a right to the beneficial ownership; the possession has been consistent with the existence of the surrender required to be presumed, and has made it not unreasonable

(11) Bull. N.P. 110.

(12) 4 Term Rep. 682.

(13) 7 Term Rep. 2.

to believe that the surrender should have been made in fact; and the presumption has been made accordingly, in order to prevent justice from being defeated by a mere formal objection.

But, here, we are called upon to declare that the presumption ought to have been made in favour of a person who has proved no right to the possession, no title, no conveyance; a person who stands upon the mere naked possession, without any evidence how or when he acquired it; and, what is stronger against the defendant, he lays before the jury only a partial statement of the ground of presumption, for he proves only the commencement of the proceedings in equity, without shewing their termination. Under these circumstances, the Court think that the defendant has not placed himself in a condition to call for any presumption in his favour, inasmuch as, for anything that appears to the contrary, the presumption which is asked for would rather tend to defeat than to promote the ends of justice.

We therefore think that the verdict should remain for the plaintiffs.

Postea to the plaintiffs.

1829. }
July 6. } KEMBLE v. FARRER.

Liquidated damages—*What shall be.*

*By an agreement containing various stipulations of different degrees of importance, some relating to matters of certain and some of uncertain nature and amount, it was provided, that, in case of the breach by either party of any stipulation therein contained, he should pay to the other 1,000*l.*, which sum was declared to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof. In an action for the breach of a clause of an uncertain nature—Held, that the sum agreed upon as stipulated damages, was a penal sum only.*

This was an action of assumpsit by the manager of Covent Garden Theatre against an actor, to recover the sum of 1,000*l.* as liquidated damages for the breach of an agreement to perform at the theatre for a certain period.

By the agreement in question, the defendant had engaged himself to act as a principal comedian at Covent Garden Theatre for four seasons, commencing with October 1828, and in all things to conform to the usual regulations of the theatre. The plaintiff agreed to pay the defendant 3*l.* 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances during the ensuing four seasons; and that the defendant should be allowed one benefit night during each season, on certain terms therein contained. The agreement also contained a clause providing, that, if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1,000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.

The breach alleged in the declaration was, that the defendant refused to act during the second season. At the trial the jury gave a verdict for the plaintiff—damages 750*l.*; subject to a motion for increasing the damages to 1,000*l.*, if the Court should be of opinion that the plaintiff was entitled to the whole sum claimed, as liquidated or ascertained damages.

Mr. Serjeant Wilde, in the last term, accordingly obtained a rule nisi.

Mr. Serjeant Spankie shewed cause.—Where an agreement contains several stipulations, some of them touching matters of great importance to the parties, and others matters of little or no consequence, a covenant for liquidated damages generally, upon any violation of the agreement, is not to be carried into effect, how strong soever the language may be; but, if the agreement consist only of a single stipulation, or the covenant for liquidated damages be confined to any specific breach, such covenant may be enforced. This rule is no violation of that which provides that written instruments shall be construed according to the evident intent of the parties. The parties might have intended here, that the defen-

dant should forfeit the full penalty if he quitted Covent Garden Theatre, to join the rival establishment; but they never could have meant that the same penalty should attach on his failure to attend a single rehearsal, or on the plaintiff's omitting to pay a single night's salary. But, as the covenant for liquidated damages over-rides the whole of the stipulations contained in the agreement, the Court cannot say to which in particular it was intended to apply; it must be left to the jury to ascertain the probable damage. In *Asley v. Weldon* (1), which was an action on an agreement similar to the present, containing a general stipulation for liquidated damages in equally strong terms, Mr. Justice Heath said—"Where articles contain covenants for the performance of several things, and then one large sum is stated at the end, to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." Mr. Justice Chambre said—"There is one case in which the sum agreed for must always be considered as a penalty, and that is, where the payment of a smaller sum is secured by a larger. In this case, it is impossible to garble the covenants, and to hold that in one case the plaintiff shall recover only for the damages sustained, and, in another, that he shall recover the penalty. The concluding clause applies equally to all the covenants." And Lord Chief Justice Eldon said—"There are many instances of the defendant's misconduct which are made the subject of specific fines by the laws of the theatre. Are we, then, to hold, that, if the defendant happens to offend in a case which has been so provided for by those laws, she shall pay only 2s. 6d., or 5s.: but, if she offend in a case which has not been so provided for, she shall pay 200l.?" *Street v. Rigby* (2) recognizes *Asley v. Weldon*. In *Love v. Peers* (3), *Reilly v. Jones* (4), *Barton v. Glover* (5), *Farrant v. Olmuis* (6), and *Cris-*

dee v. Bolton (7), the several contracts had but a single object, or the stipulations for liquidated damages were respectively confined to a single specific breach. In *Davies v. Penton* (8), Mr. Justice Bayley said—"We must look at all parts of the instrument, in order to ascertain whether it was the intention of the parties that the sum of 500l. should be a penalty or liquidated damages. Now, where the sum which is to be the security for the performance of an agreement to do several acts, will, in case of breaches of the agreement, be in some instances too large, and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty." Mr. Justice Holroyd—"We must look to the nature of the agreement and of the sum to be paid, in order to ascertain whether the sum which was to secure the performance of the agreement was intended to be a penalty or liquidated damages." Mr. Justice Littledale—"Since the statute 8 & 9 W. 3, parties, in framing agreements, have frequently changed the word *penalty* for *liquidated damages*; but the mere alteration of the term cannot alter the nature of the thing: and if the Court see, upon the whole agreement, that the parties intended the sum to be a penalty, they ought not to allow one party to deprive another of the benefit to be derived from the statute. In *Randal v. Everest* (9), where an agreement (not under seal) contained a clause that the party neglecting to comply with his part of the agreement should pay the sum of 100l., mutually agreed upon to be the damages ascertained and fixed on breach thereof—it was held that the party making default was not liable beyond the damages actually sustained. Lord Tenterden said, that, "whether the term *penalty* or *liquidated damages* be used in the agreement, a party who claims compensation for default shall only be allowed to recover what damage he has really sustained." Here, the plaintiff has had the benefit of the defendant's services for a portion of the time; he is clearly not entitled to the full penalty also. Pothier, in his *Traité des Obligations* (10), says—"I cannot receive the whole of the penalty, and

(1) 2 Bos. & Pul. 346.

(2) 6 Ves. 815.

(3) 4 Burr. 2225.

(4) 1 Bing. 502.

(5) Holt's N.P.C. 43.

(6) 3 Barn. & Ald. 692.

(7) 3 Car. & P. 240.

(8) 6 Barn. & Cross. 216.

(9) 1 Moo. & Malk. 41.

(10) Part 2, ch. 5, art. 3, pl. 351.

enjoy in part the benefit of my right of servitude: I cannot at the same time have the one and the other."

Mr. Serjeant Wilde, in support of his rule.—The intention of the parties is to be collected from the language of the agreement. However unreasonable the contract may appear to be, still, if the intention of the parties be manifest, it must be carried into effect. In *Astley v. Weldon*, the question was treated entirely as one of intention. As applied to some parts of the agreement, the sum fixed upon as stipulated damages may appear exorbitant and unreasonable, but the parties, in thus fixing the amount, probably had in view the impossibility of ascertaining the precise extent of the damages resulting from each specific breach. In *Davies v. Penton* the decision turned on the fact of the defendant having waived his right to insist on liquidated damages.

Cur adv. vult.

Lord Chief Justice Tindal now delivered the judgment of the Court:—

This is a rule which calls upon the defendant to shew cause why the verdict which has been entered for the plaintiff for 750*l.*, should not be increased to 1,000*l.*

The action was brought upon an agreement made between the plaintiff and the defendant, whereby the defendant agreed to act as a principal comedian at the Theatre Royal, Covent Garden, during the four then next seasons, commencing in October 1828, and also to conform in all things to the usual regulations of the said Theatre Royal, Covent Garden; and the plaintiff agreed to pay the defendant 3*l.* 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances during the next four seasons, and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. The agreement also contained a clause, that, if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1,000*l.*, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount; and which sum was thereby declared by the said parties to be liquidated and ascer-

tained damages, and not a penalty or penal sum, or in the nature thereof.

The breach alleged in the declaration was, that the defendant refused to act during the second season, for which breach the jury on the trial assessed the damages at 750*l.*, which damages the plaintiff contends ought by the terms of the agreement to have been assessed at 1,000*l.*

It is, undoubtedly, difficult to suppose any words more precise or explicit than those used in the agreement; the same declaring not only affirmatively that the sum of 1,000*l.* should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature thereof. If the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have had the effect of ascertaining the damages upon any such breach at 1,000*l.*; for, we see nothing illegal or unreasonable in the parties by their mutual agreement settling the amount of damages uncertain in their nature at any sum upon which they may agree. In many cases, such an agreement fixes that which it is almost impossible accurately to ascertain; and, in all cases, it saves the expense and difficulty of bringing witnesses to that point. But, in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of 3*l.* 6*s.* 8*d.* per day, or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of 1,000*l.* But, that a very large sum should become immediately payable, in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which courts of equity have always relieved, and against which courts of law have, in modern times, endeavoured to relieve by directing juries to assess the real damages sustained by the breach of the agreement.

It has been argued at the bar, that the

liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy, by the verdict of a jury. But we can only say, that, if such is the intention of the parties, they have not expressed it, but have made the clause relate, by express and positive terms, to all breaches of every kind. We cannot, therefore, distinguish this case, in principle, from that of *Astley v. Weldon*, in which it was stipulated that either of the parties neglecting to perform the agreement, should pay to the other of them the full sum of 200*l.*, to be recovered in his Majesty's Courts at Westminster:—here there was a distinct agreement that the sum stipulated should be liquidated and ascertained damages; there were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments; the action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court, that, for this very reason, it would be absurd to construe the sum inserted in the agreement as liquidated damages, and it was held to be a penal sum only. As this case appears to us to be decided on a clear and intelligible principle, and to apply to that under consideration, we think it right to adhere to it; and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it.

The verdict must stand, and the rule for increasing the damages be discharged.

Rule discharged.

1829. } HENLEY v. THE MAYOR AND BUR-
July 8. } GESSES OF LYME REGIS.

Practice—Bail in error.

In an action against a corporation, the fact of a party being one of the burgesses, is no objection to his qualification as bail in error.

Mr. Serjeant Wilde, on the part of the plaintiff, opposed one of the bail in error in this cause, on the ground of his being a member of the corporation (a burgess), and therefore one of the defendants.

The Court overruled the objection.

1829. { WALSH, BART., AND ANOTHER,
July 8. { EXECUTORS OF SIR H. STRACHEY,
v. FUSSELL.

Covenant—to indemnify a parish against settlement of paupers.

A covenant by a lessee with the lessor, to indemnify the parish in which the demised premises lay "from all costs by reason of his (the lessee's) taking an apprentice or servant who should thereby gain a settlement :"—Held valid.

This was an action of covenant. The question which arose on the pleadings was, whether a covenant with the lessor of premises, that the lessee would indemnify the parish of Elm from all costs, by reason of his taking an apprentice or servant who should thereby gain a settlement, was a valid covenant.

The case was argued in Michaelmas term 1828, by *Mr. Serjeant Wilde* for the plaintiffs, and *Mr. Serjeant Stephen* for the defendant (see the report, *ante*, p. 25), when the Court directed another argument. The second argument accordingly took place on a former day in this term.

Mr. Serjeant Wilde contended, that a pauper has no privilege to claim a settlement in one place rather than another; that, being entitled to relief wherever he is settled, the place of settlement is a matter of indifference; and that, with respect to the overseers, although a covenant to pay a sum in discharge of a liability to the parish had been held to be illegal, a contract of indemnity never had been held void.

Mr. Serjeant Stephen contended that the covenant had the effect of preventing the defendant from hiring apprentices and servants out of other parishes than that of Elm, and was thus contrary to the spirit of the poor laws, inasmuch as it would prevent the poor from bettering their condition, and that it had a tendency to make the overseers less mindful of their duty.

Cur. adv. vult.

Lord Chief Justice Tindal delivered the judgment of the Court:—

The plaintiffs declared in covenant, as executors of Sir Henry Strachey, upon an indenture of demise bearing date the 12th of March 1792, and made between the said

Sir Henry of the one part, and the said defendant of the other part, by which certain premises were demised to the defendant for a term not yet expired; and the said indenture contained a covenant by the defendant, for himself, his executors, administrators, and assigns, that he did, in and by the said indenture, covenant, promise, and grant to and with the said Sir Henry, his heirs and assigns, amongst other things, that he, the said defendant, his executors, administrators, or assigns, should and would, from time to time, and at all times thereafter, fully and clearly save harmless the churchwardens and overseers of the poor of the parish of Elm for the time being, and all and singular other owners and occupiers of lands and tenements, and the inhabitants of or within the parish of Elm for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for or by reason or by means of the said defendant, his executors, administrators, or assigns taking an apprentice or servant who should thereby gain a settlement within or become chargeable to the parish of Elm aforesaid; and then assigned as a breach, that the defendant would not indemnify and save harmless the churchwardens and overseers of the poor of the parish of Elm from all costs by reason of his taking an apprentice or servant who should thereby gain a settlement, but, on the contrary thereof, he, the said defendant, after the making of the said indenture, and after the death of the said Sir Henry, and during the continuance of the said term, to wit, on the 1st of December 1826, took a certain servant, to wit, one William Lansdown, within the true intent and meaning of the said indenture, and the said William Lansdown, by reason of his being such servant to the said defendant, did gain a settlement within the parish of Elm aforesaid, and within the true intent and meaning of the said indenture, to wit, in the parish aforesaid, in the county aforesaid, and, having gained such settlement, became chargeable to the parish of Elm.

The defendant pleaded several pleas in bar, to which there was a demurrer and joinder; and the question which ultimately arose was—whether the covenant was a valid covenant in law.

It was contended, on the part of the defendant—first, that the plaintiffs had no interest which would authorize them to maintain an action—secondly, that the covenant was void, on the ground that it was unreasonable, that it was in restraint of trade, and that it was against the policy of the poor laws, inasmuch as it took away from the overseers any reason for economy, and was injurious to the poor themselves. But we do not think any of the objections maintainable; for, as to the first, the covenant being an express covenant with the lessor, and not being a covenant running with the land, an action lies for the breach thereof in the name of the personal representative of the covenantee, who becomes a trustee for the persons (whoever they may be) who are beneficially interested in the performance of the covenant; and, as to the objections to the covenant itself, we do not think any of the consequences above stated flow so naturally and necessarily from the observance of this covenant as to call upon the Court to hold it to be void.

It is not contended that the covenant is illegal on the ground of the breach of any direct rule of law, or the direct violation of any statute; and we think, to hold it to be void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public. But such is not the case. There is nothing in the covenant which will prevent the poor generally from being employed by the defendant. He may employ as servants or apprentices the poor of that parish, who may be sufficient for the service of the mill: he may employ in those capacities the poor who have settlements in other parishes, but who have certificates from those parishes; or he may, in the case of servants, hire them for a smaller term than a year, and thereby prevent them altogether from gaining a settlement. There is, therefore, no general restraint of the poor from being employed in the service of the defendant in this parish. And, as to any abstract right in a pauper to obtain a settlement in any parish he chooses to select, as he must have a settlement somewhere, the law will not consider a settlement in one parish rather than

another as any benefit to the poor. If the objections urged in this case had been entitled to weight, we think they would not have been omitted in *The Mayor of Congleton v. Pattison* (1); for, although the question in that case was, whether or not the covenant ran with the land, this objection would at once have put an end to the action. And in a case of *Hill and Others v. Eastaff*, which was argued in the King's Bench, in Easter term 1819, where an action of debt was brought upon a bond conditioned that the obligors, who were the churchwardens and overseers of one parish, should indemnify the obligees, who were the churchwardens and overseers of another parish, and all the inhabitants of that parish, from all costs, charges, and expenses which might be incurred by the latter parish, by reason of one Stevenson having put himself apprentice to one Moor in the latter parish, the Court gave judgment for the plaintiffs; and some of the objections above raised would have applied as well to that case as to the one before us.

Upon the whole, we think that the judgment in this case should be given for the plaintiffs.

Judgment for the plaintiffs.

1829. }
July 8. } *Ex parte* JEFFRIES.

Overseer—Exemption from duty of serving the office of.

The Clerk of the Treasury of this Court is not liable to serve the office of overseer.

Mr. Serjeant Wilde, on a former day, obtained a rule *nisi* for a writ of privilege to exempt the applicant, the Clerk of the Treasury of this Court, from liability to serve the office of overseer of the poor of the parish of St. Giles, on the ground of his duty requiring his constant personal attendance on the Court.

Mr. Serjeant Merewether, contra, contended that the office of Clerk of the Treasury did not require personal attendance.

He cited *Bishop v. Lloyd* (1), and *Rea v. Clarke* (2).

Mr. Serjeant Wilde, in support of his rule, submitted that the privilege claimed was one attached to the court and not to the individual; that the personal attendance of the officers of the court could not be dispensed with; and that the court would take judicial notice of the duties required from its officers. He referred to the case of *The Mayor of Norwich v. Berry* (3), where an attorney of this court, who was also a member of the corporation of Norwich, was held to be exempted from serving an office in the corporation, on the ground of his supposed attendance in court.

Cur. adv. vult.

Lord Chief Justice Tindal now—after reading some extracts from the report of the commissioners appointed by parliament to inquire into the duties and emoluments of the officers of the various courts of justice in Great Britain, published in 1816, which tended to shew that the Clerk of the Treasury is bound to attend personally—said that the duties of overseer were clearly incompatible with such personal attendance, and that therefore the rule for the writ of privilege must be made—

Absolute.

1829. }
July 8. } HAMMOND v. TEAGUE.

Practice—Rule to plead.

In assumpsit, the Court will not allow a party to plead specially (with the general issue) that which may be given in evidence under the general issue, unless the plea be simple, and tending to a single issue.

This was an action of assumpsit for money had and received, money lent, money paid, &c.

Mr. Serjeant Russell, on a former day in this term, obtained a rule *nisi* to plead several matters—first, the general issue—

(1) Bunb. 225.

(2) 1 Term Rep. 679.

(3) 4 Burr. 2109; a. c. 1 Sir W. Bl. 636.

(1) 10 East, 130.

secondly, "That, before the said times in the said first, second, and third counts mentioned, to wit, on the day and year aforesaid, to wit, at &c. aforesaid, the said plaintiff and divers other persons had entered into and become and then were shareholders and partners together in a certain partnership or company, called the Cornwall and Devonshire Mining Company, and remained and continued such partners for a long space of time, to wit, from thence hitherto; that the said several sums of money so alleged to have been lent and advanced, and paid, laid out, and expended by the said plaintiff, to and for the use of the said defendant, and had and received by the said defendant to and for the use of the said plaintiff, were lent and advanced, and paid, laid out, and expended by the said plaintiff, and had and received by the said defendant and the said other partners in the said company or partnership, for and towards the purposes and concerns of the said company and partnership; and the said sums then and there became and were part of the stock and effects of the said company or partnership, and became and were common to all the partners and shareholders therein, to wit, at &c."

Mr. Serjeant Wilde and Mr. Serjeant Meremether shewed cause, contending that

all that could be given in evidence under the second plea might also be given under the general issue, and citing *Carr v. Hinchliffe* (1), and *Maggs v. Ames* (2).

Mr. Serjeant Russell, in support of his rule.—The same plea was pleaded in *Moffatt v. Van Millingen* (3), and in *Mainwaring v. Newman* (4), in the former case without, in the latter with the general issue. In *Holmes v. Higgins* (5), too, Lord Tenterden held, that such a plea might be pleaded.

Lord Chief Justice Tindal.—We shall not in any degree obstruct the defence to the action, by refusing to allow this plea to be put on the record; for everything it contains may be given under the general issue. There is doubt and ambiguity enough on the face of it to perplex the plaintiff in his reply.

The rest of the Court concurring—

Rule discharged.

(1) 4 Barn. & Cress. 547; 4 Law Journ. K.B. 5.
(3) 2 Bos. & Pul. 124.

(2) 4 Bing. 470; s. c. 5 Law Journ. C.P. *nomine* *Maggs v. Ault*, 130.

(4) *Ibid.* 120.

(5) 1 Barn. & Cress. 74; s. c. 1 Law Journ., K.B. 47.

C A S E S
ARGUED AND DETERMINED,
RELATING TO
THE POOR LAWS,
TO
POINTS IN CRIMINAL LAW,
AND
OTHER SUBJECTS
CHIEFLY CONNECTED WITH
The Duties and Office of Magistrates:
COMMENCING
IN THE SITTINGS BEFORE MICHAELMAS TERM, 9 GEO. IV.

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MDCCCXXIX.

REPORTS OF CASES

CONNECTED WITH

THE DUTIES AND OFFICE OF MAGISTRATES :

COMMENCING IN THE

SITTINGS BEFORE MICHAELMAS TERM, 9 GEO. IV.

1828. }
Oct. 30. } THE KING v. HEWETT, ESQ.

Poor Rate—Majority of Churchwardens and Overseers.

1. *The same person cannot at the same time fill the offices of churchwarden and overseer.*

2. *And where a rate appears to have been made by a person as churchwarden, and also as one of the overseers, the Court will not presume a merely possible case in order to maintain such a rate, though it has been allowed by two Justices.*

The defendant appealed to the Sessions for the county of Huntingdon, against a poor rate for the parish of Hilton in the said county. The Sessions confirmed the rate, subject to the following

CASE.

Amongst the grounds of appeal, mentioned in the appellant's notice, was the following:—"That the assessment was not made according to the statute, and with the concurrence of the major part of the churchwardens and overseers of the said parish." It was proved, that, when the rate was made, there were two churchwardens, Walter Peck, and the appellant George Goodman Hewett ;

that the same Walter Peck and Francis Mann, and they only, were appointed overseers ; that the said rate was signed by the said Mann in the following manner :—" Walter Peck, churchwarden ;" " Walter Peck and Francis Mann, overseers ;" and allowed by two Justices. It was also proved, that, for the five years preceding, there was always an appointment of two distinct churchwardens and two distinct overseers ; but that, previous to that time, it had differed. On the part of the appellant, it was contended, that the appointment of the same person to be both churchwarden and overseer was illegal ; and that the provisions of the statute requiring the rate to be made by a majority of the parish officers, had not been complied with.

If the Court of King's Bench are of that opinion, then the order of Sessions is to be quashed. If the Court should be of opinion that the provisions of the statute had been complied with, then the order of Sessions to be confirmed.

Mr. Kelly endeavoured to support the order of Sessions.—It cannot be denied that, according to the case of *The King v. All Saints, Derby* (1), there must be two overseers exclusive of the churchwardens.

And it may be admitted that the same person cannot act in the character of overseer and also in that of churchwarden. But in this case there were two overseers distinct from the churchwarden: at least, it may be so intended.

[*Mr. Justice Bayley.*—But still you have the same person acting as both churchwarden and overseer.]

Every possible intendment should be made in favour of an order of Justices. It was so laid down by Lord Kenyon in *The King v. Chichester* (2). This was adopted in the case of *The King v. Hinckley* (3). And, in the subsequent case of *The King v. Catesby* (4), *Mr. Justice Bayley* observed, in speaking of the case of *The King v. Hinckley*, "the Court did intend, that, as by custom, there might be only one churchwarden and two existing overseers at the time, the indenture in question might be good. Generally speaking, there ought to be two churchwardens in every parish; but by custom there may be one." Now, if in this case Peck had been appointed overseer, and afterwards had been appointed churchwarden, his subsequent appointment as churchwarden would be void; and supposing there to be by custom in this parish but one churchwarden, you would in this case have a majority to support the rate.

Mr. Justice Bayley.—The case of *The King v. Catesby* was a case where the Court would not presume fraud. Here we are asked to presume a custom, without a single fact to justify us in such a presumption.

Order of Sessions quashed.

[*Mr. Brougham* was to have argued against the order of Sessions.]

(2) 3 Term Rep. 496.

(3) 12 East, 361.

(4) 2 Barn. & Cress. 861.

1828. } THE KING v. THE INHABITANTS
Oct. 30. } OF HIPSWELL.

Poor Laws—Chimney Sweeper's Apprentices.

An indenture of apprenticeship, or other contract of service with a chimney sweeper is altogether void, if it be not made in conformity with the 28 Geo. 3. c. 48.

The pauper, when of the age of five years, had been apprenticed to a chimney sweeper for seven years. The indenture of apprenticeship was in the common form, between the master, the father, and the apprentice. The pauper served the time under the indenture: and the question was, whether this service conferred a settlement. The Sessions were of opinion that it did; but they reserved the question for the opinion of this Court.

The case turned upon the 28th Geo. 3. c. 48; and, as that statute is not given in *Mr. Nolan's* work on the poor laws, we insert the material clauses (1).

The act is intituled "An act for the better regulation of chimney sweepers and their apprentices." The preamble runs thus, "Whereas the laws now in being, respecting masters and apprentices, do not provide sufficient regulations so as to prevent various complicated miseries to which boys employed in climbing and cleansing of chimneys are liable beyond any other employment whatsoever, in which boys of tender years are engaged; and whereas the misery of the said boys might be much alleviated if some legal powers and authorities were given for the regulation of chimney sweepers and their apprentices."

The first section provided, that churchwardens and overseers of the poor, with the consent of two Justices, may bind boys of the age of eight years or upwards who shall be chargeable, or whose parents shall be chargeable, or who shall beg for alms, (or by the consent of the parents,) to a person exercising the trade of a chimney sweeper until the boy shall attain the age of sixteen years.

The second section provided, that the age of the child should appear in the indenture.

(1) The provisions of the act are given in *Mr. Gambier's "Law of Settlement,"* p. 52, 138, and 141.

The third provided for a form of the indenture by reference to the schedule at the end of the act.

The fourth section provided, "that all indentures, covenants, promises and bargains, hereafter to be made or taken, of or for the having, taking, employing, retaining, or keeping of any boy or boys, as or in the nature of an apprentice or apprentices, or servant or servants, employed in the capacity of a climbing boy or chimney sweeper, who shall be under the age of eight years as aforesaid (2), than is by this act limited, ordained and appointed, shall be absolutely void in the law to all intents and purposes; and that every person who shall from henceforth have, take, employ, retain, or keep, any such boy or boys as or in the nature of an apprentice or apprentices, or servant employed in the capacity of a climbing boy or chimney sweeper as aforesaid, who shall be under the age of eight years as aforesaid, contrary to the tenour and true meaning of this act, and being convicted thereof as hereinafter mentioned, shall forfeit and pay, for every such apprentice or servant so by him or her had, taken, employed, retained, or kept, any sum not exceeding ten pounds, nor less than five pounds."

The sixth section provided, "that it shall and may be lawful for one or more Justice or Justices, and he or they shall have full power and authority, and is and are hereby authorized and empowered to inquire into and examine, hear and determine, as well all complaints of hard or ill usage from the several and respective masters or mistresses to whom such apprentice and apprentices shall be so bound as aforesaid, as also all complaints of such boys as already have or who shall at any time hereafter voluntarily put themselves apprentices to such trade, business, or mystery of a chimney sweeper as aforesaid; and in like manner also to inquire into and examine, hear, and determine all complaints of masters or mistresses against such apprentice or apprentices, and to make such orders therein respectively as he or they is or are now enabled by law to do in other cases between masters and apprentices."

The seventh section provided "that no

master should have more than six apprentices at one time."

The ninth section provided, "that no person or persons using or exercising the trade, business, or mystery of a chimney sweeper, shall let out to hire, or lend by the day, or otherwise, to any other person for the purpose of sweeping of chimneys, any boy or boys that are already apprentice or apprentices, or that shall hereafter be bound apprentice or apprentices, under the directions of this act, nor shall cause such boy or boys to call the streets before seven of the clock in the morning, nor after twelve of the clock at noon, between Michaelmas and Lady-day; nor before five of the clock in the morning, nor after twelve of the clock at noon between Lady-day and Michaelmas: and that, if any master or mistress shall, after the passing of this act, offend in any of the cases aforesaid, he or she shall forfeit and pay for every such offence any sum not exceeding ten pounds, nor less than five pounds."

The schedule to the act gave the form of the indenture. It made the parties to be the churchwardens and overseers of the poor of the parish, ["or the father, or next friend of the boy, as the case may be,"] with the consent of the Justices, and the master of the other part. There were the usual provisions relating to apprentices; and others not in the usual form. Among the latter were, that the master should not assign over the apprentice without the consent of two Justices; that there should be a suitable working dress for the apprentice; that, over and above the working dress, he should, every year at least, have a suit of clothing, with suitable linen, stockings, hats and shoes; that once in every week he should be thoroughly washed; that he should be required to attend the public worship of God on the Sabbath-day, and be permitted and allowed to receive the benefit of any other religious instruction; and that he should not wear his sweeping dress on the Sabbath. There were also the provisions contained in the ninth section, and that the apprentice should not be forced to climb or go up any chimney which should be actually on fire; nor should any person, by the master's directions, make use of any violent or improper means to force him to climb or go up any such chimney, but that

(2) The words "or otherwise," it is believed, have been here omitted by mistake.

the apprentice should in all things be treated with as much humanity and care as the nature of the employment would admit of.

Mr. Patteson, in support of the order of Sessions.—The Sessions have rightly decided, that this indenture was not affected by the act of parliament in question. This was not a parish indenture. In the form of the indenture given, it is supposed to be a parish indenture. The parish officers are parties.

[*Mr. Justice Bayley*.—Or the parent.]

Certainly; but with the consent of the Justices. The other side will mainly rely upon the fourth section. Its language is not very clear; but, probably, the words "or otherwise," will be introduced by the other side in the reading of it. But, conceding this, it does not follow that an indenture made not in conformity with the provisions of this act, is void for all purposes. The sixth section speaks of voluntary bindings; and the 7th, which limits the number of apprentices to be kept by one master, does not make the distinction; so that a master is to keep but six, voluntary or not. All this would infer that the protection of the legislature was meant to prevent compulsory bindings on the children, and not to deprive them of the right to bind themselves, which right they had at common law. An infant may make a contract for his own benefit; and may perform it or repudiate it; but if he perform it, the contract is executed; and, as far as regards infancy, all question is at an end. The penalty imposed on the master, in the case given by the ninth section, could apply only to a parish binding. The right of an infant to bind himself does not appear to be limited to any age. *Brooke's Abridgment*, tit. "Labourers," speaks of labourers "not of the age of five years," which shews, that at that age they are considered capable of earning. Where a child is of an age extremely tender, as in the case of *Hall v. Hollander* (3), the law does not raise a presumption of its filling the relation of servant. In that case the father brought an action against the defendants for their negligence in driving over his child; of the age of two years and a half, *per quod servitium amisit*; and the Court held that the action lay not. But in *1 Bott*.

(3) 4 B. & C. 660; 7 D. & R. 133; 4 Law Journ. K. B. 39.

613, it seems that the age of eight years will do; and *1 Burn*, tit. "Apprentices," the passage from *Brooke's Abridgment* is given. But, even supposing that the act in question is applicable to this case, still the indenture is not absolutely void, but is voidable only. The master might be liable to a penalty for violating the enactment; but the apprenticeship, and the service under it, when completed, may be good for the purposes of settlement. The act, it is true, says, "void to all intents and purposes;" but those words do not, in all cases, of necessity make the thing in question void. That exemption was held in the case of *The King v. St. Nicholas, Ipswich* (4).

[*Mr. Justice Bayley*.—There, the matter related to the parties. Here, the object in view is a public one.]

The words are the same in both cases. In *The King v. the Inhabitants of Stoke Damarel* (5), the same words were used, but words of stronger import were added; and on that account the act there in question was held to be void.

[*Mr. Justice Bayley*.—I do not observe that this indenture contains any of the wholesome provisions contained in the form of indenture given in the schedule to the act.]

Mr. Alderson, contra.—The words "or otherwise," which have evidently been omitted by mistake in the act, will render the fourth clause intelligible. And then comes the question, whether this indenture was not altogether void. A distinction has been made between voluntary and compulsory bindings, but no such distinction is made in the act, with regard to the provisions which were directed respecting the age and the treatment of the children. Nor is a voluntary binding of necessity connected with a state of infancy. For corporate purposes, as well as many others, it happens that a man binds himself apprentice after he has attained the age of twenty-one. Then, as to the main point, whether the instrument is void, or only voidable? The child is presumed by the legislature to be unable to make a bargain for himself, and therefore they make it for him. And as to its being thought voidable only, can it be supposed that such a child knows how to go through the pro-

(4) *Burr. S.C.* 91.

(5) 7 B. & C. 563; 1 M. & R. 438; 6 Law Journ. Mag. Cases, p. 28.

cess of declaring it to be void? The case of *The King v. St. Nicholas, Ipswich*, was one of a very strong and extreme construction of the act of Elizabeth, and the Court will be disposed to go beyond it. The distinction between the expression "void" and that of "void to all intents and purposes," is too refined; at least it becomes so when considered with reference to any thing but the conduct of parties to a contract. Here, it was the object of the legislature to protect the children.

Mr. Justice Bayley.—I am of opinion, that no settlement was gained by the service under this indenture. The preamble of the act in question, and all its provisions, shew, that the main object of the legislature was to render certain provisions indispensable in the apprenticing of children to chimney sweepers. This appears from the sections 1, 2 and 3. The form given in the schedule is applicable to either case, whether the child be bound by the parish officers, or by the parents with the consent of the Justices. It is not necessary to decide whether this form is applicable to all bindings to persons exercising the trade of a chimney sweep; because it is evident by the fourth section, that it applies to all cases like the present, where the apprentice is, to serve in the character of a chimney sweep. The fourth section, in this respect, goes beyond the three preceding, for it extends to all apprentices or servants employed in the capacity of a climbing boy or chimney sweep; and it declares that all indentures and contracts respecting such persons, not made in conformity with the act, shall be void to all intents and purposes. Mr. Patteson raised a point on the latter expression; and truly there are cases where the word "void" means "voidable" at the election of the parties to the contract; but those are cases between the parties to the contract. The object in this case was of a public nature. It was by the legislature considered cruel to employ children of so very tender an age for such a purpose. To give a supposed option under such circumstances, would be to allow the mischief which it was the intention of the act to prevent. I think, therefore, that the fourth clause renders this indenture void; and, consequently, that the Sessions were wrong in contending

that a settlement was derived by a service under it.

Mr. Justice Littledale.—I am of the same opinion. The words of the fourth clause are not very clear. Some words must be either supplied or rejected; and, I think, the words "or otherwise" may be supplied, in order to give effect to the intention. Then, considering the clause with those words, it seems to me, that the present indenture was void in not having been made under the provisions rendered necessary by that clause. I think it was altogether void, and not voidable only, as has been contended by Mr. Patteson. The distinction in those cases cannot apply to an act of parliament which was passed for the attainment of a public object.

Order of Sessions quashed.

1828. } THE KING v. THE JUSTICES OF
Nov. 27. } GLOUCESTERSHIRE.

Appeal—Magistrate's Duty.

An act of parliament authorized a conviction by two magistrates, and gave a power of appeal, upon the person entering into recognizances and giving notice in writing, to the convicting magistrates, of his intention to appeal. A person convicted under this act expressed his intention to appeal; entered into the recognizances, and requested the magistrates' clerk to prepare the notice for him, but the latter declined so to do. The magistrates told the appellant, that they were then obliged to separate; but that if he left the notices at any time that day with their clerk, his so doing should be good service upon them. He did not send the notices until shortly before the Sessions; and for want of a proper notice the Sessions refused to hear the appeal. The appellant swore, that he believed at the time that he had done all that was necessary to secure his right of appeal:—

Held, that the magistrates ought either to have waited together a reasonable time to give the appellant an opportunity to prepare his notice, or should have directed their clerk to do it for him; and that the appeal ought therefore to be heard.

This came before the Court in the form of a rule, calling upon the Justices to shew cause why a mandamus should not issue, commanding them to enter continuances and hear an appeal of one Sayer, against a conviction under the 17 Geo. 3. c. 56. s. 20; the offence being the having in his possession woollen materials suspected to be embezzled.

The clause in the act in question, which gives the appeal against a conviction, renders it necessary that the appellant should not only enter into recognizances, but should give notice, in writing, to the convicting magistrates of his intention to appeal at the time of his conviction.

In the present case the appellant, on being convicted, declared his intention to appeal, and stated that he had brought his sureties with him. The magistrates read over to him the clause, rendering the written notice of appeal necessary, and explained the same to him. The appellant applied to the clerk of the magistrates requesting that he would prepare the notice for him. The clerk declined to do this; whereupon the magistrates asked the appellant if he meant to give the required notices; and on his stating that he was not prepared with them, informed him, that they were obliged to separate, and that, as he was not then prepared to give the written notices, they might enforce the conviction; but that, as they were always desirous that their judgment should be reviewed, and from a compassionate feeling to him, they would consider notices left with their clerk at his office, at any time *during that day*, a statutory service upon themselves, and would so accept the notices. The appellant expressed his thanks, and promised that he would not quit the place that evening without leaving the notices as directed; and upon this promise his recognizance and those of his sureties were taken. The appellant then paid the fees for taking the recognizances; and he now swore that he then considered that by so doing he had done all that was required. In point of fact, however, a month afterwards, and before the Sessions, his attorney served notices of appeal. The Sessions considered that the appellant had not given the notice required by the act, and refused to hear his appeal. Where-

upon, the rule before mentioned having been obtained,—

Mr. Justice shewed cause.—This rule has been obtained on the authority of the case of *The King v. the Justices of Leeds* (1), where the conviction was under the same act of parliament. The facts, however, of that case are so mainly distinguishable from the present, that it may be cited as an authority against this application. There, the magistrates had failed to apprise the appellant of the necessary preliminaries to his appeal. Here, they not only pursued, in minute and particular detail, the directions of the act, by full explanation thereof to the appellant, but suggested a mode by which the legislative enactment might be complied with, so far as they were parties to the prior proceedings on his part. That he understood both the act and the magistrates, is palpable: he repaid them with speeches, and promised obedience on that day to their intimation before he left the town. He did neither, because neither did he intend to do. The statute therefore being disobeyed, he had no right in law or justice to claim the privilege of appeal; and the existing law, as well as every principle of expediency, militates against extending to him the right he now claims.

Mr. Maule (contrà) was stopped by the Court.

Lord Tenterden.—The magistrates in this case did not do enough. If they had waited together a reasonable time for the notice, or had directed their clerk to draw it out for the man, all this would have been avoided. The appellant, after all, might have been mistaken, and might have acted under a belief that he had done all that was required. I dare say the magistrates did not intend to do any thing that was not right; but they did not do so much as they ought to have done.

Mr. Justice Bayley.—The provisions in these appeal clauses, must not be used as traps, to shut out appeals.

Rule absolute.

1828. } THE KING v. THE JUSTICES OF
Nov. 28. } HAMPSHIRE.

Sessions Practice—Notice of Appeal.

Semble—That where notice is given that no business will be transacted on the day usually fixed for holding the Sessions, but that the Sessions will be adjourned for business until a future day, a notice of appeal given in time for that future day, according to the practice of the Sessions, will be sufficient.

And even, if a notice of appeal should be held insufficient by the Sessions, the Court will exercise a discretionary power over the Sessions practice, and, if they think it reasonable, will order the appeal to be heard.

This was a rule calling on the Justices to shew cause why they should not enter continuances, and hear an appeal which had been entered against an order of removal. The facts were shortly these.

About three weeks before the day for holding the July Sessions, a notice appeared in the newspapers of the county, stating, that, in consequence of the Sessions week being the same as the Assize week, the Justices would meet on the usual day, and would adjourn the Sessions to a day then mentioned. The practice of the Sessions required eight days notice of appeal.

The attorney for the appellant, stated in his affidavit, that in consequence of the announcement in the newspapers, he did not serve notice on the other side eight days before the formal day for holding the Sessions; but he gave a notice which would be eleven days before the day appointed in the advertisement for proceeding to actual business. The result therefore was this,—if the attorney for the appellant, notwithstanding what he saw in the advertisement, ought to have given eight days notice of appeal, before the usual and formal day, he had not given a proper notice. If the day appointed by the advertisement for proceeding to business, was to be considered as the day to guide the eight days notice, then there had been a sufficient notice. The Sessions were of opinion, that the notice was insufficient, and refused to hear the appeal.

Mr. C. F. Williams now shewed cause against the rule, and contended, that the

SUPPL. 1829.

notice ought to have been given eight days before the usual day; and that the appellants had no right to take into calculation the adjournment of the Sessions. They should have given the notice according to the practice of the Sessions, in order that the respondents might prepare. Not receiving a notice until after the usual time, they were led to suppose that it would not be necessary to prepare for the Sessions.

Mr. Poulter, contra, contended that the notice was a good notice; it was given with reference to the day of actual business; and it would have been almost absurd to give notice with reference to a day when it was clear that the appeal would not be heard. But, even if the Court should think the appellant ought, in strictness, to have given the notice with reference to the usual time, the Court in the exercise of their visitatorial jurisdiction, direct the Sessions to hear the appeal. The question as to reasonable notice is in general discretionary with the magistrates; but is subject to the controul of the Court. This was laid down by Lord Ellenborough in the case of *The King v. the Justices of Wilts* (1). The same controlling power was exercised in *The King v. the Justices of Leicester* (2) and *The King v. the Justices of Lancashire* (3). Wherever the Court has thought it reasonable that the appeal should be heard, they have ordered the Sessions to hear it.

Mr. N. R. Clarke, as *amicus curiæ*, informed the Court, that in Lincolnshire the practice was to give the notice of appeal with reference to the adjourned Sessions.

Mr. Alderson also stated that the practice was the same in Yorkshire.

Lord Tenterden.—I think the attorney might be misled by the notice in the newspapers, and that it is reasonable this appeal should be heard.

Mr. Justice Bayley.—I am of the same opinion; but I disapprove of the practice of not giving notices until the latest period.

Rule absolute.

[See also *The King v. the Justices of Wilts*, 6 Law Journal, Magistrate's Cases,

(1) 10 East, 406.

(2) 7 B. & C. 6; 5 Law Journ. Mag. Cases, 95,

(3) 7 Id. 691.

97, as to the practice of the Sessions, in entering and respiting appeals.]

1828. }
Nov. 28. } THE KING v. JAMES NUNN.

Smuggling—Jurisdiction of Magistrates.

The magistrates of the place, on land, to which a person charged under the 6 Geo. 4. c. 108. s. 74. is carried, have jurisdiction over the subject matter; although the person may have been taken on board a vessel, upon waters within another jurisdiction.

A rule had been obtained on behalf of the defendant, calling upon the Solicitor of the Customs to shew cause why a writ of *habeas corpus* should not issue, directed to the gaoler, or keeper of the convict gaol at Springfield, in the county of Essex, commanding him to bring before the Court, the body of James Nunn. At the same time, a *certiorari* issued, commanding the Justices of the borough of Harwich to return the depositions taken touching the conviction of the said James Nunn, as well as the conviction itself.

On the depositions being returned, it appeared that the defendant had been convicted under the Smuggling Act, 6 Geo. 4. c. 108. s. 74, for having been found on the high seas, on board a vessel liable to forfeiture, under the provisions of that act. The cause of forfeiture of the vessel was, that, not being square rigged, and belonging, in the whole, to his Majesty's subjects, she was found on the high seas within one hundred leagues of the coast of the county of Essex, having on board 4300 pounds weight of tobacco, and a certain quantity of snuff in packages, each package containing less than 450 pounds weight. The defendant being taken on board the vessel, was carried to the borough of Harwich, and convicted in the penalty of 100*l.*; and in default of payment, was committed to Springfield gaol until he paid the penalty.

The clauses in the above act, and also in the 6 Geo. 4. c. 107, and 7 Geo. 4. c. 48, which bear upon the case, are as follows:—

[The acts will be found under their proper dates in the *Abridgment of the Statutes* belonging to this work; but, for the conve-

nience of immediate reference, the clauses are given.]

By the Customs Act, 6 Geo. 4. c. 107. s. 52, it is enacted, that tobacco and snuff shall be imported into the United Kingdom, only under the following restrictions, viz.

“Unless in a ship of the burthen of 120 tons or upwards, and unless in hogsheads, casks, chests or cases, each of which shall contain of neat tobacco or snuff at least 100 pounds weight, if from the East Indies, or 450 pounds weight if from any other place, and not packed in bags or packages within any such hogshead, cask, chest, or case, nor separated, nor divided in any manner whatsoever, except tobacco of the Turkish empire, &c. And unless the particular weight of tobacco or snuff in each hogshead, cask, chest, or case, with the tare of the same, be marked thereon.”

By the Smuggling Act, 6 Geo. 4. c. 108, it is enacted as follows:—

Sec. 2.—“That if any vessel, belonging in the whole, or in part, to his Majesty's subjects, or whereof one half of the persons on board, or discovered to *have been* on board, the said vessel, shall be subjects of his Majesty, shall be found within four leagues of the coast of that part of the United Kingdom, which is between the North Foreland on the coast of Kent, and Beachy Head, on the coast of Sussex, or within eight leagues of the coast of any other part of the said United Kingdom, or shall be discovered to *have been* within the said distances, not proceeding on her voyage, wind and weather permitting, having on board, &c. any goods whatsoever liable to forfeiture, then, not only all such goods, together &c., but also the vessel, together &c. shall be forfeited.”

Sec. 3.—“That if any vessel or boat, (not being square rigged) belonging in the whole, or in part, to his Majesty's subjects, or whereof one half of the persons on board, or discovered to *have been* on board, the said vessel or boat, shall be subjects of his Majesty, shall be found in any part of the British or Irish Channels, or elsewhere on the high seas, within 100 leagues of any parts of the coasts of the United Kingdom, or shall be discovered to *have been* within the said limits or distances, having on board, or in any manner attached or affixed thereto,

br having *had* on board, or in any manner attached or affixed thereto, or conveying or *having conveyed* in any manner, any brandy or other spirits, in any cask (of the description therein mentioned) 'or tea, &c., or any tobacco or snuff, in any cask or package whatever containing less than 450 pounds weight, or packed separately, in any manner, within any such cask or package, (except loose tobacco for the use of the seamen, not exceeding five pounds weight for each seaman, &c.) or any articles or implements, or materials adapted for the repacking tobacco or snuff, (unless, &c.) then, and in such case, the said spirits, tea, tobacco or snuff, together with the casks or packages containing the same, &c., and also the vessel or boat, with all her guns, &c. therein, shall be forfeited."

Sec. 16.—"That all vessels and boats made use of, in the removal, carriage, or conveyance of any goods liable to forfeiture under this or any other act relating to the revenue of Customs shall be forfeited." (See 7 Geo. 4. c. 48. s. 14, *post*.)

Sec. 49.—"That every person, being a subject of his Majesty, who shall be found or discovered to *have been* on board any vessel or boat liable to forfeiture under this or any other act relating to the revenue of Customs, for being found within four or eight leagues of the coast of the United Kingdom as aforesaid, or for being found, or discovered to *have been*, within any of the distances or places in this act mentioned, from or in the United Kingdom, or, &c. having on board, or in any manner attached or affixed thereto, or *having had* on board, or in any manner attached or affixed thereto, or conveying or *having conveyed* in any manner such goods or other things as subject such vessel or boat to forfeiture, or, &c., shall forfeit the sum of 100*l.*; and that it shall be lawful for any officer, &c., or any officer of Customs or Excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, and he or they is and are hereby authorized, empowered, and required to stop, arrest, and detain every such person, and to carry and convey such person before two or more Justices of the Peace in the United Kingdom, to be dealt with as hereinafter directed."

Sec. 73.—"That all penalties and for-

feitures, incurred or imposed by this or any other act relating to the revenue of Customs, shall and may be sued for, prosecuted, and recovered by action of debt, &c. in the name of the Attorney General, or in the name of some officer of his Majesty's Customs, or by information, before any two or more of his Majesty's Justices of the Peace in the United Kingdom."

Sec. 74.—"That in case any offence shall be committed upon the high seas, against this or any other act relating to the revenue of Customs, or any penalty or forfeiture shall be incurred upon the high seas for any breach of such act, such offence shall, for the purpose of prosecution, be deemed and taken to have been committed, and such penalties and forfeitures to have been incurred, at the place on land in the United Kingdom *into which the person* committing such offence, or incurring such penalties or forfeiture, *shall be taken, brought or carried*; and in case *such* place on land is situated within any borough, liberty, franchise, or town corporate, as well any Justice of the Peace for such borough, &c. as any Justice of Peace of the county within which such borough, &c. is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas; any charter or act of parliament to the contrary notwithstanding. Provided always, that all offences against this or any other act relating to the revenue of Customs, committed in any city, shall be deemed and taken to have been committed in the county within which such city, &c. is situated, and as well any Justices of the said city, &c. as any Justice of any county in which such city, &c. is situated, shall have jurisdiction to hear and determine the same."

Sec. 75.—"That, in cases where any information shall be exhibited before two or more Justices of Peace, for the recovery of any penalty under this or any other act relating to the revenue of Customs, it shall and may be lawful for the said Justices, and he or they is or are hereby authorized and required to summon the party accused; and, upon his, her, or their appearance, or default, to proceed to the examination of the matter, and upon due proof thereof, either upon the voluntary confession of such party, or upon the oath

of one or more credible witness or witnesses, to convict; and, in case of non-payment, the said Justices are hereby authorized and required to cause the same, by warrant of distress and sale, to be levied upon the goods of the said offender; or, in case it shall appear to such Justice, &c. that such offender has not sufficient goods whereon to levy the said penalty, it shall be lawful for such Justices to commit such offender to any of his Majesty's gaols in the county where the offence shall have arisen, or wherein the offender or offenders shall have been found, there to remain until the penalty or penalties shall be paid."

Sec. 80.—"That it shall be lawful for any two or more Justices of Peace, before whom any person liable to be arrested and detained, and who shall have been arrested and detained, for being found, or discovered to *have been*, on board any vessel or boat liable to forfeiture under this or any other act relating to the revenue of Customs, shall be carried, on the confession of such person of such offence, or on proof thereof upon the oaths of one or more credible witness or witnesses, to convict such person of any such offence; and every such person so convicted as aforesaid, shall, immediately upon such conviction, pay into the hands of such Justices, for the use of his Majesty, the penalty of 100*l.*, without any mitigation whatever, for any such offence of which he shall be so convicted as aforesaid; or, in default thereof, the said Justices shall, and he or they is and are hereby respectively authorized and required, by warrant, &c. to commit such person so convicted as aforesaid, and send such defendant as aforesaid to any gaol or prison, there to remain until such penalty shall be paid: Provided, that if the person convicted of any such offence shall be a seaman or seafaring man, and fit and able to serve his Majesty in his naval service, it shall be lawful for any such Justices, and he or they is and are hereby required, in lieu of such penalty, by warrant, to order any officer of the army, &c., or officer of Customs, or Excise, to carry or convey, or cause to be carried or conveyed, such person on board of any of his Majesty's ships, in order to his serving his Majesty in his naval service for the term of five years," &c.

By the Act 7 Geo. 4. c. 48, to alter and amend the several laws relating to the customs,—It is enacted, (s. 14.) "That, in case any vessel shall, on account of any goods, become liable to forfeiture, under the said act for the prevention of smuggling, the goods creating such forfeiture shall also be forfeited."

Sec. 16.—"That if any vessel or boat whatever shall arrive, or shall be found or discovered to *have been* within any port, harbour, river, or creek of the United Kingdom, not being driven therein by stress of weather or other unavoidable accident, having on board, or in any manner attached or affixed thereto, or having *had* on board, or in any manner attached or affixed thereto, or conveying, or having conveyed, in any manner, within any such port, harbour, river, or creek, any brandy, or other spirits (as therein mentioned), or any tobacco or snuff, in any cask or package, in which such tobacco or snuff could not be legally imported into the United Kingdom in such vessel, (except loose tobacco, for the use of the seamen, not exceeding five pounds weight for each seaman,) every such vessel or boat, together with such spirits or tobacco, shall be forfeited; and every person found or discovered to *have been* on board such vessel or boat at the time of her becoming so liable to forfeiture, and knowing such spirits or tobacco to be, or to *have been*, on board, or attached to such vessel or boat, shall forfeit the sum of 100*l.*; and shall be liable to detention and prosecution, and to be dealt with in the manner directed by the said act for the prevention of smuggling, in cases of persons found or discovered to have been on board vessels liable to forfeiture under that act."

The following is a copy of the committal of the said James Nunn:—

Borough of Harwich,
in the County of Essex,
to wit.

To Wm. Pitt, an officer
of Customs, and to
Wm. Burton, and to
the gaoler or keeper
of the Convict Gaol
at Springfield, in the
county of Essex.

Whereas James Nunn has been duly convicted before us, John Bailey, esq. mayor, and George Graham, esq., two of his Majesty's Justices of Peace in and for the borough of Harwich, in the county of Essex, upon the information of Edward James Fen-

nings, esq., an officer of Customs, who was directed by the Commissioners of his Majesty's Customs to prefer the same, of having, within six months now last past, (that is to say) on the 18th day of September, in the year of our Lord 1828, (he, the said James Nunn, then and there being a subject of his Majesty, and liable to be stopped, arrested, and detained for the offence hereinafter mentioned,) been found on the high seas, on board a certain vessel liable to forfeiture, under the provisions of a certain act of parliament relating to the revenue of Customs: For that the said vessel, not being square-rigged, and belonging in the whole to his said Majesty's subjects, on the day and year last aforesaid, was found on the high seas aforesaid, elsewhere than in any part of the British or Irish Channels, within 100 leagues of a certain part of the coast of the United Kingdom, to wit, within 100 leagues of the coast of the county of Essex, having on board divers, to wit, 4300lb. weight of tobacco; and divers, to wit, 1800lb. weight of snuff, in divers, to wit, 155 packages, each package containing less than 450lb. weight; and the said tobacco, not being loose tobacco, for the use of the seamen then belonging to and on board the said vessel (not exceeding 5lb. weight for each such seaman), contrary to the form of the statute in that case made and provided: and the said James Nunn having been found on board the said vessel at the time of her becoming and being so subject and liable to forfeiture; and the said James Nunn having been, on the day and year last aforesaid, for the offence aforesaid, stopped, arrested, and detained by one William Pitt, (he, the said William Pitt, being then and there an officer of Customs,) and by him taken, brought, and carried into a certain place on land, in the United Kingdom, to wit, into the borough of Harwich, in the county of Essex aforesaid: And whereas we, the said Justices did adjudge, that he, the said James Nunn, had forfeited for his said offence the sum of 100l.; which said sum of 100l. has not been paid.— These are therefore to require you, the said William Pitt, and William Burton, forthwith to take, carry, and convey the said James Nunn to the said Convict Gaol at Springfield, in the said county of Essex, and to deliver him into the custody of the gaoler or keeper of the said Convict Gaol. And we, the said Justices, do hereby authorize and require you, the said gaoler or keeper of the said Convict Gaol, to receive and take the said James Nunn into your custody, and him safely to keep until he shall duly pay the said sum of 100l. Given under our hands and seals, at the borough of Harwich aforesaid, in the said county of Essex, this 22d day of September, in the year of our Lord 1828.

JOHN BAILEY, (L.S.)

GEORGE GRAHAM, (L.S.)

The main objection relied upon by *Mr. Platt*, who was counsel for the defendant, was, that the offence in question was not committed "on the high seas." It was this fact alone which would give the Magistrates jurisdiction. And it was contended, that the fact, which questioned the very jurisdiction of the Magistrates, was examinable by the Court; and that the con-

viction did not conclude the defendant from disputing the fact. As a fact, it was stated, that the offence was committed within the borough of Ipswich; and to shew this, the following was the substance of the defendant's affidavits.

"That the vessel was proceeding on her voyage, and sailing upon that part of the coast of Suffolk which lies next the bounds of the parish of Walton, in the county of Suffolk, but not at a greater distance than 300 yards from the land on the said coast, and in the river Arwell, commonly called, the "Ipswich Water;" and the place where she was stopped was opposite to the south-east side of the town of Harwich, in the county of Essex, where the river is about a mile wide, and that the town of Harwich and the coast of Essex may be very distinctly seen from the said place, and also from that part of the coast of Suffolk which is nearest to the said place.

"That the jurisdiction of the borough of Ipswich extends from the town down the river below Landguard Fort. That persons have been tried at the Borough Sessions of Ipswich, for offences committed upon the river, at least seven miles distant from the parochial limits of the borough."

Other circumstances were stated, having for their object the establishing of the same fact, namely, that the vessel, when the defendant was seized, was within the jurisdiction of the borough of Ipswich.

On the return, however, of the depositions, it appeared, that the vessel was seen "coming into the harbour." And the defendant, being found on board, was carried before the Magistrates of Harwich, and convicted; as has already been mentioned.

Mr. Solicitor General and *Mr. Shepherd* now shewed cause against the issuing of the *habeas corpus*. The fact of the offence having been committed on the high seas, was one of the facts charged against the defendant upon the hearing before the Magistrates. That fact has been investigated and decided; and it is no more examinable in this proceeding than any other fact essential to the offence. The defendant might as well, on the present occasion, dispute the fact of the tobacco being on board the vessel. But even if the question can be examined into, there is abun-

dant evidence that the offence was committed on the high seas. The vessel was seen coming into the harbour. The offence is, the being, or the *having been*, on board such a vessel. The Harwich Magistrates had, therefore, jurisdiction under the 74th section, as the defendant was taken before them.

Mr. Platt, contra.—This offence was committed within the local jurisdiction of Ipswich; or, at all events, the defendant was apprehended within that jurisdiction; and the defendant might there have gotten into the vessel. Therefore, the Magistrates of Harwich had no jurisdiction under the 74th section. The 75th section shews, affirmatively, that the jurisdiction was with the Ipswich Magistrates, as the power in that section is given to commit to the gaol of the county wherein the offence has arisen. If it were otherwise held, the 74th clause might be a protection to acts of great injustice. If that clause gives a power to any Magistrate before whom the offender may be taken, it would seem, that the officers of the Customs might take a man to York, or into any jurisdiction, and any county they pleased, either midland or maritime. This was not the intention of the legislature. If they had so intended, it would not have been necessary to pass the act of 7 Geo. 4. c. 48. s. 16; and the terms of that clause shew, that the 74th clause of the previous act was not so interpreted by the legislature. *Kite and Lane's case* (1) is in point with the present. There, persons taken within the harbour of Folkestone were afterwards taken to Dover, and there convicted by Dover Magistrates under the 45 Geo. 3. c. 121. s. 7, and the 57 Geo. 3. c. 87. s. 5. Speaking of these facts, the present Lord Chief Justice observed, "That raises the question, whether persons can afterwards, without any apparent necessity, be taken within the limits of another jurisdiction, and be there convicted of the offence imputed to them. I am strongly inclined to think that no such power exists."

Lord Tenterden.—This is a rule for a *habeas corpus* to bring up the body of the defendant, in order to relieve him from

the effect of a conviction under the smuggling act.—[Here his Lordship stated the substance of the conviction.]—The first objection to this conviction is, that, in point of fact, the offence was not committed on the high seas. That is a fact necessary, in order to the jurisdiction of the Magistrates of Harwich; and it is contended, that this is a fact inquirable into by this Court in the present mode of proceeding. I have doubts upon that point; but I wish it to be distinctly understood, that I give no opinion upon it either way. It is not necessary that I should in the present case; for I am quite clear, that the evidence establishes the fact of the offence having been committed on the high seas. The vessel is seen coming into the harbour.—[Here his Lordship went over the depositions, which, as they bear upon this fact alone, need not be inserted.]—But it has been suggested, that this defendant might have gone on board the vessel after she had gotten into the harbour; and, if so, the offence by him would not have been committed on the high seas. It is not impossible that he might; and if the fact were so, he might have shewn it in his defence before the Magistrates. In the absence of any evidence upon this point, the natural conclusion from the facts must be, that he was on board before she came into the harbour; and, consequently, was on board when she was on the high seas.—That she was liable to forfeiture has not been disputed. This being the case, the 74th section of the act provides, that offences committed upon the high seas against that act shall be deemed to have been committed at the place on land into which the person charged with the offence shall be taken, brought, or carried; and it then goes on to give jurisdiction to the Magistrates of that place. Here, the defendant was carried to Harwich; and therefore the Magistrates of Harwich had jurisdiction. But it has been said, that, if this construction be given to the statute, it may be in the power of the captors to take the person wherever and before whom they please; and the extreme case was put of taking a man to York from the coast in question. To shew that this was held unreasonable, the case of *Kite and Lane* was cited; but that case was entirely

(1) 1 B. & C. 101; s. c. 3 D. & R. 212.

different from the present. What I stated in that case bore upon the facts in that case; which were, that the men were arrested within the harbour of Folkestone; their vessel was detained there, and they were taken *on shore*, within the local jurisdiction of the Magistrates of that place. On a subsequent day, they were again put on board the vessel, and carried, together with it, to Dover. The act under which they were proceeded against was of course not the present; for this case was in the year 1822. It was the act 45 Geo. 3. c. 121. s. 7, which provided, that persons taken on board any vessel, under the circumstances there stated, should be taken before a Justice *near* the port or place into which such vessel shall be carried, or near to the place where the person should be taken. Those men, therefore, had been arrested in the harbour of Folkestone; had been carried on shore in the town of Folkestone; and were afterwards carried before the Magistrates of Dover. It was upon that state of facts, that I expressed myself; and I observed, "That raises the question, whether persons *carried, by the voluntary act of the captors, within a particular jurisdiction*, can afterwards, without any apparent necessity, be taken within the limits of another jurisdiction, and be there convicted of the offence imputed to them." I stated, however, that it was unnecessary to decide that point in that case; for the conviction itself was bad on the face of it, in not shewing, that the Magistrates had jurisdiction over the subject-matter. That case, therefore, has, in my opinion, no bearing whatever upon the present. This is a case on a different act of parliament, and under circumstances entirely different. I think, therefore, that this rule ought to be discharged.

Mr. Justice Bayley.—The 3d section of this act renders the vessel liable to forfeiture, if she has been *discovered to have been* on the high seas. I have no doubt that this was the case with regard to this vessel, or that the defendant had been on board while she was on the high seas. Then, as to the jurisdiction of the Magistrates: look at the words of the 74th section,—"*any place into which the person shall be taken, brought, or carried.*" Therefore, although the defendant may have

been taken on the water within a particular county or jurisdiction, he may be carried to a place within another jurisdiction; and the place to which he is carried is, by the terms of this clause, the place, the Magistrates of which have jurisdiction over the subject-matter.

Mr. Justice Littledale.—According to the 74th section of this act, two things must concur. The vessel must be discovered to have been on the high seas, within certain limits; and the defendant must be discovered to have been on board while she was so on the high seas. I think the evidence shews the concurrence of these two facts in the case of this defendant. Then, as to the jurisdiction:—that, by the same clause, is declared to be, the jurisdiction of the place to which he is carried. Now, he may be taken on the waters within one jurisdiction; and, as you are taking him along, you may pass several other jurisdictions; but the place on land to which you carry him, is the place, which gives the jurisdiction.

Mr. Justice Parke.—I am of the same opinion, upon the facts which bring the case of this defendant within the act of parliament, as well as upon the question relative to the jurisdiction. He may have passed on the water along places within other jurisdictions; but the place on land to which he was carried, was Harwich; and that fact, by the express words of the 74th clause, gave jurisdiction to the Magistrates of Harwich.

Rule discharged.

1828. }
Dec. 9. } THE KING v. JOHN WINTER, ESQ.

Highways—Stopping up and diverting.

1. *Whether a public carriage highway can be only partially diverted; leaving it still open to the public as a footway—quære.*

2. *The order of Justices, diverting a public highway, must shew, on the face of it, not only that the proposed substituted highway is commodious; but also that the public right of passage over it will be as permanent as that which they have over the old highway.*

Accordingly, where such a substituted high-

way was, in part, over a turnpike road, made under a local act, the provisions of which did not distinctly appear to be permanent,—The Court held the order of the Justices to be bad.

The following appeared on the return to a *certiorari*.

At the Epiphany Sessions for the county of Somerset, in the year 1828, upon an appeal made by John Winter, esq., it appeared that an order was made by two Justices, who therein stated, "that having, upon their own view, found that a certain part of a highway within the parish of Bishops Lydeard, in the hundred of Kingsbury West, and county aforesaid, called Watts Land, otherwise called Sandy Lane, particularly described in the plan annexed to the said order, might be diverted and turned so as to make the same more commodious to the public; and having viewed a course proposed for the new highway in lieu thereof, (describing the proposed substituted road,) through the grounds of Sir Thomas Buckler Lethbridge, bart.; and having received evidence of the consent of the said Sir Thomas Buckler Lethbridge to the said new highway being made through his lands and grounds, thereinbefore described, by writing under his hand and seal, in consideration of the said part of the old highway, thereby ordered to be diverted and turned, being sold, exchanged, and to be vested in him, *saving always, and reserving nevertheless, a free passage* for all persons *on foot*, through the land and soil of the said part of the said old highway, thereby ordered to be diverted and turned, according to the ancient usage in that respect. It was ordered, that the said last-mentioned highway should be diverted and turned through the land aforesaid; and when such highway should be properly made and completed, and put into good condition and repair, and fit for the reception of travellers, and so certified by two of his Majesty's Justices of, in, and for the said county of Somerset, upon view thereof, and after such certificate should have been returned to the clerk of the peace of the said county, and by him enrolled amongst the records of the Court of Quarter Sessions at the General Quarter Sessions of the Peace, to be holden in and for the said county next after the

General Quarter Sessions of the Peace, in and for the said county, at which the said order should have been confirmed or enrolled, pursuant to the directions of the statute in that case made and provided. And it was ordered that the said part of the said old highway, thereby ordered to be diverted and turned, being the length of 286 yards, or thereabouts, and of the breadth of twelve feet, or thereabouts, upon a medium, as appeared by the said plan, should be stopped up, subject to, and *saving always, and reserving nevertheless, a free passage for all persons on foot* through the land and soil of the said old highway, so ordered to be diverted and turned, and stopped up, according to the ancient usage in that respect. And reciting that the said Sir Thomas Buckler Lethbridge had consented as aforesaid to the making and continuing of the said new highway through his lands, in consideration that the said part of the said old highway, thereby ordered to be diverted and turned, and stopped up, be sold, exchanged, and vested in him; *saving always, and reserving nevertheless, as aforesaid.* It was ordered, that the said lands, grounds and soil of the said Sir Thomas Buckler Lethbridge, for the said new highway, thereby ordered to be made as aforesaid, should be purchased by the sale, disposal and exchange of the said part of the said old highway, thereby ordered to be diverted and turned, and stopped up, and the same to be vested in the said Sir Thomas Buckler Lethbridge, *subject and saving always, and reserving nevertheless, as aforesaid.* And they did thereby approve and direct that the surveyors of the highways of the said parish of Bishops Lydeard, did and should make an agreement with the said Sir Thomas Buckler Lethbridge, being the person seized or possessed of and interested in the said lands, ground and soil through which the said highway, thereby ordered to be diverted and turned, was thereby ordered to and would go for the recompense to be made for such ground, and for the making of such new ditches and fences as should be necessary, by the sale, disposal and exchange, to and with the said Sir Thomas Buckler Lethbridge, of the said part of the old highway, thereby ordered to be diverted and turned, and stopped up, and the same being vested in the said Sir Thomas Buckler

Lethbridge, *subject and saving* always, and reserving nevertheless, as aforesaid. And, upon hearing what is alleged in the premises by the several parties concerned, and their counsel, and proved by them respectively;—This Court doth order, adjudge and determine, that the said order be confirmed; and the same is hereby confirmed accordingly, subject to the opinion of the Court of King's Bench,—whether the said order could legally be made under the act 55 Geo. 3. c. 68, inasmuch as the intended new road from E. to F. (the plan, for any further description, is immaterial,) does not either commence or terminate at the same points as the road to be stopped up; the distance between the points I and E being 1154 yards, and the distance between the points H and F being 1063 yards; and also as the said highway from I to H was one of the roads included in the act, 3 Geo. 4. c. 65, intituled 'An act to repeal several acts for repairing several roads leading from the town of Bridgewater in the county of Somerset, and several other roads therein mentioned, so far as the said acts relate to the roads leading to the said town, and to consolidate and comprise the same in one act of parliament,' and thereby continued under the care, management and repair of the Justices therein named: but from the future care, management and repair whereof the said trustees appear to this Court to have been discharged by the said act when a certain extension of road in the said act described, should be made and completed; and which this Court finds to have been made and completed, so as to be fit for the safe and convenient use of the public, in the year 1822."

Mr. Brougham, Mr. Cabbell, and Mr. Rogers, were for the order of Sessions.

Mr. C. F. Williams, Mr. Jeremy, and Mr. Erle, against it.

Upon this case the main question in dispute between the parties was not decided. Very early in the argument, it was suggested by Mr. Justice Littledale, that the order did not seek entirely to annihilate the old road, but only to annihilate it as a carriage road, leaving it as a footway. The learned Judge, and Mr. Justice Bayley, and Mr. Justice Park, expressed doubts whether this could be lawfully done; whether, under the 55 Geo. 3, a road, if stopped up or di-

verted, should not be stopped up or diverted altogether, and not partially. Upon this point, however, no judgment was given.

It appearing also, that a part of the road to be substituted for the old road, was part of a turnpike road made under a local act, the powers to the trustees of which were limited to a period of twenty-one years; the Court expressed an opinion, that the order was defective in not shewing that the public, from whom a permanent right was taken away, had a permanent right in return.

Mr. C. F. Williams, Mr. Cabbell, and Mr. Rogers, in answer to this objection, submitted, that if the trustees of the turnpike road, in exercise of their powers, did an act which would be of a permanent nature, although their power was but temporary, the act would be permanent; and that there was nothing from which it could be inferred that the public had not as ample and permanent a right upon the new, as they had upon the old, road. But, by—

Mr. Justice Bayley.—We need not at present decide the point, whether a public road can be partially stopped up. I am clearly of opinion, that where magistrates, acting under the limited power given them by parliament, propose to take away a permanent right of the public, their order should shew that, they are giving in return something equally permanent. That has not been done in the present instance. I think it is at least very doubtful, whether the public would have a right over this turnpike road after the twenty-one years, during which the act is to exist, shall have run out. If the road was made under any other act, or if the public will have a permanent right over it, under the local act, one or other of those facts should be made to appear. But the order and the case are equally silent, as to the supposed permanent right of the public over that part of the substituted road.

Mr. Justice Littledale.—I do not give any opinion on the question, whether the order is or is not bad on account of its proposing only a partial diverting of the road. But I am clear that the order should distinctly shew that the substituted road is one over which the public will have a permanent right of passage. If it was made under

a temporary act, which would expire in twenty-one years, the right of the public might, and I think would, expire with the act. Indeed, for aught that appears, the road itself might be made for a purpose merely temporary. The Sessions might have found, as a fact, if the public would have a permanent right.

Mr. Justice Parke.—It is sufficient for us to say, that we cannot supply, by intendment, so material and necessary a fact, in the exercise of this limited jurisdiction, as we must do to support this order. It is said, that the new road is commodious for the public; but that is not sufficient. The public right of passage over it, should be as permanent, as the right over the old road which it is proposed to take away. We are not informed under what authority that substituted road was made so as to be enabled to say, that it gave the public a permanent right of passage. This point alone disposes of the present order of Sessions.

Order of Sessions quashed.

1828. } THE KING v. THE INHABITANTS
Dec. 9. } OF LEW.

Poor Laws—Assistant Overseer.

1. *The office of assistant overseer, under the 59 Geo. 3. c. 12, is a "public annual" office, the service of which may confer a settlement.*

2. *The appointment to such an office, with a salary, requires a stamp, under the 55 Geo. 3. c. 184, schedule, part 1, title "Grant."*

Two Justices of the county of Oxford, by order, removed William Purbrick, his wife, and children, from Charlbury, to Lew, in the said county. The Sessions, upon appeal, confirmed the order, subject to the opinion of the Court on the following

CASE.

William Purbrick, the pauper, being settled in the hamlet of Lew, was, on the 16th day of October 1826, duly elected, by the inhabitants of the township of Charlbury, in vestry assembled, to be an assistant overseer of the poor of the said township, in pursuance of the statute

59 Geo. 3. c. 12. s. 7. The vestry determined that the pauper should perform the duties and receive the salary mentioned in the warrant of appointment hereinafter set forth. On the 18th of the same month, he was appointed such assistant overseer by a warrant under the hands and seals of two Justices, which warrant is in the following form, that is to say:—

"The township of Charlbury, in }
the county of Oxford, to wit. }

"Whereas the inhabitants of the township of Charlbury, in the county of Oxford, in vestry assembled, in the said township, on the 17th day of October 1826, did nominate and elect William Purbrick, of the township aforesaid, to be an assistant overseer of the poor of the said township, and did determine and specify that he should execute and perform all the duties of the office of an overseer of the poor of the said township, and did fix the yearly sum of 10*l.* as and for the yearly salary of the said William Purbrick, for the execution of his said office. Now we, two of his Majesty's Justices of the Peace in and for the said township, in pursuance of the statute in such case made and provided, do hereby appoint the said William Purbrick to be an assistant overseer of the poor of the said township, and we do hereby authorize and empower him to execute and perform the said duties, and to receive the said salary, so as aforesaid fixed by the said inhabitants in their said vestry.

"Given under our hands and seals, this 18th day of October, in the year of our Lord 1826.

"A. T. Rawlinson, (I. s.)

"F. Penystone, Jun. (I. s.)"

This warrant of appointment was not stamped. The pauper duly performed the duties of assistant overseer, by virtue of the aforesaid appointment, for one whole year from the date thereof, and resided during that time in the township of Charlbury.

The Sessions were of opinion, that the said warrant of appointment, under the hands and seals of two Justices, did not require any stamp; and they therefore received it in evidence, but they decided

that no settlement was gained, subject to the opinion of this Court on the two following questions :—

First. Whether the situation of assistant overseer, described in the warrant of appointment, is an office the serving of which for a year will confer a settlement.

Secondly. If the Court shall be of opinion that it is such an office, whether the said warrant of appointment thereto, being in writing, required a stamp.

Mr. Cooper, as to the first question, was in support of the order of Sessions.—First, the situation in question is not an office the service of which can confer a settlement. It is, in fact, no office at all. The statute 59 Geo. 3. does not render it necessary that there should be a person so employed in any parish : it only gives a power to the inhabitants to make such an appointment if they think fit. Even if it be called an office, it clearly is not annual. An annual office, or charge, is one to which appointments are made from year to year. The office, or charge, need not be one which a person is compellable to accept ; but the instances of offices conferring a settlement have uniformly been of such as were necessarily existing, and not of situations which the inhabitants of a parish or district, or those authorized to appoint, might dispense with, or fill up, as they pleased. The familiar instances are those of constable, tithingman, parish clerk, sexton, overseer, churchwarden, borsholder, hog ringer, collector of land-tax, collector of duties on births and burials, ale taster : all of these are offices which must necessarily be filled by some one. If at the end, or in the middle of a year, the inhabitants can determine that the *situation* shall no longer exist, it cannot be an *annual* office. In the present case, the statute 59 Geo. 3. c. 12. authorizes the inhabitants to *elect* any discreet person or persons to be assistant overseer or overseers, and to determine and specify the duties, &c. ; and it empowers two Justices to appoint the person or persons so elected by warrant, &c. ; but it at the same time empowers the *inhabitants in vestry* to revoke the appointment at any time. It depends, therefore, on the will of the inhabitants, whether there shall be one, or two, or

three assistants, or none. It is not the question, whether it may, by long usage, *become* an annual office ; but whether it is so on a first appointment. It is not like the case of a general hiring for a year. The question of its being an annual office is not determined by the length of time the appointee may *chance* to serve ; but, by the nature of the situation at the time of the appointment. The words of the 9 & 10 W. 3. c. 11. are, “ shall execute some annual office, *being legally placed in such office,*” which clearly suppose an appointment to a *previously existing* office. The mode of appointment is always, therefore, an inquiry under 3 W. & M. c. 11, as well as under 9 & 10 W. 3. c. 11. The office is also insufficient for the purposes of settlement, inasmuch as it is not an independent office. It is a service as deputy to another. It was held, in the case of *Rex v. Mersham* (1), that the situation of master of a workhouse, under 9 Geo. 1. c. 7. s. 4, was not an office within the stat. 3 W. & M. c. 11. In the case of *Rex v. Ilminster* (2), discussion was precluded by the statement of facts in the case.

[*Mr. Justice Bayley*.—But the Sessions there found the office in question to be a public annual office.]

In the case of *Rex v. Hambledon* (3), it was a question whether a governor of a workhouse, under stat. 22 G. 3. c. 83, was a public annual officer, though the point was not determined. But, assuming the Court to have been of opinion that the above situation was a public annual office within the statute, there are the following points of difference between the two offices :—

1. The appointment, under the former statute, is absolute for a year, subject only to be determined by the death, or misconduct, or incapacity, of the person appointed. Under the latter, it may, *at any time*, be determined by resignation, or by a revocation on the part of the parishioners.

2. Under the former, the duties are ascertained, viz. to superintend the workhouse ; and the appointment is independent, and not in aid of any other. Under

(1) 7 East, 167.

(2) 1 East, 83.

(3) 4 B. & C. 459 ; 6 D. & R. 554.

the latter, the duties ought to be (but have not been) specified, and they are in aid of the overseers.

3. Under the former statute, the parishes, having once agreed to an incorporation with other parishes, are bound for at least three years, and the office of governor of the workhouse must necessarily be continued during that time. The 13th section enacts, that proceedings shall be immediately taken to fill up vacancies in any of the offices; and section 14 enacts, that the offices of guardian, governor, &c. shall determine in Easter week, when the persons entitled shall either agree with the persons already in office to continue therein, or shall proceed to recommend others, as if such persons had died.

Under the latter statute, it is entirely at the option of the parishioners whether the appointment of an assistant overseer shall be continued or not.

Secondly; this was not an office which the pauper executed for himself, and on his own account. A person who serves as deputy does not thereby gain a settlement; nor even a principal, where he serves for and on account of another: *Rex v. All Cannings*. (4) In the present case, the appointment is to do all the duties of an overseer; not as principal, certainly; it must therefore be as deputy. The case of *Bennett v. Edwards* (5) appears to favour the argument that this officer is a deputy. There would be more colour in calling him an independent officer if his duties were specified, and limited to particular purposes.

Thirdly; this appointment is bad: first, because the duties are not specified; secondly, because it is not stamped. First, the duties ought to have been specified. The statute enacts, that the inhabitants shall determine and specify the duties, and empower the Justices to appoint for such purposes as shall have been fixed by the inhabitants, and authorizes the person appointed to execute all such of the duties of the office of an overseer of the poor as shall in the warrant of his appointment be expressed. It appears to have been the object of the

legislature, that the particular duties of the assistant overseer should be distinctly marked out, in order to avoid doubt as to the nature and extent of those duties. What are the acts he can do under the present form of appointment? Can he make a rate? Can he join in an act necessary to be done by the majority of the parish officers? Can he, by his vote, controul them? Assuredly not. The statute also provides, that a bond may be taken from the assistant overseer to the churchwardens. In short, every circumstance attending the situation shews it to be a mere employment; or, at the most, that of the acting as deputy to the overseer. But, independent of these considerations, which affect the main question, whether the service of this office (if such it be), can confer a settlement, the appointment of this man was void, for want of a stamp: this argument is of course against the judgment of the Sessions. The Stamp Act, 55 Geo. 3. c. 184, schedule, part 1, title "Grant," provides a stamp duty for (every "grant or appointment by his Majesty, his heirs, or successors, or by any other person or persons, body politic or corporate, of or to any office or employment, by letters patent, deed, or other writing, where the salary, fees, and emoluments appertaining thereto shall not amount to 50*l*. per annum,) 2*l*." There is no exception in favour of such an instrument as the present. On the contrary, under the head "Grant," there is a list of exemptions, no one of which is applicable to this case. If, therefore, the Court think this is not an office, no settlement can have been gained by the service of it. If they think it is an office, then the appointment was bad for want of a stamp.

Mr. Chilton (contra) was stopped by the Court as to the first point, and told to confine himself to the question as to the stamp. — There was no necessity for a stamp upon the instrument in question. The act imposing the duties was passed before the 59 Geo. 3, which gave the power to create the office of assistant overseer: and this accounts for the appointment not being included in the list of exemptions. The part of the Stamp Act, which has been referred to, evidently was meant to apply to patent offices only. But, at all events,

(4) *Burr. S. C.* 634; 2 *Nol.* 627.

(5) 7 *B. & C.* 586; 1 *M. & R.* 482; 6 *Law Journ. K. B.* 104.

if there be a doubt on the subject, the Court will decide against such an objection.

Mr. Justice Bayley.—Upon the first point, I have no doubt whatever. The party who is appointed to such an office, and serves under the appointment, has executed a public office. He is appointed by the Magistrates on the nomination of the vestry. He is in this case appointed with a yearly salary; and the service under it, makes it therefore, an annual, as well as a public, office. It is an annual office, if it be served, although there may be a power in himself to resign, or in others to discharge him. His office would not determine with the change of overseers; and this may be referred to for the purpose of shewing that he is not a mere deputy to the overseers in whose time he is appointed. But my difficulty is upon the second point. The words in the Stamp Act are very general and comprehensive.—[Here the learned Judge read them.]—I have no doubt, that, if this part of the Stamp Act had been brought under the notice of the legislature when they were passing the 59 Geo. 3, they would have introduced a clause exempting this appointment from stamp duty. But how can we get over the positive words of the Stamp Act? The 59 Geo. 3. gives the power of appointment; and it is under the hands and seals of the Justices. It cannot therefore be said, that it is not an appointment in writing. I am afraid the stamp duty is chargeable. It follows that the Sessions are, in my opinion, wrong upon both points.

Mr. Justice Littledale.—I am of the same opinion. The Stamp Act contains no clause of exemption which can, in any point of view, apply to this instrument; and the words which impose the duty clearly comprehend it. Upon the other point, I have no doubt whatever of this being a public annual office. It is called an office three several times in the clause. Neither can this officer be considered a deputy; for a deputy, in general, is one who acts in the room of another.

Mr. Justice Parks concurred.

The result of this decision was to confirm the order of Sessions, although the Court thought their judgment was wrong

upon both points. The Sessions thought the office not a public annual office, and, consequently, that the serving of it could not confer a settlement. The Court thought otherwise: but the Sessions thought the instrument in question required no stamp; and, therefore, received it in evidence. The Court thought it required a stamp, and ought not, therefore to have been received in evidence. The Sessions, therefore, thought a settlement had not been gained; while the Court only thought that the facts had not been legally proved.

Order of Sessions confirmed.

1828. }
Dec. 10. } THE KING v. ROBERT SHIPTON.

Parish Apprentice—Magistrate acting for two Counties.

Where a parish apprentice is bound by indenture, according to the 56 Geo. 3. c. 130. s. 2, to serve in a county different from that from which he is bound, the allowance of the indenture must be by two different Magistrates of each county; and the allowance by the same Magistrates acting for both counties is insufficient.

This was an indictment against the defendant, for not receiving a parish apprentice, according to the 56 Geo. 3. c. 139. The case came before the Court in the form of a general demurrer to the indictment. The question was raised by the second clause in the act, which declares "that, in all cases where the residence or establishment of business of the person to whom any child shall be bound shall be within a different county, or jurisdiction of the peace, from that within which the place by the officers whereof such child shall be bound shall be situated, and in all other cases where the Justices of the Peace for the district or place, within which the place by the officers whereof such child shall be bound shall be situated, and who shall sign the allowance of the indenture, by which such child shall be bound, shall not have jurisdiction; every indenture by which such child shall be bound, shall be allowed as well by two Justices of the Peace for the county or district, within which the place by the officers

of which such child shall be bound shall be situated, as by two Justices of the Peace for the county or district, within which the place shall be situated *wherein* such child shall be intended to serve."

And the question in this case upon the above clause was, whether that part of it which is marked by *Italics* was satisfied by the indenture being allowed by only two Magistrates, they however being Magistrates for both counties. The defendant, by his demurrer, contended, that by this, the act was not satisfied. The same Magistrates had allowed the indenture, as magistrates of the county of Derby; and had afterwards allowed it, as magistrates of the county of Stafford.

Mr. N. R. Clarke for the defendant.—The preamble of the present act, as explanatory of its provisions, shews that it was intended to make the Magistrates, in a case like the present, checks upon each other. The preamble runs in the following terms:—"Whereas many grievances have arisen from the binding of poor children as apprentices by parish officers to improper persons, and to persons residing at a distance from the parishes to which such poor children belong; whereby the said parish officers, and the parents of such children, are deprived of the opportunity of knowing the manner in which such children are treated, and the parents and children have, in many instances, become estranged from each other, and also from the permission given to apprentices, by the persons to whom such apprentices have been bound, to serve others without a formal assignment, whereby the discretion to be exercised by magistrates, in placing out apprentices to suitable persons is frequently rendered of no avail."

Then come the provisions, shewing that it is incumbent on the Magistrates to make inquiry as to the fitness of the master, the distance, &c.; and after all this, comes the clause in question, requiring that in such a case as the present, there must be two sets of Magistrates to allow the indenture. The act is mandatory, and does not give a discretion. The 6th section imposes a penalty upon parish officers, who shall bind apprentices contrary to the provisions of this act. Magistrates frequently act for two counties, having property only in one; the

power given to them in some instances to act for more than one county, is a power given for purposes very different from the present; chiefly for that of facilitating the apprehension of offenders who may be on the borders of different counties. The legislature meant that the magistrates should exercise a judgment upon the several matters necessary for their consideration. Here, the Magistrates do so, in the first instance, very properly; but, having once exercised a judgment, they must be supposed to exercise it again, and, as magistrates of Derby, to review their judgment as magistrates of Stafford. This is an absurdity, which it surely was never the intention of parliament to sanction.

The cases of *The King v. Hinckley* (1), and *The King v. All Saint's, Derby* (2), if looked at for the purpose of construing such a provision in an act of parliament, would support the present argument. Some reliance may be placed by the other side upon the third section, which declares, that the allowance by two Magistrates of the county wherein the apprentice is to serve shall be valid, although the place may be situate in a place within which any other Justices of the Peace may, in other respects, have an exclusive jurisdiction. But the object of this clause was to prevent borough magistrates acting without the concurrence of county magistrates.

Mr. Starkie, contra.—It was not necessary in this case, that the indenture should be allowed by two sets of Magistrates. The act was passed to give effect to the statute of the 43 Elizabeth, c. 2. s. 9, and neither the preamble, nor any one of the provisions, indicates an intention by the legislature to make one set of Magistrates a check upon the other. The object evidently was, that in case the child should be put out into another county, it should have the benefit of an examination of the facts by Magistrates of that county. No reason has been suggested why the jurisdiction given to the Magistrates to act generally for the two counties, should be limited in the present instance. That there was no such intention, may be collected from the third section. Supposing the child to be intended for ser-

(1) 13 East, 361.

(2) 13 East, 143.

vice in a place where there is an exclusive jurisdiction; the allowance by the county Magistrates will be sufficient. This shews that the legislature was looking to the jurisdiction, and not to the number of persons.

Mr. Justice Bayley.—I think the allowance of this indenture was not sufficient; the language of the clause in question is "as well by two Justices of the Peace of the county from which the child is bound, as by two Justices of the county wherein the child is to serve." And the question in this case has arisen, because the clause has not the very words, "or by two Justices, being Justices of both counties." I see no reason why they need be different persons, if they are Justices of both counties. If we were allowed to speculate upon the question, what it was the legislature intended, I think there might be a very good reason assigned for its being intended that, in a case like the present, they should be the same persons. But the safer course is to go by the words of the act. The Magistrates who have allowed in this case are, it is true, as well Justices of one county as of the other; but, as the language runs, I think it must be read as if it said "by two of one county, and two others of a different county." I think they must be different persons; it is better to proceed according to the words of the act.

Mr. Justice Littledale.—I am of the same opinion, though I cannot concur in the suggestion, that it was intended the Magistrates should be checks upon each other. Nor do I see any reason why the Magistrates in this case should not be thought fit persons to exercise their jurisdiction in two counties, any more than I should see a reason why they should not exercise it in two parishes. It is, however, a safe rule to abide by the words of the act; and, looking solely at the words, I think the Justices in this case should have been different persons, and consequently, that the allowance by two who were Magistrates of both counties, was insufficient.

Mr. Justice Parke.—I can see no reason against the Magistrates being allowed to exercise their jurisdiction in both counties in a case like the present. But I concur in what has fallen from my learned Brothers,

that our safer course is to proceed upon the words of the act. It is upon that I proceed, and upon the consideration of which, it appears to me, that the allowance of the indenture, in a case like the present, must be by two Justices of one county, and two other Justices of the other county.

Judgment for the defendant.

1828. } THE KING v. THE INHABITANTS
Dec. 10. } OF ST. ANDREW, PERSHORE.

Poor Laws—Hiring and Service.

A hiring at weekly wages, with "a month's warning or a month's wages," infers a yearly hiring.

Two Justices, by order, removed William Horton, his wife and children, from the parish of St. Andrew, in Pershore, in the county of Worcester, to the parish of Moreton in the Marsh, in the county of Gloucester. The Sessions, on appeal, quashed the order, subject to the following

CASE.

The pauper, William Horton, was hired to Mr. Benjamin Fieldhouse, a stage-coach proprietor, to serve him as horse-keeper, and to look after his coach-horses at Moreton in the Marsh, at 1*l.* a week; the terms of the hiring were, a month's warning or a month's wages. There was no further mention of time, how long the pauper should serve. The pauper continued to serve under this contract at Moreton in the Marsh between two and three years.

Mr. Godson, in support of the order of Sessions.—This was expressly a weekly hiring; and there is nothing in the case to infer a yearly hiring. It is therefore distinguishable from that of *The King v. Hampreston* (1), and *The King v. Great Yarmouth* (2), where a hiring at weekly wages, with liberty for each party to part at a month's notice, was held to be a yearly hiring. Here the language used is "a month's warning or a month's wages." This appears to be the obligation on the part of the master, and not upon that of the servant; for the servant has not to pay wages.

(1) 5 Term Rep. 205.

(2) 5 Mau. & Selw. 114.

It appears to be that the option is with the master to give a month's warning, or pay a month's wages. If this be the true interpretation of the contract, and the Sessions, by their judgment, appear to have so interpreted it, there was no obligation on the part of the pauper to give any warning; and he might have left when he pleased. The case would therefore fall within the principle of *The King v. Bradninch* (3), as a weekly hiring.

Mr. John Evans (contrà) was stopped.

Mr. Justice Bayley.—There are no premises to warrant the conclusion which has been drawn by the Sessions. Weekly wages might lead to the presumption that the hiring was weekly; but, when the contract has this provision, "a month's warning or a month's wages," the presumption is rebutted; and a yearly hiring is necessarily inferred.

Mr. Justice Littledale concurred.

Order of Sessions quashed.

1828. } THE KING v. THE INHABITANTS
Dec. 10. } OF CHRISTCHURCH, LONDON.

Poor Laws—Settlement by Rates.

The being rated to and paying ward-rate for the city of London, under the 10 Geo. 2. c. 22. s. 2, held not to confer a settlement under the 3 Wm. 3. c. 11.

Two Justices, by order, removed the wife of John Gyles and their children from the parish of St. Ann, Blackfriars, in the city of London, to the parish of Christchurch in the said city. The Sessions, on appeal, confirmed the order, subject to the following

CASE.

John Gyles, the pauper's husband, occupied part of a house in Warwick-lane, in the appellant parish of Christchurch, of the yearly value of 20*l.* for several months in the year 1821, and during that time he was rated to and paid two quarters' watch-rates for the ward of Farringdon Within, in which ward the said house is situated. The city of London is divided into twenty-six wards;

and the wards into precincts. The ward of Farringdon Within contains seventeen precincts; and the house, in respect of which the watch-rates were paid by John Gyles, is, with regard to ward matters, in St. Ewins, and not in Christchurch precinct. The watch-rate is made by the Alderman and Common Councilmen of each ward, under the authority of the statute 10 Geo. 2. c. 22. s. 2, which enacts, "For the better raising and levying of monies for paying the wages of the watchmen and beadles, and other charges incident thereto, that the Mayor, Aldermen and Commons of the said city of London, in Common Council assembled every year, should then and there determine and direct what sum and sums of money shall be raised and levied upon each respective ward for answering the purposes aforesaid; and for raising the said several sums of money, to direct the Alderman, Deputy, and Common Councilmen, of each and every of the respective wards in the said city of London and Liberties thereof, to make an equal rate and assessment upon all and every the person or persons who do or shall inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement, within their respective wards (regard being had, in making the said rates, to the abilities of and likewise to the rent paid by the said several inhabitants and occupiers so to be rated and assessed); and the Alderman, Deputy, and Common Councilmen of each ward of the said city are hereby authorized and required to make such rate and assessment for their respective wards, in such manner and form as shall be so directed by the said Court of Common Council; which said rates or assessments shall be collected quarterly from the several inhabitants or occupiers in each of the said several wards, by the several constables for the time being, of the several precincts; or by the beadles in each of the said respective wards, as the Alderman, Deputy and Common Councilmen of each ward shall direct and appoint; and, in case of non-payment, the Lord Mayor, or the Alderman of the ward wherein the premises are situate, may grant a warrant to the collector to levy the same."

The form of the watch rates in question, (varying the time for which each was respectively made,) is as follows:—

LONDON.

"A rate and assessment made upon the several persons who inhabit, hold, occupy, and enjoy any land, house, warehouse, or other tenement, within the ward of Farringdon Within, (the precinct of Blackfriars and Monkwell excepted,) for raising money to pay the watchmen and beables appointed for the said ward, and other charges incident thereto, (except the watchmen of the aforesaid precincts,) for one quarter of a year, from the 25th of March to the 24th of June 1821, pursuant to an act of Common Council of the year 1820.

St. Ewin's.

	£.	s.	d.
Warwick-lane.			
John Gyles . .		3	0

The question for the opinion of the Court of King's Bench was, whether such rate is one of the public taxes or levies within the statute of the 3 Wm. 3. c. 11. or any subsequent act, the being charged with, and paying towards which, confers a settlement on the party so charged and paying.

Mr. Adolphus, in support of the order of Sessions.—It has been decided by the case of *The King v. Bromley* (1), that payment of land-tax has been sufficient to gain a settlement. The Court there said, "It hath been a great doubt whether, in this respect, the legislature did not mean parochial taxes. But this hath been long gotten over, and the land-tax has been holden to be within the act." It seems to be treated for this purpose as a public parish burthen. And, in the case of *The King v. Micham* (2), the form of collection is given; and that form is for the parish.

(1) Burr. S. C. 75.

(2) Cald. 276. See also *Rex v. Endon*, Cald. 374; *Rex v. St. Lawrence*, Winchester, Cald. 379; *Rex v. St. James*, Bury St. Edmunds, Cald. 385; *Rex v. Bridgewater*, 3 T. R. 550; *Rex v. Folkestone*, 3 T. R. 505; *Rex v. St. Michael's*, Cornhill; *Burn's Justice*, tit. "Settlement by Rates;" *Rex v. St. Pancras*, 2 B. & C. 126; 3 D. & R. 343. And see also the statute 6 Geo. 4. c. 57, which seems to abolish this kind of settlement altogether.

SUPPL. 1829.

[*Mr. Justice Bayley*.—But surely the present is not a parochial tax; nor is it collected by a parish officer.]

If the Court should not think that the analogy of this rate to the land-tax will bear out the judgment of the Court below, it undoubtedly cannot be maintained.

(*Mr. Bolland* and *Mr. Payne* were to have argued against the order of Sessions.)

Mr. Justice Bayley.—The payment of a county rate will not confer a settlement. There is no analogy in this rate to the land-tax. The principle of all the decisions as to the land-tax is, the notoriety within the parish; so that the parish may be aware of the party being one of their inhabitants.

Order of Sessions quashed.

1828. } THE KING v. THE INHABITANTS
Dec. 10. } OF NEWINGTON NEXT HYTHE.

Poor Laws—Dairy Tenement.

In 1809 a master agreed to give his servant certain wages, and the right of feeding his cow in his master's pasture. The servant was to serve as waggoner, and it was a part of the agreement that he should board his mate. Subsequently, in 1810, by another agreement, the servant was to have the right of feeding another cow on his master's pasture. The cows were fed alike, under these two agreements, for eighteen months. The value of the feeding exceeded 10*l.* per annum:—Held, that the servant thereby gained a settlement, by renting a "tenement" of the value of 10*l.* a year.

Two Justices, by order, removed John Cook, his wife and children, from the parish of Saltwood, in the county of Kent, to the parish of Newington next Hythe, in the said county. The Sessions, on appeal, confirmed the order, subject to the following

CASE.

At Michaelmas, in the year 1809, the pauper, John Cook, hired himself as waggoner to William Deedes, esq. in the parish of Saltwood. He agreed to board his mate, to receive twelve shillings per week in money for himself, and the further sum of

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seven shillings per week for his mate; to live in part of Gumage Farm House, belonging to his master; to have his cow fed in the pasture of his master in Gumage Farm throughout the year, and to have twenty score of pork and wheat at a low price. At Michaelmas 1810, the pauper agreed to board another servant; to receive a further sum of seven shillings per week; and an additional twenty score of pork and wheat in proportion. The pauper applied to his master to be allowed to keep a second cow in the same manner as the first; and he was allowed to do so on paying three shillings per week. The value of the pasturage of the two cows exceeded 10*l.* per annum; and the cows were fed alike, according to agreement, for eighteen months. The pauper disposed of part of the milk, and fed the men as he pleased. He quitted the part of the house he occupied, and the service of his master at the same time, in consequence of six months' notice from his master.

The question for the opinion of the Court was, whether the feeding of the cows was a tenement, so as to confer a settlement.

Mr. Law, in support of the order of Sessions.—The argument on the other side will rest upon the case of *The King v. Cherry Willingham* (1). And unless the Court can see reason to distinguish the present from that case, the order of Sessions cannot be maintained. In this case, there were two distinct contracts; while in the case cited, there was but one entire contract; and the question therefore is, whether the subject matter of these two contracts, can be considered as forming a "tenement" according to the interpretation given to that term in this class of cases.

The Court were decidedly of opinion, that this circumstance did not distinguish the case from that of *The King v. Cherry Willingham*; and, consequently, that the pauper had gained a settlement in the parish of Saltwood.

Order of Sessions quashed.

(*Mr. Bolland* and *Mr. Starr* were to have argued against the order of Sessions.)

(1) 1 B. & C. 626; 3 D. & R. 13.

1828. } THE KING v. THE INHABITANTS
Dec. 10. } OF MATTISHALL.

Poor Laws—Parish Apprentices.

*A person who, of his own accord, was about to bind himself as apprentice, applied to the parish officers, stating that his intended master objected that he had not sufficient clothes. The parish officers thereupon agreed to give him 2*l.* for clothes on the execution of the indenture, and 2*l.* more for the same purpose at the end of the year:—Held, that this was within the statute 59 Geo. 3. c. 139. s. 11; and that the service under this indenture did not confer a settlement.*

Two Justices, by order, removed Jeremiah Taylor, and Ann his wife, from the hamlet of Heigham, in the county of the city of Norwich, to the parish of Mattishall, in the county of Norfolk; which order the Sessions, on appeal, confirmed, subject to the following

CASE.

Jeremiah Taylor, on the Sunday fortnight before the Christmas 1820, when he was living at Mattishall with his father and mother, was informed by a person named Hudson, that Joseph Middleton, who was a blacksmith living at Wymondham, wanted a lad. Jeremiah Taylor went to Middleton's the next day, when they agreed that Taylor should go on the Tuesday following, and should stay a month upon liking; and if they liked each other, that he should be apprenticed to him for three years. Taylor went to Middleton's on the Tuesday following, and continued with him for a month; at the expiration of the month, the indenture (a copy of which is annexed,) was executed. Taylor served under that indenture for three years; living, during all that time, with Middleton. Middleton, before the indenture was executed, said, the pauper should have some better clothes; and the pauper thereupon applied to the parish officers of Mattishall. The parish officers, who are the attesting witnesses to the indenture, agreed to give him 2*l.* at the execution of the indenture to buy clothes, and 2*l.* more for the same purpose at the end of the year. They gave the first 2*l.* to the pauper's mistress, who laid it out for him in the purchase of clothes; and at the end of the year the other 2*l.* was paid to the pauper.

[The indenture annexed to the case ran in the usual form; the only parties to it being the master and the apprentice. Nothing was said about clothes for the apprentice. The attesting witnesses were "David Williams" and "William Edwards," without any addition to their names; and it has already been stated in the case as a fact, that those two persons were, at the time in question, parish officers of Mattishall.]

The case turned upon the act, 59 Geo. 3. c. 139. s. 11, of which section the following is a copy:—

"And whereas the salutary provisions enacted by an act, passed in the 43rd year of the reign of her Majesty Queen Elizabeth, c. 2, intituled, 'An act for the relief of the poor,' are frequently evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out such poor children without the sanction of Justices of Peace,—Be it further enacted, that, after the said 1st day of October, no indenture of apprenticeship *by reason of which any expense whatever* shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two Justices of Peace, under their hands and seals, according to the provisions of the said act and of this act."

Mr. Kelly, in support of the order of Sessions.—It may be contended, on the other side, that the introductory part of the clause in question is not contained in the enacting part. But the enacting part is perfectly clear; and applies in terms to the facts of this case. Nor, as it may be observed, does the case, in express words, say that the sum of money in question was a part of the parish funds; but it is clear, from the whole of the circumstances, that it was. Until the contrary be shewn, it must be presumed that the overseers charged the money in their accounts. There is no fact to lead to a supposition, that they paid it out of their own pockets. And if they paid it out of the parish funds, the case is clearly within the act, which says, "that no indenture of apprenticeship *by reason of which any expense whatever* shall at any time be incurred by the public parochial funds shall be valid, unless" &c. These words shew that the legislature meant to provide as extensively

as possible for all cases where the parish funds should be chargeable,—whether the parish officers were or were not parties to the indenture, and whether they did, or did not interfere in the course of the treaty for the apprenticeship.

Mr. Chitty and *Mr. B. Andrews*, contra.—The indenture itself was good, as far as regards the master and the apprentice, notwithstanding the statute of Elizabeth. This appears from the case of *The King v. the Inhabitants of Arundel* (1). There, Lord Ellenborough, speaking of such an indenture, said, "This indenture must be considered clearly as for the infant's benefit; and not having been vacated, it must be considered as binding, so as to confer a settlement upon him by reason of his service under it. This was not the binding of a parish apprentice; it was to a person not residing in the parish; and all that the parish officers did, was the advancing of 40*l.* as the premium. As to any supposed controuling influence of the parish officers, I do not see how we can enter upon that subject; nothing being stated concerning it in the case." That case was decided just before the passing of the act of 56 Geo. 3. But that statute was intended to provide against indentures of apprenticeship brought about and effected by the instrumentality of parish officers. That was not the case here. Not only was there no controuling influence by the parish officers; but they were applied to by the pauper himself. The supply of clothes was not made a condition precedent to the apprenticeship. The argument on the other side must go to this extent—that if a parish officer give a pair of shoes to an apprentice just as he is about to execute the indenture, it will be void. That would be carrying the statute greatly beyond the intention of the legislature. There is nothing in the statement, or in the indenture, to shew that any of the mischiefs against which the legislature meant to provide, would occur in this case. It does not appear that the master was not to provide the apprentice with clothes; so that, in this respect, the master was not relieved from any charge by the providing of the apprentice with an outfit of clothes. At all events, to bring the case within the act, it should

(1) 5 Mau. & Selw. 257.

appear that the money in question came out of the parish funds. The circumstance of any stranger having advanced the money, would not avoid the indenture; nor can the mere fact of the person being a parish officer have that effect. Nothing is more probable than that the money may have been advanced, as is frequently the case, by persons who, from laudable motives, render assistance to poor people to prevent the evil consequences which follow an habitual application for parochial relief.

Mr. Justice Bayley.—I think the order of Sessions in this case was right. The expense incurred by the parish on this occasion did not appear in the shape of premium; but the master said that the boy wanted better clothes. A bargain was thereupon struck by the parish officers that they would supply him; and accordingly they did supply the means. But it is suggested that this money does not very clearly appear to have come out of the parish funds. I see nothing to negative the very strong presumption that it did. It does not appear that these parish officers advanced the money in their character of private individuals. And unless the Sessions had been satisfied of the fact that it had come out of the parish funds, they would not have acted as they did. Then look at the words of the act,—“No indenture of apprenticeship by reason of which ANY expense whatever shall at any time be incurred by the public parochial funds.” Here, the master objected that the boy wanted better clothes; and then the agreement was made. It seems to me to be a case clearly within the act.

Mr. Justice Littledale.—I am of the same opinion. The case is clearly within the act, supposing the money to have been parish money; and of that fact, I think, no doubt can be entertained. There is nothing from which I can infer that this was a donation by private individuals, upon grounds of public utility, as has been suggested by the counsel for the appellants.

Mr. Justice Parke.—I have no doubt that this money was paid by the overseers in their public character; and none whatever that it is a case within the words used, and the mischief described by the act.

Order of Sessions confirmed.

1828. } REX v. THE INHABITANTS OF
Dec. 10. } ST. ANDREW THE GREAT.

Poor Laws—General Hiring.

1. *The Court will not quash an order of Sessions upon a question of yearly hiring, merely because, from the facts stated, they would have drawn a different conclusion. If there be any facts which may warrant the conclusion, so as not to be repugnant to the facts, the Court will confirm the order.*

2. *Accordingly: The pauper was hired for a fortnight or three weeks. Afterwards, she was told, by her mistress, that she might sleep in the house, and that when she wanted clothes, she, the mistress, would find them. She was told by her mistress, two or three times, while she staid, that she might provide a place for herself elsewhere when she could. The Sessions held this to be a general hiring; and the Court, for the above reason, confirmed the order.*

Two Justices, by their order, removed Mary Ann Farrant, from the parish of Ely St. Mary, in the Isle of Ely, to the parish of St. Andrew the Great, in the town and county of Cambridge. Upon appeal, the Sessions confirmed the order, subject to the following

CASE.

It was proved, that the pauper was hired to a Mrs. Furbank, as nursery-maid, in the parish of St. Andrew the Great, in Cambridge, and lived there for five months; that she then went to Miss Henly, a straw-bonnet maker, in the same parish, and asked her if she could give her work in her business, which she said she would, for a fortnight or three weeks; that she did give her work for that time; two shillings a week and her board; and that, during this period, the pauper lodged at her uncle's, in another parish; that, after that, she went into Miss Henly's house, being told by Miss Henly that she might sleep there; and further, that when she wanted clothes, she, Miss Henly, would find them for her: she had her board, but no wages; that after her thus coming into the house to sleep, Miss Henly told her she might provide a place for herself elsewhere when she could, and that she repeated this two or three times during her stay; that, soon after

this, she went to visit her mother, who was ill in Ely, leaving some of her clothes behind her; that she asked Miss Henly's leave to go, who gave her some pocket money; that she staid with her mother three weeks, and returned without any order from Miss Henly; that she went a second time to see her mother, had leave for one week, but staid three; and finally left Miss Henly three weeks after her return. She staid altogether about fifteen months; did the household work; and, after having done that, she went to the straw-bonnet work. During the time the pauper remained in the house, Miss Henly had no servant.—If the Court of King's Bench shall be of opinion that a settlement, by hiring and service, was gained in the parish of St. Andrew the Great, under the above circumstances, both orders are to be confirmed. If the Court of King's Bench shall be of a contrary opinion, then both orders are to be quashed.

Mr. B. Andrews, in support of the order.—The Sessions have drawn a proper conclusion from the facts. The original employment, by Miss Henly, would not shew a yearly hiring; but when the pauper was afterwards told, that she might sleep in the house, and that when she wanted clothes Miss Henly would find them for her, the relation of mistress and servant was created generally, without any limit as to time. The observation made by Miss Henly, respecting the pauper getting another situation, is corroborative of this, as it implies that Miss Henly had the power to give or withhold her consent to the pauper leaving. These general hirings are upheld, unless there be some fact which clearly rebuts the presumption of there being such a hiring. This is laid down in the cases of *The King v. Stockbridge* (1), *The King v. Christchurch, York* (2), *The King v. Great Bowden* (3).

[*Mr. Justice Bayley*.—In the latter case, the Court thought the Sessions were wrong.]

They did so; because it was expressly found as a fact, that the pauper might leave, when he pleased. The previous

limited hiring, in this case, makes no difference with regard to the subsequent general hiring: *Rez v. Long Wharton* (4). The other facts in the case, relative to the pauper's occasionally leaving, were clearly dispensations, and do not affect either the contract or the nature of the service.

Mr. Flanagan and Mr. Kelly contrà.—An express hiring has not been found by the Sessions, and none can be inferred from the circumstances. The pauper was frequently told, in the course of the supposed yearly service, that she might leave when she pleased; and this must be reasonably supposed to refer to the previous contract. It was descriptive of it. The limited hiring in the first instance is also explanatory of the situation in which the parties subsequently stood.

Mr. Justice Bayley.—In cases like the present, the Sessions must draw their own conclusion; and we are not accustomed, nor indeed ought we, to reverse their decision, unless the premises on which they have proceeded are repugnant to the conclusion they have drawn. I think that, in this case, they might draw the conclusion they have drawn from the premises which were before them. The first contract was not for a year. The next contract varied the situation of the parties. Miss Henly then told the pauper that she might sleep in the house, and that when she wanted clothes, she, Miss Henly, would provide them for her. The mention of clothes might imply that a continuation of the service for some time, was in the contemplation of the parties. What was said afterwards, about her getting another place, would not alter the original contract, if there really was one; and the Sessions must have found that there was. I think, therefore, we cannot say affirmatively that the Sessions were wrong; that is to say, that there were no premises at all from which they might draw the conclusion that there was a general hiring; though I, most likely, should not have drawn that conclusion myself.

Mr. Justice Littledale.—I think the Sessions are the proper judges of cases like this, which are cases of fact, as to the contract which the parties entered into at the

(1) Burr. S. C. 759.

(2) 3 B. & C. 459; 5 D. & R. 314.

(3) 7 B. & C. 249; 1 M. & R. 13; 6 Law Journ. Mag. Cases, 17.

(4) 5 Term Rep. 447.

time. I should myself have come to a different conclusion from that to which they have arrived; but I cannot say that they had no facts from which they might not draw the conclusion which is now before us. The cases as to yearly hiring have become very refined; and I cannot, therefore, upon these facts, say that it is clear the Sessions have drawn a conclusion not warranted by the facts. Unless we can say that, we ought not, in my opinion, to reverse their judgment.

Mr. Justice Parke.—What we would have decided in the first instance upon these facts, is a very different question from that which is before us, when we are to examine the conclusion drawn by the Sessions. The question was one for them to decide; and although I might have come to a different conclusion from those facts, I cannot say that there are no facts at all to warrant the conclusion drawn by the Sessions.

Order of Sessions confirmed.

1828. } THE KING v. THE INHABITANTS
Dec. 10. } OF EDWINSTOWE.

Poor Laws—Acknowledgment of Settlement by Relief.

Where relief is given under circumstances which do not lead to the inference, that the parish officers knew enough of the facts to form an opinion as to their own liability, such relief is not even prima facie evidence to charge a parish.

Accordingly, an overseer of parish E. at a public-house, on a market-day, seven miles from his own parish, was applied to by a woman for relief. He gave her 3s., and said, if she wanted further relief, she must apply to him again at his parish. On a second application, she was refused further relief, and was told she must throw herself on parish M. The Sessions held, that this was prima facie evidence of an admission by the parish of E. that the pauper was there settled. The Court were of a different opinion; but confirmed the order of Sessions, as the case was one peculiarly for their decision.

Two Justices, by order, removed Sarah Dewick and her children from the parish of Mansfield, in the county of Notting-

ham, to the parish of Edwinstowe, in the same county. The Sessions, on appeal, confirmed the order, subject to the following

CASE.

The pauper, at that time resident in Mansfield, applied for relief to Mr. Bullivant, the overseer of the appellant parish of Edwinstowe, at a public house in Mansfield, a distance of seven miles from Edwinstowe, on a market-day; he gave her 3s. as relief, and said, if she wanted further relief, she must apply to him again at Edwinstowe, and he would give it her. A fortnight after, pauper went for relief to Edwinstowe, when she saw Mr. Bullivant and Mr. Sykes, the other overseer. They then refused to give her relief, saying she must throw herself on the parish of Mansfield.

Mr. N. R. Clarke, in support of the order of Sessions.—The question is, whether relief, given by a parish out of its own parish, is not *prima facie* evidence that the person thus relieved is settled in the parish which gives the relief. It may be admitted that it does not prove a settlement. It does *prima facie*. It calls upon the other side to answer or explain the circumstance; but, in the present case, no explanation was offered. When the pauper applied the second time, nothing was said to shew, that the relief had been given under any mistake, or in consequence of any misrepresentation: it was merely said to her, "you must throw yourself upon Mansfield parish."

Mr. Clinton, contra.—The Sessions have drawn a wrong conclusion from the facts. Relief to a person out of the parish is generally considered as evidence, that the parish knew the person they relieved belonged to their parish. But, in such a case, it is taken for granted, that the parish knew, or were in a condition to know, the circumstances under which they granted the relief. According to the expression of Lord Ellenborough, in the case of *The King v. Maidstone* (1), the giving relief is an opinion expressed by the parish, that the pauper is settled with them. Here, the parish officer was in no condition to inform himself of the circumstances. The woman applies to him at a public-house in a place seven miles from his own

(1) 12 East, 553.

parish; and to hold, that his giving her present relief under such circumstances was *prima facie* evidence of settlement, would be monstrous. When the pauper next applied, she received an answer different from that which she received at first. It may easily be inferred, that inquiry had been made in the meantime; and that the result of it was a belief by the parish, that she did not belong to them. It was neither necessary nor available to explain to her at that time the reasons of their refusal. Whether they were well founded or not, it would not be for her to decide. The overseer on the first occasion could not be expected to go so many miles to make inquiry, when the question merely was, whether he should give present relief.

[*Mr. Justice Bayley*.—Would not this officer have been a competent witness to explain the circumstances, under the 54 Geo. 3. c. 170. s. 9?]

As an inhabitant, he would. But he was a party on the record, and was liable to costs.

Mr. Clarke.—But he is only a party as trustee for the parish.

(No opinion was given upon this point, except that which fell from *Mr. Justice Bayley*.)

Mr. Justice Bayley.—I do not say, that I concur with the Sessions in the conclusion they have drawn. But this is a case, in which it was peculiarly the province of the Sessions to draw the inference from the facts which were before them; and I think, that before we set aside the judgment of the Sessions in such a case, we should be satisfied that they were decidedly wrong. Here, the relief was given under circumstances, which perhaps admitted of explanation. Probably, the overseer had no means of knowing what were the facts upon which the question of the liability of his parish would turn. But perhaps he had the means of knowing. He might have said, that he had not the means; and that he gave the relief, subject to inquiry afterwards. He was not called, and tendered as a witness, for the purpose of offering the explanation. I still think there was not enough to make out even a *prima facie* case; but that is not the question before us. The question is, were there any premises from which the Sessions might draw their conclusion? And I think there

were; and that we ought not to set aside their judgment.

Mr. Justice Littledale.—I concur in opinion with my Brother Bayley; and for the reason given by him; and, for that reason alone, I think the order of Sessions ought to be confirmed. I think it was a case too slight even to call on the other side to answer or explain it.

Mr. Justice Parke.—If I had to decide upon these facts in the first instance, I should probably have decided in favour of Mr. Clinton's clients; but it was a question peculiarly fit for the Sessions; and, in such a case, unless we see that they are *entirely* wrong, I think we ought not to disturb their judgment.

Order of Sessions confirmed.

1828. { THE KING v. THE INHABITANTS
Dec. 10. { OF THE PARISH OF ST. MARTIN, LEICESTER.

Poor Laws—Hiring and Service.

The pauper went with his father to Neale, an innkeeper, and informed him, that he heard he wanted a lad. Neale said he had got one coming in a fortnight; but that the pauper might stop for that fortnight until the other lad came. He was to fill the situation of boots and tap-boy; was to have his board and lodging in the house, and the wails which he might obtain in this employment. At the end of the fortnight, the other lad came, but was not engaged; and the pauper continued in the service (without any thing further passing between him and Neale,) for three years and a quarter. At the end of that time, he engaged in another situation without consulting Neale, and went into it on the following day; Neale saying, that "if it was his mind to go, he believed he must."

Upon these facts, the Sessions found, that there was an implied yearly hiring.

Mr. Justice Bayley held, that they were right. Mr. Justice Littledale did not concur; but as it was a conclusion not repugnant to the facts, agreed that the order of Sessions should be confirmed.

Two Justices, by their order, removed Francis Ward, with his wife and four chil-

dren, from the parish of Great Bowden to the parish of St. Martin, in Leicester. Upon appeal, it appeared that—

(CASE.)

The pauper, being then about fourteen years old, went, in company with his father, to the house of one Neale, an innkeeper in appellants' parish, and informed Neale, that he heard he wanted a lad. Neale answered, that "he had got one coming in a fortnight; but that pauper might stay for that fortnight, till the other lad came. Pauper was to fill the situation of boots and tap-boy: he was to have his board and lodging in the house, and the vails which he might obtain in this employment. At the end of the fortnight, the other lad came, but was not engaged by Mr. Neale; and the pauper continued in the service (without anything following between him and Mr. Neale), for a period of three years and a quarter; at the end of which time, the pauper, hearing that the place of hostler at another inn was vacant, went and engaged it, without consulting his master, and removed into it on the following day, Neale telling him, that if it was his mind to go, he believed he must.

The Court found, that there was an implied hiring for a year, and confirmed the order, subject to the opinion of the Court of King's Bench, on the above facts.

Mr. Jeremy, (with whom were *Mr. Humphrey* and *Mr. M'Dowell*), in support of the order of Sessions.—The Sessions having found that there was an implied hiring for a year, the Court will support that finding, unless they should see that there are no premises at all to warrant the conclusion.—[Here he was stopped by the Court, who called upon]

Mr. Denman and *Mr. Reader*, contra.—There were no premises at all to warrant such a conclusion as has been drawn by the Sessions. There was no hiring between the pauper and Neale: nothing to create an obligation on either side. This case seeks to carry the doctrine of presumption much farther than it has already gone. It does not appear how the other boy, who was expected, was to have been hired. For aught that appears, or can fairly be presumed, it might be a weekly hiring. The case, in its facts, resembles that of *The King v. Christchurch, York* (1).

(1) 3 B. & C. 459; a. c. 5 D. & R. 314.

[*Mr. Justice Bayley*.—In that case, it was part of the original bargain, that the pauper should stop as long as he had a mind.]

There is nothing to shew the contrary in this case. The finding by the Sessions is to be treated as their conclusion of the law from the previous facts. It was so treated in the case of *The King v. Great Bowden* (2). The judgment of *Mr. Justice Bayley* there treats the conclusion drawn by the Sessions as a matter of law; and the order was quashed, because the conclusion was not a sound one. The whole of the conduct of the parties shews, that there was no contract between them for a year. The cases of *Gregory Stoke v. Pitminster* (3), and *Rez v. Weyhill* (4), shew that the existence of a contract, either express, or implied by necessity, must be proved. But there is another case, which seems to run upon all fours with the present, as shewing the principle: it is the case of *The King v. Berwick St. John* (5). There, the head keeper of a chase, having parted with one Hill, who had been many years his servant, at yearly wages, and a keeper's livery, &c., asked the pauper, "Do you like the life of a keeper?" And being answered "Yes," said,—“Then go into Ned Hill's place, and you shall want no encouragement. I'll give you a suit of clothes directly.”—There, the reference to the terms, upon which the former servant had lived with him, manifested an intention to engage the new servant for the same period as Hill had been hired, which was for a year. In the present case, the terms also appear by some reference to the other boy; but there is nothing to shew what were the terms upon which he was to be engaged; and certainly nothing can be implied; for, in the case of *The King v. Berwick St. John*, the other servant had lived several years in the situation; while here, the other boy had never served at all. The right of the boy to vails, in this case, can amount to nothing; for it is consistent with a service short of a year: it was thrown into the employment for the fortnight. When can it be said, that the relation of master and servant, under a

(2) 7 B. & C. 249; a. c. 1 M. & R. 12; a. c. 6 Law Journ. Mag. Cases, 17.

(3) 9 Bott. 179; a. c. 1 Nol. 343.

(4) Burr. S. C. 185; a. c. 1 Nol. 345.

(5) Burr. S. C. 502; a. c. 1 Nol. 366.

yearly contract, commenced between these parties? Not when the boy first came; for the other boy was then expected. Not afterwards certainly; for it appears as a fact, that nothing further passed. The master, at the end of the service, uses language not that of a person who was willing that the servant should go, if he had the power to retain him. He says, that "if it was his mind to go, he believed he must." There seems, on the whole case, nothing to warrant the implication of a yearly hiring, but every thing to exclude it.

Mr. Justice Bayley.—I think the Sessions might properly draw the conclusion which they have. The boy applies for a situation. If the master at that time had engaged him, there could be no doubt on the subject. He, however, gives a reason why he cannot then hire him. He says, "I have a boy, who is coming in a fortnight; but you may stay until he comes." That boy, in the result, is not engaged; and it is said, that this boy continued in the service, "nothing further having passed" between him and his master as to the terms. But I think, that, from these facts, the Sessions might infer, that the service would be the same as it would be, in the first instance, had it not been for the doubt, as to the boy who was expected. There was a case, *The King v. Pandleton* (6), where the Sessions, in order to ascertain the terms of a service, referred to an unstamped agreement, under which there had been a previous service. The Sessions looked at the instrument, although it was not stamped, because they had not to adjudicate upon that contract at all: and this Court held, that they were entitled to do so. In like manner, they were here entitled to look at the situation of the parties with regard to the subject matter of reference, which subject matter so referred to, was reasonably to be taken as a part of the contract. I think, therefore, they were at liberty to infer, that the other boy was to have come under a yearly hiring; and that the pauper supplied his place.

Mr. Justice Littledale. (7)—I am not prepared to say, that I should have come to the same conclusion, as that which has been drawn by the Sessions from the facts in this

case. But, inasmuch as there were premises not altogether repugnant to that conclusion, I agree with my Brother Bayley, that the judgment of the Court of Sessions should not be disturbed. That is the rule upon which the Court act in similar cases.

Order of Sessions confirmed.

1828. } THE KING v. THE INHABITANTS
Dec. 10. } OF ROSLISTON.

Settlement—General Hiring.

The pauper's mother went with her son to one Slater, and asked if he wanted a boy? He said "Yes." She then asked, "What wages he would give?" He said "Let him stop what time he will, I will give him satisfaction; if not in money, in clothes."—The Sessions held this not to be a general hiring; and the Court confirmed the order.

Two Justices, by order, removed Richard Taylor, his wife and child, from the parish of St. Michael, in the county and city of Lichfield, to the parish of Rosliston, in the county of Derby. The Sessions, on appeal, confirmed the order, subject to the following

CASE.

Richard Taylor, the pauper, on the 6th of February 1817, and when about thirteen or fourteen years of age, went with his mother to Joseph Slater, a victualler and farmer, living in Landford-street, in the parish of St. Chad, otherwise Stowe, within the city, and county of the city, of Lichfield. The pauper's mother asked Slater, if he wanted a boy? He said "Yes." She then asked, what wages he would give? He (Slater) said, "Let him (the pauper) stop what time he will, I will give him satisfaction; if not in money, in clothes." The pauper went into the service a few days afterwards. He looked after the horses, cows, and sheep, and attended to the general business of the farm. Slater gave the pauper his board, some clothing, and also some money at different times, and the pauper continued in such service in St. Chad's parish for thirteen months, and then ran away, because Slater beat him. Slater never sent after the pauper, nor did the pauper ever offer to return to Slater's service; but a few days after he had ran away, he went to

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(6) 15 East, 449.

(7) There was no other Judge in Court.

SUPPL. 1829.

Slater's for his hat, which Slater refused to give him. The pauper, on his cross-examination by the respondents' counsel, stated, that, at the time of hiring, Slater did not say, that he (the pauper) might go away when he pleased, or that Slater might turn him away when he pleased. After the expiration of a year or more from the original hiring, the pauper's mother went to Slater's house to make an agreement, but he was out; and no new agreement was made. In 1827, and before the pauper was removed, and whilst pauper, wife and child, were living in St. Michael's parish, he applied to the overseer of the parish of St. Chad, otherwise Stowe, for relief; and after being examined as to his settlement, was twice relieved by such overseer. The Court of Quarter Sessions were of opinion, that there was no general hiring in the parish of St. Chad, otherwise Stowe.

Mr. Shutt (with whom was *Mr. John Jervis*.) in support of the order of Sessions. There was no general hiring. The opinion of the pauper, or that of his mother, can go for nothing. The words made use of by the master at the time of hiring, import, that it was at the will of either party to determine it. Some confusion has arisen in these cases, from the supposition, that an indefinite hiring, and a general hiring, are synonymous terms. They are not so. The present is an instance to shew that they are not; for the hiring was indefinite, but was not general, according to the received interpretation of that phrase. The case of *The King v. Christchurch, York* (1), is, in substance, like the present: there the pauper went to service "for meat and clothes *as long as he had a mind to stop*; to do what he could, and what he was bid;" and this was held to be no general hiring. (Here he was stopped.)

Mr. Whately, contra.—This was an indefinite general hiring.—There is no fact in the case to repel the presumption of the hiring being general. The case of *The King v. Great Bowden* (2), is in favour of the present as a case of general hiring. There, it was expressly found as a fact, that the pauper might leave, or the master might turn him away, at pleasure. Here,

all that passed had reference not to the time of staying, but to the wages. The master says, that for the period the pauper stays he shall have satisfaction, in money or in clothes.

[*Mr. Justice Bayley*.—But the Sessions have interpreted that expression.]

The cases of *The King v. Wincanton* (3), and of *The King v. Stockbridge* (4), are not distinguishable from the present. In the former, the master agreed to provide meat, drink, washing, lodging, and clothes, when wanted. The Court held that to amount to a general hiring; the circumstance of clothes being alluded to, leading to a presumption that the parties contemplated a service of sufficient duration to earn the clothes.

Mr. Justice Bayley.—Upon the principle which has obtained respecting these cases, I cannot say that the Sessions have come to a wrong conclusion. That principle I take to be, that if at the time of the hiring there is any special provision, which shews that either party may determine the contract at pleasure, the presumption of a general yearly hiring is rebutted. It was so in the case of *The King v. Trowbridge*, to which I alluded in the case of *The King v. Christchurch, York*. My note of the case of *The King v. Trowbridge*, which occurred in the year 1816, is this: "Finchett agreed with Moon to take his son, aged ten years, to maintain him as long as he pleased; to find him in meat and clothes as long as he should keep him, and the father and son were willing that he should stop. The Sessions thought that this was a general hiring; but the Court were of opinion, that it was a hiring at will only, and quashed the order of Sessions." That case went on the principle, that the presumption of a general hiring may be rebutted. The same was decided in *The King v. Great Bowden*. So, here, it was agreed that the service should be as long as both parties pleased. Here it is said, "Stop what time he will, I will give him satisfaction, either in money or in clothes." The question therefore is, whether the Sessions might not treat this as a

(1) 3 B. & C. 459; 5 D. & R. 314.

(2) 7 B. & C. 249; 1 M. & R. 13; 6 Law Journ. Mag. Cases, 17.

(3) Burr. S.C. 299.

(4) Burr. S.C. 759; familiarly known as the Boot Catcher's case.

fact which rebutted the general presumption? It is not what conclusion we should draw, but are there not premises from which the Sessions might draw the conclusion, as to a matter of fact, which it appears they have drawn; and I am of opinion, that there are such premises.

Mr. Justice Littledale concurred.

Order of Sessions confirmed.

1828. } THE KING v. THE INHABITANTS
Dec. 11. } OF RAWDEN.

Settlement by Tenement—Evidence.

1. *The facts of occupation and payment of rent, will be sufficient to raise a presumption, that the person who so occupied and paid was the tenant; and for the purpose of raising merely this presumption, those facts may be ascertained by parol, although the tenancy was under a written agreement, which is not produced.*

2. *But if it be sought to carry this presumption any further, or to alter it, by shewing either the terms of such a tenancy, or that the person who so appeared to be tenant, was a tenant with others, the written agreement must be produced.*

Two Justices, by order, removed George Clayforth, his wife and children, from the township of Idle to that of Rawden, both in the West Riding of the county of York. The Sessions, on appeal, confirmed the order, subject to the following

CASE.

The respondents proved a settlement in the appellants' township. The appellants then set up a subsequent settlement gained in the respondents' township, by the pauper having been rated, and having actually paid the rates, in respect of a tenement of the annual value of 10*l.* 10*s.* in that township.

It appeared, that in December 1823, he began to occupy the tenement, which was the property of Joshua Crompton, esq.; that he occupied it for a twelvemonth; paid the rent for it, and also the rates, during all which time he resided in that township.

In answer to this, the respondents insisted, that the pauper did not take the tenement of Mr. Crompton solely, but jointly with his father and father-in-law; and to prove this, they called Mr. Robinson, who was Mr. Crompton's steward at that time. He stated, that he did not know who occupied the tenement in question. He was then asked by the counsel for the respondents, who it was to whom he had let the tenement, and who were the tenants.

Whereupon the appellants' counsel interposed, and asked him, whether there was not an agreement in writing; and on his admitting that there was, they objected, that parol evidence of the letting and tenancy could not be received. The Court, however, permitted the question to be put, and the witness stated, that he had let the tenement to the pauper, the pauper's father, and father-in-law; that they were the tenants, and that they jointly delivered a notice to quit, but that he could not say whether this notice was signed with one or more names.

Upon this evidence, the Court of Sessions confirmed the order.

If the Court of King's Bench shall be of opinion, that this evidence was improperly received, then the order of Sessions is to be quashed.

Mr. Blackburne and Mr. Dundas, in support of the order of Sessions.—The other side sought to raise a presumption from the occupation, and the payment of the rates. We sought to rebut that presumption, by shewing the fact, that the pauper was tenant with others. This fact may be shewn by parol, according to the case of *The King v. the Inhabitants of the Holy Trinity and St. Mary's, Hull* (1). Here, the fact of tenancy was allowed to be proved by parol, although the terms of the tenancy were in writing.

[*Mr. Justice Bayley*.—Your difficulty is this,—Who was the tenant? That is the fact in dispute. There is a written agreement shewing the fact; and you seek to shew it by parol.]

The fact of "who was tenant," may be shewn by parol. It has nothing to do with the terms of the tenancy. The mere occupation by the pauper amounted to nothing.

(1) 7 B. & C. 611; M. & R. 444; 6 Law Journ. Mag. Cases, 24.

He occupied: but the question was, to whom was the property let?

[*Mr. Justice Bayley*.—The occupation was *primâ facie* evidence of a tenancy by the pauper-alone.]

[*Mr. Justice Littledale*.—The *Hull* case was very different; there it was merely allowed to shew the *primâ facie* case, which was made out here, and which you sought to alter.]

Mr. Starkie and *Mr. Milner* (contra)—were stopped by the Court.

Mr. Justice Bayley.—You may make out a *primâ facie* case by proving occupation and payment of rent. Here, rent and rates being paid, it might be presumed that the man was rated; and this would be a *primâ facie* case. Then it was sought to alter this case, by shewing that the person who was thus apparently the tenant, was not so; at least, that he alone, was not the tenant. It comes out that the tenancy was created by a written instrument; and what were the terms of it, or who were the parties to it, ought to have been shewn by the production of the instrument itself.

Mr. Justice Littledale.—I am of the same opinion. The case stands that a man occupied and paid rent; that would shew, *primâ facie*, that he was the tenant. But it is then offered in evidence that this man was only a tenant in conjunction with others; and the person who is called to prove this, says that he let the premises, and that he let them by a written contract. If then he were to be allowed to say to whom he had let them, he would be allowed to give parol evidence of the written contract. The *Hull* case is entirely different.

Mr. Justice Parke.—The *primâ facie* case is made out by proof of occupation and payment of rent. The other party seeks to alter this, by shewing that the person who thus appeared to be tenant, was tenant with others. It was admitted, that if this was so, it was by reason of a written contract. It follows that that contract ought to be produced, or the fact to alter the *primâ facie* case is not established.

Order of Sessions quashed.

1828. } THE KING v. THE INHABITANTS
Dec. 11. } OF GREAT DRIFFIELD.

Poor Laws—Certificate.

A person who is residing in a parish under a certificate, cannot obtain a settlement by the purchase of property in that parish, whatever may be the amount of the purchase-money. He can obtain a settlement there only by one of three modes:—

1. *By taking a lease of property there, of the value of 10l.;*
2. *By executing some annual office in the parish, to which he shall be legally appointed; or,*

3. *By acquiring property there, which shall come to him, not by his own act, but by descent, or other act of law.*

Consequently, no settlement is gained by a service under an indenture of apprenticeship to a certificate-man, who has not acquired a settlement, by one or other of the above modes.

Two Justices, by order, removed Thomas Harrison the younger, his wife and family, from the township of Great Driffield, in the East Riding of the county of York, to the township of Garton on the Wolds, in the said Riding. The Sessions, on appeal, quashed the order, subject to the opinion of the Court on the following

CASE.

The pauper, Thomas Harrison, never acquired any settlement in his own right.

The pauper's grandfather resided at Garton, the appellant township. His son, (the pauper's father) whilst living with him at Garton, was bound an apprentice to one Richard Lyon, a shoemaker, who was then residing at Great Driffield, (the respondent township) under a regular certificate from the parish of Kirkburn, as the father of the pauper then knew. The indenture, which was in the usual form, and regularly stamped, and executed by all parties, was dated the 25th of March 1786, and stated, that the apprentice was thereby bound for the term of seven years, from—(a blank being left in that part of the indenture for the time from which the apprentice was so bound). The said apprentice served his said master from the date of the indenture, until about five weeks previous to the expiration of

the seven years, in Great Driffield. The said Richard Lyon had resided in Great Driffield, from the year 1771, to the time of executing the said indenture, and from thence until his death, in the year 1793; but the said Richard Lyon, on or about the 10th of May 1792, whilst the said apprentice was so serving him in Great Driffield, purchased a cottage in the said township of Great Driffield for the sum of 110*l.*, of which 30*l.* was paid by him, and the remaining 80*l.* was paid by one Elizabeth Day; and the same was thereupon duly conveyed by an indenture of feoffment, with livery of seisin indorsed, bearing date the said 10th of May 1792, unto the said Richard Lyon and his heirs; to the use of the said Elizabeth Day, her executors, administrators, and assigns, from the day next before the date thereof, for the term of five hundred years, subject to the proviso therein contained for the redemption of the said premises, with remainder to the use of the said Richard Lyon, his heirs and assigns for ever. The said indenture also contained a proviso, for making void the said term, on payment, by the said Richard Lyon, his heirs, executors, administrators, and assigns, unto the said Elizabeth Day, her executors, administrators, and assigns, of the sum of 80*l.*, with interest for the same, on the 10th of November then next. The said Richard Lyon occupied the said cottage until his death; the said apprentice served the said Richard Lyon, in Great Driffield aforesaid, for more than forty days after the said Richard Lyon had purchased the said cottage as aforesaid, and there resided with the said Richard Lyon. The father of the pauper did no other act to gain a settlement; and if, by the said apprenticeship and service, he gained no settlement in Great Driffield, the place of his and the pauper's last legal settlement is Garton, the appellant township, where the pauper's grandfather was legally settled.

The question for the opinion of the Court was, whether, under the circumstances above set forth, the father of the pauper gained a settlement in Great Driffield, the respondent township, by being bound to, and serving the said Richard Lyon in Great Driffield as aforesaid.

Mr. Reader and Mr. Kennedy, in support of the order of Sessions.—There are two

questions: First, was the certificate discharged by the master gaining a settlement by the purchase of an estate? Secondly, supposing him to have so gained a settlement, was the service to him, while he lived under the certificate, sufficient to gain a settlement for the apprentice, the binding having taken place before the master gained the settlement? The first question turns upon the two statutes, 9 and 10 William and Mary, c. 11, and 12 Ann., stat. 1. c. 18, and upon the interpretation, which has been given to those acts by decided cases. Upon the second point, the other side will rely upon the case of *The King v. Hinckley* (1), where it was decided, that if an apprentice to a certificated person be assigned to a second master in the same parish, he cannot gain a settlement in that parish by serving the second master. Upon the first point, the cases have established the proposition, that an estate acquired by a person residing under a certificate, whether that estate be acquired by descent or purchase, discharges the certificate. The other side must therefore ask the Court to overturn decided cases; though, indeed, it may be admitted, that the cases were adjudged by departing from the acts of parliament. The first case on the subject, was that of *Burclear v. East Woodhay* (2), where the Court had their attention called to the statute, and they decided, that where the estate came to the pauper by descent, the certificate was discharged; for although the statute of William and Mary declared that a certificated man shall not gain a settlement, unless he takes 10*l.* per annum, or serves a parish office, yet the Court said, the act must receive a liberal construction; and that where a man gained a settlement by the act of law, the provision in the statute did not apply. Next came the case of *The King v. Cold Ashton* (3).

[It was here intimated, that the other side did not dispute the cases which applied to a settlement by act of law, but only those which applied to a settlement said to be gained by the act of the party.]

Then, there is a series of cases which decided, that where a man acquires the estate by purchase, (that is, purchased by

(1) 4 Term Rep. 371.

(2) 1 Stra. 162.

(3) Burr. S.C. 444.

money,) he is in like manner discharged from the certificate and gains a settlement. The first of these cases was *Ivinghoe v. Stonebridge* (4). The next was *Deddington v. Dunfrem* (5). Then followed the case of *Stansfield parish* (6). Those cases have been long acquiesced in; and it is important in the administration of settlement law, that that law, as it has been long understood, be not disturbed. And if this certificate-man acquired a settlement, and became a free man, the service to him under the indenture, was a good service, for the purposes of settlement.

Mr. Alderson and *Mr. Archbold*, contra. —Undoubtedly, cases have decided that a certificate-man may become discharged by purchasing a sufficient estate; and, although an adherence to adjudged cases is very desirable, yet an adherence to the words and the spirit of an act of parliament, of which those cases are in direct violation, is much more desirable. The act of parliament is clear and plain in its terms. The recital in the act 9 and 10 of William 3. c. 11. shews that it was passed for the purpose of removing doubts, as to the meaning of the previous act of 8 and 9 William 3. c. 30; and, to remove those doubts, it declares, in express terms, that no certificate-man shall obtain a settlement, unless he takes a lease to the amount of 10*l.* a year, or serves an annual parish office. It says, that unless by one or other of those means, the man shall not "by any act," be adjudged to have obtained a settlement. And can it be doubted, that making a purchase is "an act" of his own? All the acts of parliament are in restriction of settlement. The right at common law, was acquired by forty days residence. That right was afterwards restricted by a notice in writing becoming necessary, and the statute 9 and 10 Will. 3. was passed to declare, what should be equivalent to notice in writing. Where a man acquires an estate by descent, it may be admitted that he becomes discharged from the certificate. The act of 9 Geo. 1. c. 7. is restrictive of the right only in cases of purchase, under a certain amount; leaving the right, in case of an estate by descent, as it stood before. So much for the statute of

William, which regards the settlement of the master. This leads to a consideration of the statute of 12 Ann. c. 18. In general, what confers a settlement by apprenticeship? The binding, and residence;—and this statute expressly declares, that a settlement shall not be gained by apprenticeship with a certificate-man. The binding must be valid, as well as the residence. Here, the binding was bad; inasmuch as the master in his then situation had no right to take an apprentice.

The Court took time to consider; and on the 20th of December,

Mr. Justice Bayley delivered judgment in the following terms:—

The question for our consideration was, whether the pauper's father had obtained a settlement in the township of Great Driffield, by serving an apprenticeship to a man who was living there under a certificate.

In support of the order of Sessions, it was contended that he had, because it was said the certificate was discharged by the master having obtained a settlement in Great Driffield, by the purchase of an estate, which purchase was described in the case; and it was afterwards argued (that was the second point) that the subsequent service to the master while he lived under the certificate (though under the binding made to him before he obtained a settlement,) will be sufficient to gain a settlement. It will be unnecessary to consider the second question, unless a settlement was gained by the master, while he was residing under the certificate; and we are of opinion that no settlement was gained.

The statute of the 9 and 10 William 3. recites the 8 and 9 William 3, which is the common Certificate Act, and also recites, "that some doubts had arisen upon the construction of the said act, by what acts any person coming to inhabit and reside within any parish, by virtue of any such certificate, may procure a legal settlement in such parish;" and then it enacts, "that no person or persons whomsoever, who shall come into any parish by such certificate as aforesaid, shall be adjudged, by any act whatsoever, to have procured a legal settlement in such parish, unless he or they shall really and *bona fide* take a lease of a tene-

(4) 1 Stra. 264.

(5) Stra. 1193; Burr. S.C. 220.

(6) Stra. 1193; Burr. S.C. 205.

ment of the yearly value of 10*l.*, or shall execute some annual office in such parish, being legally placed in such office." The 8 and 9 William 3. has provided, that persons living under a certificate, and becoming chargeable, shall then, and not before, (if they have not acquired a legal settlement) be liable to be removed. At the time when the 9 and 10 William 3, passed, there were many different modes by which settlements might be obtained. Residence and notice was one; hiring and service, another; apprenticeship, a third; living on your own, a fourth. Then that act of the 9 and 10 William 3, says, in distinct terms, "that a certificate-man shall not be adjudged by any act whatsoever to have procured a legal settlement, unless he shall really and *bond fide* take a lease of a tenement, of the yearly value of 10*l.*, or shall execute some annual office." By the express words, therefore, of this statute, no settlement can be obtained by a certificate-man by any act whatsoever; that is, as the context shews, by any act whatsoever done by him, other than two which are pointed out by the act. The purchase by a pauper of an estate for a sum of money, is *an act* done by him. He is the agent; he is not merely passive, as he is when he receives something which somebody gives him, but he is active to get the thing purchased by him for a sum of money; an act done by the pauper other than is mentioned in the statute, by which, according to the plain import of the words, he cannot procure a settlement in the parish. That is as far as the words go. We are bound to construe every statute according to the plain and ordinary import of its words, and to act upon that construction, unless we are bound by an uniform course of well considered decisions, giving a different effect to the construction of the statute; or unless that construction would lead to such consequences, that we may safely pronounce the legislature had a different intention from that which the ordinary meaning of the words conveys. It will be found, however, upon referring to the decisions, which are two, that they are founded, in some degree, upon a mistaken supposition which arose in the first. The point has not been a point of very frequent occurrence, being that of a purchase by a certificate-man of an estate in the parish, where the purchase-money

would amount to at least 30*l.*, or otherwise, by the operation of the 9 Geo 1, no settlement could be obtained by the purchase.

There is a plain distinction between those cases, in which the estate comes to a man by act of law, or by gift by another person, and those cases, in which he is, in the common and ordinary acceptation of the word, a purchaser of the estate; not where he comes to the estate by purchase, in the technical and ordinary notion, as contradistinguished from descent, but where he pays money for the thing. The first case is that of *Burclew v. East Woodhay* (?); and there, a certificated pauper had acquired an estate in right of his wife, which was surrendered to her by her father. The father surrendered the copyhold to the wife; and the Court decided, that his certificate was discharged, and he gained a settlement; and it is stated in the judgment in *Strange*, that he did not come in by an act of his own, "which," the Court said, "might savour of fraud," but that the estate was cast upon him by act and operation of law. The Court, however, did not confine themselves to that, as the only reason which they gave for that decision; for, I think, the language of the Court was, "The 9 and 10 of William 3. being a new law, and not an explanatory act, is to receive a liberal construction. The exceptions in the statute prove this case, being a case more reasonable than either of those which are mentioned. If a certificate-man, by taking a tenement of 10*l.* a year, gain a settlement, *a fortiori* shall he that has an estate of his own; especially in this case, where it does not come to him by his own act, (which might savour of fraud,) but it is cast upon him by act and operation of law. If he that serves a parish office gains a settlement, by reason of his *presumed* ability, with greater reason shall he that *has* ability of his own, visible to all the world. It has already been adjudged, that any other person, by the descent or purchase of a freehold or copyhold, or by becoming entitled to a lease for years, gains a settlement; and it cannot be supposed, that the parliament intended to put a certificate-man in a worse situation." Now, that was a case certainly in which

the language of the Court seems to import, that they considered a certificate-man might gain a settlement by purchase, in the more ordinary acceptation of the word; but that was not a case of property coming to him by purchase; and, I must say, the language of that case, as applied to the construction of an act of parliament, is not language which (unless I were imperatively bound by it,) my judgment goes in any respect along with. When an act of parliament says, in distinct terms, that, out of several other modes of obtaining a settlement, a certificate-man shall only be entitled to gain a settlement by *two* of those modes, I do not think it is competent for a court of justice, in explaining that statute, to say, that, amongst the other modes of obtaining a settlement, which the legislature has *not* introduced, as cases in which you may obtain a settlement, you are at liberty so to construe it as to say, because some are *as reasonable* as those which the legislature has said shall *alone* have that effect, that *they* shall have that effect also. I think, when the legislature has said, that it is *only* by one of two modes, that you shall obtain a settlement, that you cannot properly, in the construction of that act, say you shall be at liberty to gain a settlement by any other *than* one of those two. Now, in that case, in point of fact, the property came to the individual by act of law: it was given to his wife; and therefore he, in right of his wife, was entitled to have that property. In the case in *Strange*, it is noticed, in distinct terms, that it did not come to him by his own act; and they mention, that coming to him by his own act, might savour of fraud. At that period, the purchase was not restricted as to amount. If he had made a purchase, though the amount of the purchase-money was 20s., or 1l. 10s., or 2l.; yet it would have conferred a settlement, except in the case of a certificate-man; but at the period to which I am referring, when the statute of the 9 and 10 William 3. was passed, a man, if he made a purchase of any value, would by that means obtain a settlement: and it is not to be supposed quite an outrageous thing to take it for granted, that the purchase might not be made for a larger sum than 10l.; for, in one of the cases, the property

he bought was worth 1l. 10s., or 2l. Now this case of *Burclear v. East Woodhay*, was, therefore, a case where the property came to the pauper, not by his own act, but by act of law.

The next case was *Ivinghoe v. Stonebridge* (8), and that decided, that the apprentice of a certificate-man gained a settlement; but then, under what circumstances? That was before the statute of the 12 Anne: he was bound, and served the whole of his time before the passing of that statute. Well, the 9 and 10 William 3. only prevented a certificate-man from gaining a settlement for *himself*; it did not prevent any body standing in the relation of a hired servant, or standing in the relation of apprentice to such certificate-man, from obtaining a settlement; but the Court there notice, that that was a case in which the settlement was obtained, because the binding and service were all before the statute of the 12 Anne. They certainly go on, and use language which would apply to the point in question; but it is clear that language was extra-judicial; because they say, "the order of Sessions must be quashed; for, as the apprenticeship expired in 1709, the statute of Anne is out of the case. But had this been a case since that statute, yet we think the settlement would have been in the certificate parish; because, according to *Burclear v. East Woodhay*, when a certificate-man makes a purchase, he immediately ceases to be there in the nature of a certificate-man, and becomes a settled inhabitant." Therefore, that was a case in which the point did not properly arise. They were laying a stress upon the case of *Burclear v. East Woodhay*, as if it had decided the point, which point in that case certainly did not properly arise. Therefore, those two cases, it seems to me, are not authorities which will justify us in acting contrary to the express directions of the act.

I now come to two cases, where there was purchase, in the common and ordinary acceptation of the word. The first was the case of *Stansfield* (9); in that case the facts before the Court were, that "the pauper, being in the parish of Rochdale, under a certificate, took a lease for a long term

(8) *Strange*, 264.

(9) *Burr. S. C.* 205.

years at a nominal rent ; that he assigned the lease for value ; that, afterwards, upon an uncle of his dying and leaving him some money, he purchased back the lease he had so assigned, together with some other property, for a sum above 30*l*."

Now it is not immaterial to see the language that is made use of by the Court at that period of time ; because it is by that language, that we are assisted in judging how far the case received the careful consideration, which it was entitled to have. My Lord Chief Justice Lee says, "A descent or a devise," (which are both acts by which the party comes to it by act of law), "and I believe a purchase to have been determined to gain a settlement (after forty days' residence), upon the footing of the person's not being removable from his own, and as not being an intruder within the meaning of the 13 and 14 Car. 2. So that, whenever a man has an estate of his own, though under 10*l*. a year, he shall not be removable under that statute. The present question turns, indeed, upon the construction of the certificate act. Now, though this man was a certificate-man, yet if he had come to this by act of law, it would have gained him a settlement ; and, I believe, it has been so determined, in the case of purchases too. I think the same construction has been made upon this act as has been made upon the 13 and 14 Car. 2."

Now there, the foundation of that judgment was, that it would apply to the case, where the property was obtained by act of law, by devise or descent,—where the party is, if I may use the expression, passive only, and he believes it has been so held in the case of a purchase also.

The next case, and the only other case in which the point was decided, was *The King v. Deddington* (10) ; it came before the Court in the following term ; and therefore there are, upon this point, two decisions, and two decisions only. These certainly are authorities, speaking as if that was a point, that had been decided. It was decided, that a purchase by a certificate-man, for the sum of 42*l*., gained him a settlement ; but that was expressly on the authority of *Burclear v. East Woodhay*. My Lord Chief Justice Lee says, "I think

the case of *Burclear v. East Woodhay* is an authority in the present case. That order (meaning the proceeding in the cause,) has now been read ; and it appears that a certificate-man's wife's father surrendered to her a copyhold of 20*s*. per annum ; and this was held a settlement, though it was most plainly neither of the two cases mentioned in the act. I remember the case. Lord Chief Justice Pratt held it more than equivalent to renting 10*l*. a year. Mr. Justice Eyre held, that the construction of this act of 9 & 10 W. 3. should be agreeable to that of 13 & 14 Car. 2. c. 12, upon which a man was irremovable from any tenement of his own, though it should be under 10*l*. a year. I do not see that the parish will be safer as to the notice arising from renting 10*l*. a year, than as to the notice arising from a purchase. There seems to be an equal notoriety in both cases. If this act were to be taken so strictly as has been contended for, a certificate-man could never gain a settlement, though he should purchase 5000*l*. a year." In the case I am citing, it will be seen that my Lord Chief Justice here says, that the notoriety would be equal in both cases—as if notoriety was the point ; where the legislature has said, in distinct terms, that you are only to get the settlement in one or other of those two modes. And as to notoriety—the notoriety would not be greater than giving distinct notice to the parish that you were there, and your remaining there for a period of forty days. He says, "One of the other Judges indeed, in the case of *Burclear*, observed, that it was not strictly to be considered as an act of the party himself, as he came in by the surrender to his wife ; but all the Court held it not to be within the prohibition of the act of 9 & 10 W. 3 ; the man being irremovable as long as he had any thing of his own, though he should become actually chargeable to the parish." Then he goes on, "If that be so, then the right will be communicated to those who derive from the man in question ; for after gaining settlement by the purchase, he is himself to be considered as an inhabitant of the parish in which he has gained it, in the same manner, as if he had actually rented a tenement of 10*l*. a year, or executed an annual office." Now, those are the only two

cases in which the point was expressly decided; and they are both founded upon the case of *Burclear v. East Woodhay*; and they are consecutive—one in Easter Term, and the other in Trinity Term following.

There were two cases which were mentioned; the one was *The King v. Cold Ashton*, in which a leasehold devolved upon the pauper's wife on her father's death, and then it came to the husband—not by his own act, but by act of law; and my Lord Mansfield does not appear to have had the act immediately before him; but he says, "The question was, whether he came within the 9 & 10 W. 3. c. 11, which mentions only two methods whereby certificated persons can gain settlements in parishes, to which they come with certificates—viz. taking a lease of a tenement of 10*l.* per annum, or executing an annual office. But an estate of a man's own, from which he cannot be removed, has been, by construction, (and a very reasonable one too,) holden to be within this act; for it would be a very hard thing to remove a man from his own estate." That may be very reasonable, where his own act does not concur in getting that, and making it his own; but where it is obtained by his own purchase, it does not follow that he cannot be removed from his own, because there is one distinction—a distinction pointed out by the 9 Geo. 1., that a man is irremovable where he is resident upon his own, unless he becomes chargeable. That act distinctly provides, "that no person shall gain a settlement by the purchase of any tenement, whereof the purchase-money, for such tenement, did not at that time amount to 30*l.*;" and when he ceases to inhabit that estate, he is liable to be removed; and therefore there is no doubt that there is a distinction between a man gaining a settlement, and a man being irremovable.

There is another case of *The King v. Long Wittenham*. It is not reported anywhere, I believe, and is not cited in any case; but I think it is in Mr. Const's book (11). That was, where the party came to the property by act of law. The property devolved upon a widow. The husband was certificated there, and he bought a cottage for 5*l.*, and lived in it till he died;

and the widow lived in it for ten weeks after his death; and the question was, whether she gained a settlement? Lord Mansfield says, "She was irremovable during the forty days." But that, as I have already mentioned, is only a case where the property does not come by purchase.

There came afterwards before this Court; the case of *The King v. Warbleton* (12); and in that case a part of the waste was granted out by the lord to a particular individual, and he was to pay 1*s.* rent and 1*s.* fine: and there was evidence in the case to shew, that it was the usage not to grant unless some small sum of money was paid for it; that they did not specify the amount of the money which was paid in the grant, nor in their books; that that was the common course of proceeding; that they did not grant, except for money, and the value of the property granted in that case was about 35*s.* or 40*s.* On the whole, it was insisted that that was a voluntary grant by the lord; and being by a voluntary grant on the part of the lord, it was not to be considered as a purchase. But the reason why I mention that case is, for the purpose of shewing what was operating upon the mind of Mr. Justice Ashurst and Mr. Justice Buller, upon the construction which had been put upon the statute of the 9 & 10 Wm. 3. They do not advert, either of them, to the distinction between the case of a voluntary grant and the case of a purchase; but they thought, even as to the case of a voluntary grant, it was insufficient. In that case they decided against the settlement, they held it not a voluntary grant; but Mr. Justice Ashurst says, "If it were necessary to give any opinion upon the point, whether, supposing this to be a voluntary grant, the party would gain a settlement, I should have wished the matter to have undergone further discussion. It seems extraordinary, that, in the teeth of an act of parliament, this matter should have been taken for granted. Nothing can be stronger than the words of the certificate act. [Which words the learned Judge then read.] I mean the part that described the two modes by which, and which only, a certificate-man could gain a settlement." Then he goes on, "It is singular that a practice should have prevailed

(11) *Dow's Poor Laws*, by Const. vol. IV. p. 41:

(12) 1 Term Rep. 241.

in opposition to that act of parliament where the words are so strong." Now, though that might have been said to be within the act of parliament, (any case of a voluntary grant) yet, it is said, if a voluntary grant be within the act of parliament, that, *a fortiori*, a purchase would. Mr. Justice Buller says, "I reserve to myself the consideration of the question, what effect a voluntary gift would have on a certificate person, as to the giving of a settlement. I agree that, under the act of the 9 Geo. 1, the word 'purchase' has not the same extensive sense as is generally annexed to it. But no case has been cited at the bar where a certificate has been discharged by a voluntary gift." There was also a case of *The King v. Upton* (13), which was before Lord Kenyon, but Mr. Justice Ashurst and Mr. Justice Buller were present; and the question there was, whether a particular case came within the notion of a voluntary gift, or came within the notion of a purchase; and the whole Court were of opinion, that it came within the notion of a voluntary gift, and they decided it conferred a settlement. Perhaps, at that period of time, Mr. Justice Ashurst and Mr. Justice Buller might be satisfied, upon the words of the act, of the distinction between property coming to the party by an act of his own, and property coming to the party by another person's act. In that case I think the property was worth more than 30*l.*; a party gave it to his son, but he made the son give him 10*l.* for it. Lord Kenyon considered it not in the nature of a purchase, but a gift of the money on the part of the son to the father, in order that the father might probably make a provision, by means of that 10*l.*, for another of his children.

Now, under these circumstances, we do not feel ourselves bound, by the two decisions that I have mentioned, to put a construction upon the statute, at variance with the plain and ordinary meaning of its words. It is clear that those decisions have proceeded in part on a misapprehension of the precise point, which arose in the case of *Burclear v. East Woodhay*. The other reasons assigned in giving those judgments do not appear to us to be satisfactory. Nothing seems to us to turn upon the noto-

riety of the purchase. There is no question whether a certificate-man would be removable during the time of his living in the parish, and being merely the proprietor of an estate; but the question is, whether he acquired a settlement; and, with respect to the similarity of construction to be put upon this statute, and upon the 13 & 14 Car. 2, it is to be observed, that the words are very different in this act. Looking at the recital in the latter statute, it applies to poor persons going from one parish to another, and endeavouring to settle themselves. Well, there is a distinct statute to prevent that, and to authorize the removal of such persons only as are mentioned in the recital. From that it is clear that it was never meant to apply to persons who come to reside and settle in a parish where they had estates. We think also, no mischief will arise from the construction we put upon the statute of Wm. 3; for, although by that construction a certificate-man might gain no settlement by the purchase of a large estate; on the other hand, he would be disabled from burthening the certificate parish by obtaining a settlement for a small consideration, as he might have done before the statute of Geo. 1.

We are of opinion, therefore, that the 9 & 10 Wm. 3. prevents a settlement being gained by a pauper by the purchase of an estate, in the common and ordinary sense of that word; but it does not prevent a settlement being gained by the pauper acquiring an estate that devolves upon him by operation of law; or by purchase, in the technical sense of that word; and we are, therefore, of opinion, that the order of Sessions must be quashed.

Order of Sessions quashed.

1828. } THE KING v. THE INHABITANTS
Dec. 11. } OF CROWLAND.

Poor Laws—Removal—Extra-parochial Place.

1. *The fact, that a given parish is that in which a pauper was last legally settled, does not necessarily (though it may generally,) lead to the consequence that that parish is bound to maintain him.*

2. Every order of removal must include both the fact and the consequence above mentioned.

Accordingly, an act of parliament was passed, to secure the draining of certain tracts of land. It provided, that the poor of those tracts should be maintained and kept by the trustees of the act, and should never become chargeable to the parishes in which they resided. A pauper, who, by hiring and service in one of those tracts, would have acquired a settlement there, became chargeable to a foreign parish; that parish removed him to the parish in which he was last legally settled:—Held, that the order of removal was bad; and that the removing parish must seek their remedy against the trustees of the act.

Two justices, by order, removed Ruth Reed, and her two children, from the parish of Spalding, in the parts of Holland, and county of Lincoln, to the parish of Crowland, in the same parts and county. The Sessions, on appeal, confirmed the order, subject to the following

CASE.

The respondents having proved that Reed, the husband of the pauper, gained a settlement in 1806, by hiring and service in the parish of Crowland, the appellants, for the purpose of shewing a subsequent settlement in Deeping Fen, proved, that the said — Reed, (the husband,) had served under a yearly hiring with one William Patchett, of Deeping Fen, from 1807 to 1808, and continued in that service until 1809, in which latter year he was married to Ruth, the pauper; that the said William Patchett, during the time of such service, was resident upon a part of the said fen called Deeping Fen; and which part is more particularly mentioned in a certain act of parliament, passed in the 16th and 17th years of the reign of King Charles the Second, cap. 11, for the draining of certain fens in Lincolnshire, as consisting of five thousand acres, and described in the said act of parliament, as being set apart for an additional recompense to certain trustees therein named, over and above a third part of the said fens, before assigned to one Thomas Lovell, and vested, under the provisions of the said

act of parliament, in the said trustees therein mentioned, their heirs and assigns, in consideration of certain burthens and charges, imposed upon the said trustees, their heirs and assigns, by the said act; that although, at the present time, there are no overseers for Deeping Fen, yet, nevertheless, that overseers were appointed for that place at intervals, but not regularly, from the year 1790 to the year 1810,—since which time no overseers have been appointed; and that, until within the last eight or nine years, a workhouse was kept and maintained in the said Deeping Fen, for the residence and management of the paupers residing in the said fen.

Upon this evidence, the Court of Quarter Sessions confirmed the order of removal to Crowland, subject to the opinion of the Court of King's Bench upon the above facts, and directed that the said act of parliament should be considered as part of the case.

The act referred to in the case recited, that, in the reign of Elizabeth, certain fens in Holland and Kesteven, in the county of Lincoln, called Deeping Fen, Pinchbeck, Spalding South Fen, Thurlby Fen, Bourn South Fen, and Croyland Fen, otherwise Goggershland, were put into a course of draining; that Thomas Lovell, esq. (the celebrated engineer of that day) had undertaken the works, and had made some progress therein; and that a third part of the fens had been allotted to him as a recompense; that, by an act subsequently passed in the reign of James I., the allotment to Lovell had been confirmed under certain conditions; that, by some neglect in the assigns of Lovell, and failure in the maintaining and cleansing the banks, rivers, sewers, and other works necessary thereunto, not only the said fens and marsh-grounds were returned into their ancient condition, of being hurtfully surrounded and annoyed by waters, but a great and considerable part of some adjacent towns of Holland had been overflowed and laid desolate, and many inhabitants and families utterly ruined and destroyed thereby. For the purpose of remedying this mischief, the act proceeded to repeal the grant to Lovell, and make certain provisions in favour of Parsons, who alaimed through him; to appoint trustees and undertakers for draining the fens, and

to give them certain powers and means of accomplishing this object. And then came the clause of the act chiefly upon which the present question turned.

[*Note*.—The act, though a public act, is not printed in the usual collection of the statutes. A copy, in duodecimo, was used in the argument, and the clause in question referred to, as being at p. 37 of that book. It will be found also in Pulton's edition of the Statutes (black letter), p. 1444.]

The clause is as follows:—"And be it further enacted by the authority aforesaid; that the said trustees, their heirs and assigns, or the survivor of them, their, or any of their tenants, farmers, or ground-holders of any part of the said third part, or of the said fen, or of the five thousand acres, shall not any time hereafter, have, use, or claim any common of pasture, or other commonage of pasturing, in any part of the remainder of the said fens, nor any of them, nor in the north fen of Pinchbeck and Spalding, nor any part thereof, by virtue or pretence of his or their residence there. But all and every the inhabitants that may hereafter be upon any part of the said third part, or upon any part of the five thousand acres, and are not able to maintain themselves, shall be maintained and kept by the said trustees, their heirs and assigns, and the survivor of them, and never become chargeable, in any kind, to all or any of the respective parishes wherein such inhabitant or inhabitants shall reside or dwell; any statute or law to the contrary hereof in any wise notwithstanding."

Mr. M'Dowell, in support of the order of Sessions.—The question appears to be, whether a settlement gained in a parish can be destroyed by hiring and service for a year in a place extra-parochial. By the clause at p. 37 of the act, it is undoubtedly provided that the charge of maintaining the poor of this fen is to fall upon the trustees, and not upon the inhabitants of the parishes; but although that is an arrangement made by the authority of the legislature, it is an arrangement only as between the trustees and those parishes. A foreign parish has nothing to do with it, and is entitled to remove to the parish where the pauper has acquired a legal settlement; leaving that parish to arrange with the trus-

tees, and enforce the performance of the duties cast upon them. The case might be doubtful if there were overseers of this fen, to whom an order of removal might be directed; but as there have not been any for eighteen years, the removal has been properly made by Crowland.

Mr. Bolland and Mr. Burnaby, contra.—It is admitted that the parish of Crowland is not liable to maintain the pauper; then why was the removal made to Crowland? The order of removal adjudges, not merely the place of settlement of the pauper, but the liability to maintain him. First, let it be conceded that the place in question is extra-parochial. If it be, the settlement at Crowland has been superseded. The other side should have removed to Deeping Fen; or supposing there to be no overseer, or other officer to whom the order could be directed, they should have applied to the trustees, and should have compelled them to discharge their public duty. The principle of the case was established in that of *The King v. Saughton-on-the-Hill* (3). There, the pauper, being a settled inhabitant of the township of Saughton-on-the-Hill, in the county of Chester, acquired a subsequent settlement in the township of Gloverstone, in the parish of St. Mary-on-the-Hill, in the city of Chester, in which parish there were several townships. Gloverstone was one, and was situated in the County Palatine, and not in the city. At the time the pauper gained his settlement, Gloverstone was a township, having overseers, and maintaining its own poor, which continued to be the case until some time afterwards, when all the houses in the township were taken down for the purpose of enlarging Chester Castle. At the time of the discussion of the case, there were no buildings in the township of Gloverstone, nor had there been, for the last ten years, except part of the Courts for the county, and some buildings belonging to the Barrack Board. No place within the township was inhabited by persons capable of being overseers, nor had there been overseers for the last ten years. After argument, the present Lord Chief Justice said, "The authority of Magistrates to remove paupers exists only, and is de-

rived from the express provisions of an act of parliament; and, in a new case, the best mode for the Court is to form their judgment on the very words of the act. There may be many cases where a pauper, having no settlement where he may happen to be, may still not be removeable from it; either because he has no settlement at all, or because the parish officers are not enabled to discover the place of his settlement. The words of the act are, that any two Justices of Peace may, by their warrant, remove and convey persons likely to be chargeable to the parish where he or they were last *legally settled*. It is, therefore, enough for the Court, in deciding this case, to say, that Saughton is not the parish where the pauper was last legally settled, inasmuch as he appears to have subsequently acquired a settlement in Gloverstone, by which the former settlement was extinguished. The Justices, therefore, in this case, had no authority to remove the pauper; and the Sessions have done wrong in confirming their order." Now it cannot be denied, that the hiring and service in this case entitled the pauper to a settlement. He should therefore have been removed to Deeping Fen; or, as before observed, the removing parish should have applied to the trustees. In no case was the pauper properly removeable to Crowland; for the act expressly says, that the poor of the places in question shall *never* become chargeable to the parishes to which those places belong. It is the same with bastard children born in extra-parochial places. Such children do not follow the settlement of the mother: *The King v. the Inhabitants of St. Nicholas, in the Borough of Leicester* (5).

Mr. Justice Bayley.—I am of opinion that this removal cannot be supported. The pauper is in Spalding, and is there chargeable. The removal to Crowland supposes that that parish is under a liability to maintain. The pauper's husband had done that at Deeping, which, in common cases, would give him a settlement there. This act, undoubtedly, would not affect distant parishes; but the question is, whether Crowland is liable to maintain. True it is, the clause, at p. 37 in the act, plainly

(1) 2 Barn. & Cres. 687.

means, that if a party is at the place in question, under circumstances which, in ordinary cases, would entitle him to be maintained by the parish of which it is a part, he shall not be maintained by the parish, but that the obligation to maintain him shall be upon the trustees: that shews the parish not to be liable; but that will not shew that Crowland was liable. The mode of enforcing this obligation on the trustees, may probably be by an application to the Magistrates; but whether that be the mode or not, the trustees are liable, and not the parish of Crowland; and, consequently, the order of removal to that parish ought to be quashed.

Mr. Justice Littledale.—The act evidently implies that Deeping Fen is in some parish or township; and it expressly states that the trustees, and not the parish, shall be liable to maintain the poor. The removing parish must therefore enforce the remedy against the trustees. They cannot justify the removal to a parish which is clearly not liable to maintain the pauper. Had the subsequent settlement been in a place extra-parochial, it might be different.

Mr. Justice Parke.—The case appears to me to be a very simple, and a very clear one. The pauper could not be removed to Crowland, if she had a legal right to be maintained in some other place. Deeping Fen appears to be a part of the parish or township of Deeping; and the liability to maintain the pauper was between Spalding, (the removing parish,) Deeping, and the trustees. The removal to Crowland cannot therefore be justified. If the place in question were extra-parochial, the case might be different; as the pauper might then have a right to be maintained in the parish where she was last legally settled.

Order of Sessions quashed.

1828. } THE KING v. PHILIP WILLIAMS,
Dec. 11. } ESQ.

Churchwarden.

1. *The ecclesiastical officer, the commissary, cannot try the validity of an election of churchwardens so as to bind the contending parties.*

2. To a mandamus to such an officer, commanding him to admit and swear in a person "duly elected" as churchwarden, he returned that the person was "not duly elected." The return was held to be good, as the applicant had his remedy by action if the return was false; the use of the word "duly" being considered, not as the assumption of a right to decide the validity of the election, but only as a traverse of a material allegation, upon which the mandamus was founded.

The defendant being official and commissary of the parish of Hornchurch, and liberty of Havering-atte-Bower, in the county of Essex, a writ of mandamus had been addressed to him by this Court, as follows:—

Reciting, that James Meakins, an inhabitant and parishioner of the said parish, had been *duly elected* into the office of churchwarden thereof, to serve for the ensuing year, according to the custom of the parish, and ought, by the defendant, to have been sworn and admitted into the said office; that he had presented himself to the defendant to be so sworn and admitted, but the defendant had refused so to swear and admit him. The defendant, was therefore commanded to swear and admit him into office, or shew cause, &c.

The defendant, in answer, stated in his return, that the said James Meakins had not been *duly elected* into the said office, as by the writ was suggested.

Mr. Brodrick now moved for a peremptory mandamus, contending that the above return was insufficient. The commissary is bound to obey the writ. He has no right to take upon himself to judge upon the merits of the election. Most of the cases upon the subject will be found in *Burn's Ecclesiastical Law*, vol. i. tit. "Churchwarden." In the case of *The King v. White* (1), the defendant to a mandamus like the present returned *non fuit electus*, "upon opening which, Mr. Justice Fortescue said, that it was settled, and had been often ruled, that the archdeacon could not judge of the election, and therefore this action was ill. Whereupon a peremptory mandamus was granted."

[Mr. Justice Bayley.—Read what follows, Mr. Brodrick.—"But note, it was certainly wrong, for the return was a good return, and has often been made to such a mandamus, and actions brought upon the return, and tried."]

There has been a difference of opinion on the subject. Lord Raymond and Lord Holt have been of one opinion, in favour of such a return, and other Judges have entertained a very different opinion.

[Mr. Justice Littledale.—If, as you contend, the commissary ought to exercise no discretion at all, you were entitled to a peremptory mandamus in the first instance.]

[Mr. Justice Parke.—The return traverses a material part of your mandamus. Is the man entitled to be sworn in, whether the fact be true or not?]

As regards the commissary, the man is entitled. The commissary has no right to judge of the election; he cannot exercise any discretion on the subject. To say, in a return, that the man is "not duly elected," is to judge of the election.

[Mr. Justice Parke.—No, it is merely denying the fact upon which you have obtained your mandamus.]

But in the case of *The King v. Rice* (2), the Court ordered a peremptory mandamus, in consequence of the defendant endeavouring to judge of the election. There the defendant returned, that the person applying was unfit, being a poor dairyman; and for this reason, the Court ordered a peremptory mandamus; and in the case of *The King v. Harwood* (3), the Court, upon a return of *non fuit electus*, ordered a peremptory mandamus to issue, on the ground that the archdeacon was not to judge of the election.

[Mr. Justice Bayley.—That case is reported differently in 2 Lord Raymond, 1405. It is there said, after noticing the case of *The King v. Rice*, "But both my Brother Reynolds and myself took the return to be good. But upon the importunity of the counsel, and pressing the authority of that case of *The King v. White*, and no counsel for the defendant appearing, a

(1) 2 Lord Raymond, 1379.

(2) 1 Lord Raym. 138.

(3) 3 Mod. 390.

rule was made for a peremptory mandamus, nisi, &c. At which, afterwards, my Brother Reynolds and I were much dissatisfied; but the counsel for the defendant, at another day, coming to shew cause against the rule, we discharged it; and the Court not being unanimous, it was ordered to come again on the paper. But there can be no doubt that such a return is good."]

That certainly is the defect of the case in *Lord Raymond*; but in the case of *The King v. Ward* (4), the case is quoted from 8 *Mod.*

[*Mr. Justice Bayley*.—It may be so; but Lord Raymond was more likely to be acquainted with the case, he being one of the judges, than the reporter in 8 *Mod.* That book is known to be inaccurate, and of no authority.]

[*Mr. Justice Littledale*.—Surely, the commissary may be allowed to make some inquiry about the person. Your argument would go to compel him to swear any man that may present himself.]

The argument would not produce so extensive a consequence. The commissary may return any personal disability of the person applying; such as, that he is an alien, an infant, a Jew, a felon, or the like. This seems to have been the opinion of Lord Stowell, in the case of *Anthony v. Seger* (5). But he has no right to judge of the election at all.

[*Mr. Justice Parke*.—Undoubtedly; he cannot judge of the election so as to conclude the parties in litigation. That is what the cases mean.]

The case of *The King v. Harris* (6), shews that such a return as the present is not good. Indeed, Lord Mansfield strongly condemned such a return. It was a mandamus to Dr. Harris, commissary of the Bishop of Winchester, for the ports of Surrey, commanding him to swear in two persons; and there was another mandamus commanding him to swear in four other persons to the same office. He returned that a cause was depending before him, in which it was disputed "who were elected

churchwardens?" and that he could not swear in the applicants until it had been judicially determined, in the cause depending before him, that the applicants were duly elected. To the other mandamus he returned the same; but adding, after the words, "duly elected," "by a majority of legal votes." Lord Mansfield said, "It is an indecent return. He has no right to try the question. He cannot try the legality of the votes. The king's writ commands him to admit and swear, and he must obey it." And, on its being objected by Mr. Blackstone, for the defendant, that there were two cross mandamuses, and that the Doctor did not know which to obey, Lord Mansfield and Mr. Justice Wilmot said, "He ought to obey both. It is without prejudice to the right of either claimant."

Mr. Justice Bayley.—That case is entirely different from the present. The commissary no doubt cannot judge of the election so as to bind the parties. But he may, at his peril, say, the applicant was not elected; and his doing so, gives the party an opportunity of trying his right in the form of an action for a false return. In the case of *The King v. Harris*, the defendant returned the same as if he had said, "I am considering that which I have no business to consider; and I have not yet made up my mind, and that is the reason I do not obey the writ." The present is a good return; for it in terms denies the suggestion in the mandamus. If this be false, the party has his remedy by action.

The other Judges concurred.

Return allowed.

See also—

The King v. Simpson, Stra. 610.

The Queen v. Guise, 2 Lord Raym. 1008; 3 Salk. 88; and 6 Mod. 189.

The King v. Twattly, 2 Salk. 433.

Anonymous, 1 Ventris, 267.

The King v. Reynell, cited in 3 Burr. 1422, on the same question.

(4) 2 Stra. 898.

(5) Hagg. Rep. 11.

(6) 3 Burr. 1420.

1828. }
Dec. 17 & 18. } BENNETT v. EDWARDS.

Poor-rate—Assistant Overseer—Pleading.

An assistant overseer is not liable to an action upon the statute 17 Geo. 2 c. 3. for refusing to permit an inhabitant of the parish to inspect a poor-rate, unless it be shewn, that, according to his appointment pursuant to the statute 59 Geo. 3. c. 12. s. 9, it was a part of his duty to produce the rate to the inhabitants.

But a declaration in debt upon the statute, stating, that the defendant was assistant overseer, and upon request of the plaintiff (a parishioner) although, "as such assistant overseer, he had the rate in his possession, yet that defendant did not nor would permit plaintiff to inspect the said rate,"—is good after verdict; for it will be intended to have been proved that the select vestry, in their appointment of the defendant to that office, imposed the duty of producing the rate to the inhabitants of the parish.

This was an action of debt upon the statute 17 Geo. 2. c. 3; the pleadings wherein will be found reported 6 Law Journ. K. B. 104; 7 B. & C. 586.

The case now came before the Court upon the fourth, and subsequent counts, charging the defendant as an assistant overseer. The fourth count stated, that the plaintiff was an inhabitant of the parish of Almondsbury, in the county of Gloucester, and the defendant was the assistant overseer of the said parish; that a rate for the relief of the poor was duly made, allowed, and published for the said parish; and that afterwards, and at a reasonable time in that behalf, plaintiff did request defendant, as such assistant overseer of the said parish as aforesaid, to permit him, the said plaintiff, to inspect the said rate, and then and there tendered and offered to him one shilling for the same: and although defendant, as such assistant overseer, then and there had the said rate in his possession, yet defendant did not nor would permit plaintiff to inspect the said rate, but then and there wholly neglected and refused so to do, contrary to the form of the statute, &c.

Upon this count a verdict was found for the plaintiff, at the last Assizes for the coun-

SOPPL. 1829.

ty of Gloucester; but a rule nisi in arrest of judgment having been obtained—now

Mr. Campbell shewed cause.—One objection to be made is, that there is no express allegation that the defendant was a person authorized to take care of the poor, pursuant to the provisions of the statute 17 G. 2. c. 3. ss. 1 & 2, and, in consequence thereof, liable to be called upon to allow an inspection, or to give a copy, of the rate. The precise words used in the statute are certainly not introduced, but it may be collected from the whole statement that the defendant was a person so authorized. It is alleged, that the defendant, as assistant overseer, had the rate in his possession; and it follows, after verdict, that it was his duty to produce and to permit it to be inspected. The rule for a new trial upon a former occasion was granted, expressly that the duties which the defendant was liable to perform might be ascertained; and it must therefore now be intended that one of those duties as assistant overseer, was to produce the rate to the plaintiff. The statute, whereon the action is founded, must be taken in connexion with the 59 Geo. 3. c. 12. s. 7, authorizing the appointment of an assistant overseer. By the latter statute, an assistant overseer is to perform such duties as shall be specified in his appointment by the select vestry; and it must be inferred, from the statement, that the defendant, "as such assistant overseer, had the rate in his possession, and would not permit the plaintiff to inspect the rate;" that one of the duties specified in the present case was to allow of such inspection, since, without proof of that fact, the plaintiff could not have obtained a verdict.

[*Mr. Justice Parke.*—We may take it that the rate was in the defendant's custody as assistant overseer for some purposes, but no further.]

If in his custody in that character, the duty to produce it upon lawful demand necessarily results: otherwise, as the fact of the rate not actually being in their custody, would discharge the other overseers from their liability, the rights of the parishioners to inspect the rate at all times, which the statute intended to confer, might be suspended for a long period, and all the mischiefs intended to be guarded against by that statute still prevail.

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Mr. Taunton, Mr. Serjeant Ludlow, and Mr. Justice, contra.—All the statutes upon this subject, it is admitted, form one connected system; but the statute upon which the declaration in the present case is framed, is a penal statute, and therefore, the defendant must be clearly shewn to be within its enactments. It is contended, that he is brought neither within its language nor its meaning. The only persons liable to be proceeded against for the penalties imposed, are churchwardens, overseers, or other persons authorized to take care of the poor. The defendant was neither an overseer nor a churchwarden, nor is it averred that he had the care of the poor. An assistant overseer, indeed, was never contemplated by the legislature when that statute was framed; but the words, "other persons," &c. were introduced to meet the case of persons farming the poor under 9 Geo. 1. c. 7. s. 4. The statute 59 Geo. 3. c. 12. s. 7, which first authorized the appointment of an assistant overseer, does not, of necessity, make him in all respects the representative of the overseer, and entail upon him all the duties and liabilities that belong to the higher office. On the contrary, he is only to execute "such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed." The care of the poor, unless positively averred, cannot be intended to have been one of the duties, which, by virtue of the appointment as assistant overseer, he is called upon to discharge. It is not, under the act of parliament, necessarily incident to his office; and, so far as responsibility is concerned, he might as well have been stated to have had the rate in his possession as assistant constable. *Rex v. Everett* (1), (decided upon the principle laid down in *Maz v. Roberts* (2),) seems here expressly in point. The fact alone, that the defendant was deputy overseer, is here stated; but there is no allegation by which the duty sought to be raised can be inferred. The act 59 Geo. 3. makes him a mere servant of the overseers, to do what shall be directed by the warrant of the Justices.

[*Mr. Justice Parke.*—Would not your argument go to this, that the action would

not be maintainable against an assistant overseer, although he were appointed to discharge every duty of overseer except that of taking care of the poor?]

It might; and in such case this statute would be defective: but the 58 G 3. c. 69. s. 6. which provides for the safe custody of the parish books and documents under the direction of the select vestry, would also in some cases impair the remedy of parishioners. The office of assistant overseer, as appears from the clause authorizing the appointment, is of a nature totally distinct from that of overseer. The person nominated to fill it need not be a householder; he is to have a yearly salary for his services; and he is moreover to enter into a bond, with sureties, for the due execution of his office. The Court will not, therefore, intend, from the averment that the defendant had the rate in his possession in his character of assistant overseer, and refused to allow an inspection of it, that he is within the statute, since that would be to decide in variance from the rule, that "the plaintiff ought to aver every fact, without being informed of which, the Court cannot judge whether he has a cause of action" (3). It might be, that the defendant, although he had the rate in his possession, had no power, or was forbidden, as assistant overseer, to produce it for inspection. The objection in this case will not be aided by verdict, since "nothing is to be presumed but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated:" *per Mr. Justice Buller*, in *Spiers v. Parker* (4), *Sutton v. Johnstone* (5).

Mr. Justice Bayley.—I agree, that in order to sustain the verdict that has been given in the present instance, the case must be brought within the words of the statute upon which the action is founded. I perfectly concur also in the position laid down by Mr. Justice Buller, in *Spiers v. Parker*, that nothing can rightly be presumed unless it be expressly stated, or must necessarily follow, by implication, from such facts as are stated in the declaration. Here, it may be admitted, that there is a defect in express statement, such as might, in that respect,

(1) 8 B. & C. 114, s. c. 6 Law Journ. Mag. Cases, 86.

(2) 12 East, 94.

(3) Com. Dig. "Pleader," c. 76; Litt. 162.

(4) 1 Term Rep. 145.

(5) Id. 493.

render the declaration insufficient; but, then, it must also be seen whether there is not that, which, by leading to a necessary inference and implication, will supply that defect, and bring the defendant clearly within the purview, and subject to the penalty, of the act of parliament. Now, the statute upon which the question depends, after providing that the churchwardens, overseers, or other persons authorized to take care of the poor, shall give notice of every rate allowed by the justices, and shall permit every inhabitant, at seasonable times, to inspect such rate, &c., proceeds, in these terms, to impose the penalty for which this action has been brought:—[Here the learned Judge read the third section of the statute.]—In order, then, to make the defendant liable to the action, it must be shewn that he comes within the description of the persons here mentioned. It is said, and that is a principal objection for the defendant, that it does not appear from the statement made, or by necessary inference, that he was a person authorized to take care of the poor. Conceded, that, by express statement, that does not appear, may not the defendant for this purpose still be an overseer? The appointment was made under the 59 Geo. 3. to perform "such duties as shall be expressed in the warrant for his appointment, in like manner, and as fully, to all intents and purposes, as the same may be executed by any ordinary overseer of the poor." It must be shewn, therefore, that the defendant was assistant overseer, with, by necessary implication, the duty in question cast upon him. A part of the argument has indeed gone so far as to suppose, that even if he were assistant overseer, with this duty incumbent upon him, still he would not be liable. To that I cannot agree; for, if that were so, the right of the parishioners to inspect the rates would be gone, and the act of parliament become abortive. When once you have ascertained that it was a part of the duty of the defendant to produce the rate, the plain consequence must result that he is liable to the penalty. Substantially, the same rule as that referred to in *Spiers v. Parker*, is laid down in 1 *Lord Raymond*, in these words:—"The general rule is, that where a thing is so essentially necessary to be proved, that if it had not been given in evidence, the jury could not have given such a ver-

dict, there, though it is not mentioned in the declaration, yet this defect shall be aided by the verdict." The declaration describes the defendant as assistant overseer, and, as there is no such person known to the law, except by virtue of the statute 59 Geo. 3, he must be considered to have been appointed under that act. It then says, that "within a reasonable time in that behalf," that is to say, *quoad hoc*, "the plaintiff applied to inspect the rate;" and avers, that, "although defendant, as such assistant overseer, had the rate in his possession," yet he refused to permit such inspection. If the defendant had the rate merely in his corporal possession, and for temporary purposes only, he would not have it in his possession as assistant overseer, and therefore it must have been proved, at the trial, that he had it in that character. On the whole, then, I think that it was an essential part of the proof at the trial, that it was the defendant's duty under his appointment by the select vestry, to permit the plaintiff to inspect the rate; and that the application was made at a reasonable time in that behalf. Although, therefore, I think the declaration is very imperfectly framed; yet, I am of opinion, that after verdict it is sufficient.

Mr. Justice Littledale.—The question is, whether the defendant is made out to be liable to the penalty imposed by the statute 17 Geo. 2. c. 3, for refusing to permit the inspection of the parish rate, according to the provisions of that statute. In order to make him so liable, I think it is sufficient if it appears that he had the books in his possession, as assistant overseer, and that it was a part of his duty, in that capacity, to allow an inspection of the rate. In the body of the count, it is certainly not so stated; but in the breach it is alleged, that "although the defendant, as such assistant overseer, had the rate in his possession, yet he did not nor would permit the plaintiff to inspect the said rate." Is this allegation, then, introduced in the breach, sufficient to maintain the verdict, and to supply the defect in the antecedent part of the count? It is said, that it is not; principally because the powers of an assistant overseer appointed under the statute 59 Geo. 3. are uncertain, and may have been so limited in respect of the present defendant, as to discharge him from all responsibility under the act of par-

liament, whereon the present action has been brought. To that, however, it may be answered, that had they been so limited, the fact might, at the trial, have been given in evidence; and, consequently, I think, that after verdict, it may be intended to have been proved to have been his duty to take care of the books, and to permit the plaintiff as an inhabitant of the parish, in the manner stated in the count, to inspect the rate. This is certainly a more rational presumption than that which we have been required to raise,—namely, that the defendant, although he might have the actual custody of the books, had not the power to shew them, on a demand made in the manner required by the act. The declaration, I admit, is very imperfectly drawn, and my mind was for some time in doubt; but I think there is just enough to turn the balance, and to entitle the plaintiff to retain his verdict. If the objection had been raised on demurrer, the result might have been different; but I cannot say that it affords good ground of an arrest of judgment.

Mr. Justice Parke.—I am also of opinion that the allegations in this declaration, are sufficient, and but just sufficient, to sustain the verdict. The former decision in this case determines, that if, as assistant overseer, it was part of the duty of the defendant to produce the rate, in case of refusal, he will be liable to the penalties of the act. That also decided, that he need not be overseer for all purposes; which disposes of a great part of the argument urged by the defendant's counsel. I agree in the decision given when the case last came before this Court; and, I think, that when the defendant is described as an assistant overseer, the necessary inference is, that he was appointed under the 59 Geo. 3. c. 12. I am ready to adopt the rule as to presumption laid down in *Spiers v. Parker*, and to act upon it in deciding the present question. It is quite clear, that the rate was delivered to the defendant, and was in his possession for some purposes; and therefore, I think, after verdict, we may intend that he had it as assistant overseer, or that he had it in his custody in the same manner, and for the same purposes, as the overseers would have had it in their custody. The 58 Geo. 3. does not prescribe the duty of permitting an inspection of the books to those persons

in whose hands they may be deposited for safe custody; but, I think we must presume that that was one of the duties proved to have belonged to the defendant under his appointment by the select vestry. On these grounds, therefore, I consider the declaration sufficient: and I am induced to believe this decision to be right, since it appears to me that the consequence of a contrary one would be, that the parishioners would otherwise be without a remedy.

Rule discharged.

[*Note.*—It is understood that this case will be carried up to a Court of Error.]

1829. } *DAVIES v. RUSSELL AND OTHERS.*
February. }

Constable — *Authority of, to act on a charge of felony.*

A constable is not liable to an action of trespass for arrest and false imprisonment for apprehending a person charged with felony, if he have reasonable or probable cause for suspecting that a felony has been committed, and that the party charged is the felon.

This was an action of trespass, brought against the defendant Russell, the high constable of the hundred of Cheltenham, in the county of Gloucester, and two others, who acted as his assistants, for arresting and imprisoning the plaintiff.

The defendants pleaded the general issue.

The circumstances of the case, as they appeared in evidence at the trial, before Mr. Justice Gaselee, at the last Summer Assizes for the county of Gloucester, were as follows:—

In November 1827, the plaintiff was lodging in the house of one Ann Hammerton, at Cheltenham. Miss Hammerton complained that she had been robbed of various articles. The plaintiff likewise asserted that she had been robbed of a 10*l.* Bank of England note, a note of hand for 7*l.*, and some articles of wearing apparel; neither party at the time suspecting the other to be implicated in the robbery. Subsequently, however, the plaintiff applied for and obtained, at the public office

at Cheltenham, a warrant to search the house of Miss Hammerton, on her allegation that she suspected that that person had been concerned in the robbery. On Miss Hammerton's appearing before the Magistrates on that occasion, the charge was dismissed. Shortly afterwards, Miss Hammerton informed the defendant Russell that she had strong grounds for suspecting that the felony had been committed by the plaintiff, and shewed him a letter, bearing the London post-mark, which had been left for the plaintiff at her house, and which she said she had good reason to suspect would lead to a discovery. The letter was accordingly opened by Russell, when it was found to be dated "London," and signed "Obadiab," and appeared to be a communication from the receiver of the stolen articles to the plaintiff, respecting the disposal of them. Upon this, Russell, under the impression that the plaintiff was the thief, and at the request of Miss Hammerton, proceeded to a house in Elm-street, Cheltenham, where the plaintiff was then lodging, at a late hour in the evening, apprehended the plaintiff, and took her to the prison, where she was lodged until the next morning. On the following day, the 28th of January 1828, the plaintiff was taken before a Magistrate, by whom the deposition of the complainant was taken, and the plaintiff was thereupon committed for a further examination.

The plaintiff was again brought up before two other Magistrates, on the 12th of February, when another letter addressed to the plaintiff, which Miss Hammerton stated she had intercepted, and which was confirmatory of the first, was produced by her; and the Magistrates, considering that the letters which were produced to them afforded a strong case of suspicion against the plaintiff, remanded her for a further examination; but, on the 16th, the plaintiff being again brought before them, and no additional evidence being offered, she was discharged.

At the following Spring Assizes, the plaintiff preferred a bill of indictment against Miss Hammerton, who was found guilty of stealing the articles alleged to have been lost by the plaintiff, and was sentenced by Mr. Baron Vaughan to transportation for seven years. Miss Hammer-

ton, whilst in prison at Gloucester, committed suicide.

Notices of action were served on the three Magistrates, by whom the plaintiff was committed and remanded; and the present action was commenced against these defendants for the alleged malicious arrest and false imprisonment.

On the trial of the cause, the learned Judge left it to the jury to say whether or not there was sufficient ground to justify the constable in taking the plaintiff into custody on this charge; and said, that, if they thought he had reasonable ground to suspect that she had been guilty of felony, they ought to find a verdict for the defendants.

The jury returned a verdict for the defendants.

Mr. Serjeant Russell, in the course of the last term, obtained a rule, calling on the defendants to shew cause why this verdict should not be set aside, and a new trial had, on the grounds that the learned Judge had misdirected the jury as to the defendants' right to arrest the plaintiff on reasonable and probable cause of suspicion; and that the learned Judge had omitted to leave it to the jury to say whether or not there was reason to apprehend that the plaintiff would attempt to escape, so as to justify the constable in arresting the plaintiff at a late hour of the night; or whether, she being resident there and well known, and not likely to attempt to escape, he should not have waited until the morning.

Mr. Serjeant Ludlow now shewed cause. —The direction of the learned Judge was clearly right; the proper question to be considered was, whether or not the constable had acted *bonâ fide*: not whether there was reasonable and probable cause to justify any person in suspecting that the plaintiff had been guilty of felony or not. In *Beckwith v. Philby* (1), it was held, that a constable, having reasonable cause to suspect that a felony has been committed, is justified in arresting the party suspected, although it afterwards appear that no felony has been committed. The learned Judge who tried that cause (*Mr. Justice Littledale*) was of opinion, that the arrest and detention of the plaintiff in that case were lawful,

(1) 6 Barn. & Cross. 635.

provided the defendants had reasonable cause to suspect that he had committed a felony; and he directed the jury to find a verdict for the defendants, if they thought, upon the whole evidence, that the defendants had reasonable cause for suspecting the plaintiff of felony. A verdict having been found for the defendants, a motion was afterwards made to enter it for the plaintiff, not on the ground that the question had been improperly left to the jury, but on the ground that a constable had no authority, without a warrant, to apprehend a person, unless there was a charge of felony made by a third person, or unless a felony had been committed. Lord Tenterden said (2), "Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury, which they have decided against the plaintiff, and, in my judgment, most correctly. The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a Justice of the Peace to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected, until inquiry can be made by the proper authorities. Now, in this case, it is quite clear, upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed, or was about to commit, a felony, and, the jury having so found, I am of opinion that the action was not maintainable." On this authority, therefore, it is perfectly clear that the direction of the learned Judge was substantially correct.—(The learned Serjeant was about to proceed with his argument, when the Court called on—

(2) 6 Barn. & Cross. 638.

Mr. Serjeant Russell to support his rule. If this direction of the learned Judge be upheld, it will have the effect of overturning all the law and the practice of the courts in cases of this nature. The question now presented for the consideration of this Court, is, whether this case has not been disposed of by a tribunal that ought not to have disposed of it. The matter was left entirely to the jury. In *Sutton v. Johnstone*, Mr. Baron Eyre said (3), "In our law, justification is a conclusion of law, which necessarily results from a given state of facts:" and afterwards, in giving judgment in the same case, in error, Lord Mansfield said (4), "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable or not probable are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law: and upon this distinction proceeded the case of *Reynolds v. Kennedy* (5)." It is an universal principle running throughout our law, that, where there is a question of probable cause, it is always to be treated as a question of law. Lord Coke, as to tolls, says (6), "What shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the judges of the law, if it come judicially before them." Again (7), "Reasonable time shall be adjudged by the discretion of the Justices before whom the cause dependeth, and so it is of reasonable fines, customs, and services, upon the true state of the case depending before them; for reasonableness in these cases belongeth to the knowledge of the law, and therefore to be decided by the Justices. *Quam legum esse debet non definitur in jure, sed pendet ex discretione justitiariorum*. And this being said of time, the like may be said of things uncertain, which ought to be reasonable; for nothing that is contrary to reason is consonant to law." In the case of *Swinton v. Molloy* (8), an action for false imprisonment brought by the plaintiff,

(3) 1 Term Rep. 507.

(4) Id. 545.

(5) 1 Wilson, 232.

(6) 2 Inst. 222.

(7) 1 Inst. 56, b.

(8) Mich. 1783, cited in *Johnstone v. Sutton*, 1 T. R. 537.

the purser of the *Tydem* man of war, against the defendant, his captain, the defendant pleaded a justification, for a supposed breach of duty; but, it appearing in evidence that the defendant had imprisoned the plaintiff for three days without inquiring into the matter, and had then released him on hearing his defence, Lord Mansfield ruled, as matter of law, "That such conduct on the part of the defendant did not appear to have been a proper discharge of his duty, and therefore that his justification had failed him." In the *Second Institute* it is said (9), "Whether the suspicion be just or lawful shall be determined by the justices, in an action of false imprisonment brought by the party grieved, or upon a habeas corpus, &c." Suppose, in this case, the defence had been put upon the record, must not the defendant have averred, in pleading, the facts, and then that he, having reasonable and probable cause to suspect, and suspecting, that the plaintiff had committed a felony, apprehended her: and thus the whole question would be brought before the Court; and if on such a record the cause went down to trial, all that the jury would have to do would be, to find whether or not the facts were proved—not whether they amounted to a justification. The case of *Beckwith v. Philby* cannot apply; nor, if it did, could it be deemed sufficient to overturn the current of authorities on this subject. There, however, this point was not before the Court; the question did not there turn on the direction of the learned Judge, because his Lordship expressed an opinion, that, if the jury found that the facts were proved, they were sufficient to justify the defendant in arresting and imprisoning the plaintiff. In *Hill v. Yates*, the Court said (10)—"Since the case of *Sutton v. Johnstone*, the question of probable cause is a matter of law, and cannot be left to the jury. It appears here, that the learned Judge who tried the cause intimated to the jury that he thought there was probable cause; he, therefore, should have nonsuited the plaintiffs, and not allowed the case to have gone to the jury for their verdict."

As to the other point, the learned Judge should have given some direction as to

whether or not the constable might reasonably have feared that the plaintiff would escape if he delayed to apprehend her.

A constable is only authorized to do that which is *necessary* for the capture of an offender. Formerly, it was considered, that not even a warrant could be granted, unless there was a suspicion in the Magistrate who granted it. Lord Coke says (11), "A Justice of the Peace cannot make a warrant, upon a bare surmise, to break any man's house to search for a felon or stolen goods, for they, being created by act of parliament, have no such authority granted unto them by any act of parliament; and it would be full of inconvenience, that it should be in the power of any Justice of the Peace, being a Judge of Record, upon a bare suggestion, to break the house of any person, of what state, quality, or degree soever, and at what time soever, either in the day or night, upon such surmises. But, if the party suspected be indicted, then the sheriff by force of the King's writ may demand the party indicted to be delivered; and, that not being done, he may break open the house, &c., and apprehend the felon, for that the King's writ is a *non omittas propter aliquam libertatem*; but if the King's process be in debt, trespass, &c., at the suit of a party, there the sheriff by force of the King's writ cannot break open the house of the subject; and so is the book in 13 Eliz. 4. fo. 9, which saith it was holden, that for felony, or suspicion of felony, a man may break the house to take the felon; and two reasons are yielded in the book,—first, because it is for the common weal to take them,—and, secondly, because the King hath an interest in the felony, and in such case the writ is *non omittas propter aliquam libertatem*; but otherwise it is for debt or trespass, the sheriff, or any other, cannot break the house to take them. And yet it is to be understood, that, if one be indicted for felony, the sheriff may by process thereupon, after denial made, &c., break the house for his apprehension; or upon hue and cry of one that is slain, or wounded so as he is in danger of death, or robbed, the King's officer that pursueth may, if denial be made, break a house to apprehend the delinquent; but

(9) Page 52.

(10) 2 B. Moore, 82.

(11) 4 Inst. 177.

for Justices of the Peace to make warrants, upon surmises, for breaking the houses of any subject to search for felons or stolen goods, is against Magna Charta,—*Nec super eum ibimus, nec super eum mittemus, nisi per legale iudicem parium suorum, vel per legem terræ*,—and against the statute of the 42 Eliz. 3rd, c. 3. &c. And we hold the resolution of the Court, viz. of *Brudnell, Pollard, Broke, and Fitzherbert*, in 14 Hen. 8, to be law,—that a Justice of Peace could not make a warrant to take a man for felony, unless he be indicted thereof, and that must be done in open Session of the Peace. For the Justice himself cannot arrest one for felony, *unless he himself suspect him* (as any other may), and, by the same reason, he cannot make a warrant to another. And all this appeareth in that book, and is agreeable with our former books, in 42 *Ass.* p. 5, and 12 and 24 *Eliz.* 3rd, *Com. Br.* 3, and with reason, for this warrant to take a felon should be in the nature of a *capias* for felony, which cannot be granted before indictment, nor after indictment but in open court. And this is the reason wherefore Justices of the Peace before indictment could not have let any charged with felony, or suspicion, to bail or main-prize, because Justices of Peace are Judges of Record, and ought to proceed upon record, and not upon surmises. *Sed distinguenda sunt tempora et concordabis leges*; for since the statutes of 1 & 2 P. and M. c. 13, and 2 & 3 P. and M. c. 10, (the words whereof be,—that the said justices, or one of them, being of the quorum, when any such prisoner is brought before them for any manslaughter, or felony, shall take examination, &c.) if any person be charged with any manner of felony, and information be given to a Justice of the Peace of the felony, or suspicion of felony, and feareth that the King's peace may be broken in apprehending of him, the said Justice may make a warrant to the constable of the town to see the King's peace kept in the apprehending and bringing of the party charged with, or suspected of, the felony before him, and the party that giveth the information of his knowledge or suspicion to be present and arrest the delinquent; and in this manner it is implied and intended by the said statutes for the prisoner to be brought before them: and this (as we take it) agreeth with the common use and ob-

servance ever since those statutes." Thus, in the whole of our law there is manifested the greatest anxiety not to interfere unnecessarily with the liberty of the subject.

Gradually, however, the power of granting warrants was extended. In *Hale's Pleas of the Crown* is the following passage (12): "A Justice of the Peace may issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant; and the reason is, because he is a competent judge of the probabilities offered to him of such suspicion. But that I may say, at once for all, it is fit in all cases of warrants for arresting for felony, much more for suspicion of felony, to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion, for he is in this case a competent judge of those circumstances that may induce the granting of a warrant to arrest." The constable might not be allowed to do this, because, he is not supposed to be so competent a judge of the circumstances. Again *Hale* says (13), "If there be a felony done (suppose a robbery upon A.), and A. suspects B., upon probable grounds, to be the felon, and acquaints the constable with it, and desires his aid to apprehend him; in this case, I say that the constable may apprehend B. upon this account, though the suspicion arises in A. at first; and with this agree the statutes of 3 E. 1, c. 9, and 5 E. 3, c. 14, and the books of 2 E. 4, 9 a., 5 Co. Rep. 91 b., *Semain's case*, *Dalt.* c. 109, p. 292 (new edit. c. 162, p. 535), 13 E. 4, 9 a., *accords* 2 H. 7, 15 b., though *Brian* be to the contrary; but there are to be these circumstances to accompany it:—*first*, A., the person suspecting, ought to be present, for the justification is that he did aid A. in taking the party suspected, 2 H. 7, 15 b.;—*secondly*, he ought to inquire and examine the circumstances and causes of the suspicion of A., which, though he cannot do it upon oath, yet such an information may carry over the suspicion even to the constable, whereby it may become his suspicion, as well as the suspicion of A. And if the constable should not be allowed this in cases of this nature, many felons would

(12) 2 *Hale's P.C.* 109, 110.

(13) *Id.* 91.

escape; and the party arrested hath no prejudice thereby, for the Justice of the Peace to whom in such cases he is properly to be brought, may consider the circumstances, and possibly in some cases discharge or bail him, and upon his trial, if innocent, he will be discharged;—*thirdly*, but there must be a felony in fact done, and the constable must be ascertained of that, and aver it in his plea, and it is issuable." Again (14), "A constable may, *ex officio*, arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a Justice of the Peace. So, if A. be dangerously hurt, and the common voice is that B. hurt him, or if C. thereupon comes to the constable, and tells him that B. hurt him, the constable may imprison him till he knows whether A. dies or lives, or can bring him before a Justice. So, if a felony be committed, and A. acquaints him that B. did it, the constable may take him and imprison him, till he can bring him before some Justice of the Peace (15). If a hue and cry be levied upon a felony, and come to the town, B. the constable, and those of the town, are bound to apprehend the felon if in the town, or, if not in the town, then to follow the hue and cry, otherwise they are punishable upon an indictment (16). Yet, to avoid question in these cases, it is best to obtain the warrant of a Justice, if the time and necessity will permit." In *Samuel v. Payne* (17), it was agreed, that if no felony had been committed, the apprehension of a person suspected could not be justified by anybody. In *Ledwith v. Catchpole* (18), it was held, that where a felony has actually been committed, a constable, or even a private person, acting *bonâ fide*, and in pursuit of the offender, upon such information as amounts to a reasonable and probable ground of suspicion, may justify an arrest. In the course of the argument of that case Mr. Justice Buller asked, "If the constable acts on suspicion, must it not, to make it a justification, be a reasonable ground of suspicion

in his own mind, and within his own knowledge (19), and not merely the information of others? for, if it is not so, he takes upon himself to *judge* of the evidence of others, when he ought to go before a magistrate, who is the proper Judge:" and Lord Mansfield, in giving judgment, said (20), "Upon a highway robbery being committed, an alarm spread, and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea-ports, it would be a terrible thing, if, under probable cause, an arrest could not be made; and felons usually are taken up upon descriptions in advertisements. Many an innocent man had been, and may be taken up upon such suspicion: but the mischief and inconvenience to the public in this point of view is comparatively nothing. It is of great consequence to the police of the country." In the *Year Book*, Hilary Term, 7 Hen. 4, fo. 55, pl. 3, in an action of trespass and false imprisonment against a bailiff, the bailiff pleaded that certain persons came to him in London, and told him that the plaintiff and another were come to London with certain oxen, which, as it seemed to them, were stolen, and he went to them and found the oxen in an obscure place in a house, and thereupon arrested the plaintiff by reason of the suspicion. The plaintiff demurred to that plea: and the Court said, "If a felony be committed in the country, and thereupon a man be arrested on suspicion of the felony, the arrest is good, because *there is a special cause of suspicion*: but if every man might arrest another on mere suspicion, then every imprisonment might be justified."

By the Court.—This was an action of trespass for an arrest and false imprisonment. The defendant Russell justified as a constable in the discharge of his duty,—the other two defendants, as the assistants of Russell. At the trial, it appeared that certain facts were sworn to which the jury did not believe, viz. as to the improper language alleged to have been used by Russell, which had the jury believed, they would have been fully warranted in inferring that he had been actuated by improper motives,

(14) Hale's P.C. 587.

(15) Id. 588.

(16) Id. 589.

(17) 1 Doug. 359.

(18) Cald. 291.

(19) 2 Hawk. P.C. s. 18. p. 121; and tit. "Arrests by public officers," s. 11. p. 132.

(20) Cald. 295.

and in finding a verdict against him. A constable, or other peace officer, is bound to use his authority in the gentlest possible manner. As, however, the jury did not draw such a conclusion from that evidence as they might have done, I take it for granted that they did not believe it. A motion has been made to the Court for a new trial, on two grounds: first, a supposed misdirection by the learned Judge to the jury;—secondly, an omission on his part to direct them on a point on which it is said they ought to have been directed.

As to the misdirection, it has been said that it was improperly left to the jury to say whether or not the defendants had probable cause for the arrest of the plaintiff. Probable cause is certainly a question of law, and as such within the province of the Court to decide; but the jury are not only to find facts—they are also to draw conclusions from the facts; and it is difficult to say where the line is to be drawn between matters of law and matters of fact. It has also been contended, that the learned Judge ought to have nonsuited the plaintiff; but, on the facts proved, he could not possibly nonsuit: it was necessary to leave it to the jury to say whether or not they believed the evidence, and whether they concluded from that evidence that the defendants had acted honestly. If they had thought not, and that the arresting was a mere pretence, and the constable had acted harshly and arbitrarily, no doubt the verdict should have been against the defendants with large damages. The learned Judge, in substance, left it to the jury to say whether or not they thought that the defendants had acted honestly and fairly, and in such a manner as they, the jury, in such circumstances would have acted; or, in other words, that, if they found certain facts, and drew from those facts certain conclusions, the defendants were entitled to a verdict. That in substance was strictly correct; and if a Judge's charge to the jury be substantially correct, a mere inaccuracy in the mode of summing up, is not to make it ground for an application to the Court for a new trial.

The direction of my Brother Gaselee in this case is strictly in conformity with that of Mr. Justice Littledale in *Beckwith v. Philby*. There, that learned Judge left it to

the jury to find a verdict for the defendants if they thought, upon the whole evidence, that they had reasonable cause for suspecting the plaintiff of felony; and afterwards, on the question coming before the Court of King's Bench (1), Lord Tenterden said, "Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury." In that case, no felony had in fact been committed: here, there had been. "The only question of law in the case, (continued his Lordship) is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a Justice of the Peace to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed: whereas, a constable having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected, until inquiry can be made by the proper authorities. Now, in this case, it is quite clear, upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed, or was about to commit, a felony; and, the jury having so found, I am of opinion that the action was not maintainable." So, in this case, the committal of the plaintiff by the Magistrate before whom she was taken by the defendants, evidently shewed that there was some probable cause for her apprehension, and that the constable acted *bonâ fide*.

It has been argued that a constable has no right, on bare suspicion, to arrest a person on a charge of felony without being armed with a warrant. It is, however, too late now to broach such a doctrine. There is a material distinction between common persons, and persons clothed with authority which they are bound to exercise. Although

(1) 6 Barn. & Cresk. 224.

a private individual may not justify the arresting of another on suspicion of felony, unless he can shew a felony actually committed, the mere having reason to suspect such a fact, is in itself sufficient to justify a constable. He need only shew probable cause of suspicion. Had this constable then, reason to suspect that a felony had been committed? He was told so by Miss Hammerton, who said that the plaintiff had robbed her, that she had lost certain goods, and that the plaintiff alone had an opportunity of taking them, and that her suspicions of the plaintiff were confirmed by two letters that had come into her possession, one of which she opened in the presence of the constable. The constable had no knowledge, or means of knowledge, that these letters were fabricated by Miss Hammerton; he thought they came from London; and their contents were such, as would clearly justify him in suspecting the plaintiff of felony. All these facts were submitted to the jury, and it was left to them to say whether or not what Russell did was fairly done in his character of constable. In the *Fourth Institute*, it is said, (2) "Upon hue and cry of one that is slain, or wounded so as he is in danger of death, or robbed, the King's officer that pursueth may (if denial be made) break a house to apprehend the delinquent." The authority of Lord Hale, which has been relied on by the counsel for the plaintiff, in my opinion bears against him. It is there said (3), "If there be a felony done (suppose a robbery upon A.) and A. suspects B., upon probable grounds, to be the felon, and acquaints the constable with it, and desires his aid to apprehend him, the constable may apprehend B. upon this account, though the suspicion arises in A. at first." Here, Miss Hammerton told the constable that she had been robbed, and that she had reason to suspect that the plaintiff was the felon, and desired the aid of the defendant Russell to apprehend her. In *Samuel v. Payne* (4), it was held, on the second trial, that a constable may justify in such a case. In *Ledwith v. Catchpole* (5), Mr. Justice Buller said, "It must be a reasonable cause of suspicion."

As to the second point, it has been urged very strongly that the jury should have been told that the constable had no right to go into the house at night. But what was the constable to do under these circumstances? If he had not gone to the house directly he was acquainted with the charge, he would have been liable to a prosecution for neglect of duty. These persons are not to exercise much discretion: when a charge is positively and directly made, they are bound to take into custody the parties accused. The defendant Russell would in this case clearly have been guilty of a gross dereliction of duty, if, after having heard the charge, and being shewn the letter which stated that the stolen property was in the possession of a person in the house, he had omitted to go there that night. Was he then to wait all night at the door of the house? Was he to watch all the doors and windows to prevent the possibility of escape? That would be unreasonable; Russell was bound to act as he did. It is the duty of a constable to secure the person of the accused without loss of time.

This is a case of considerable importance: it is important to constables, and highly important to the public. To the former it is important that they should know the full extent of their duty and authority; and to the latter it is highly important that constables should not be permitted to exceed or abuse their authority. It is also most important and requisite, that constables should not be rendered liable to the ruinous consequences of actions for discharging their duty. Courts of justice will not countenance any ill usage or unnecessary restraint of prisoners; but due regard must be had to their safe custody: and we ought not to hold such a doctrine as would have the effect of discouraging constables from entering houses where persons accused of felony are secreted. Under such circumstances, a constable is not to be restrained from entering a house. We think that the defendants acted properly, and were fully justified in all they did. This rule therefore must be—

Discharged.

(2) Page 177.

(3) 2 Hale's, P.C. 91.

(4) 1 Doug. 369.

(5) Cald. 291.

1829. }
February. } WRIGHT v. WALES.

Notice of Action—where necessary.

The plaintiff was employed by a private individual in making a new road across common lands belonging to a township. The Fenn-reeve, or person having the care of the town lands, finding the plaintiff thus trespassing, desired him to desist, and on his refusing so to do, caused him to be apprehended and taken before a Magistrate, who refused to receive the charge. The plaintiff thereupon brought trespass against the defendant:—Held, that the latter was entitled, under the 41st section of the 7 & 8 Geo. 4. c. 30, to a month's notice of action.

This was an action against the defendant for assaulting and taking the plaintiff into custody, and carrying him before a Magistrate.

The defendant pleaded the general issue.

At the trial, before Mr. Justice Holroyd, at the last Summer Assizes for the county of Suffolk, it appeared that the plaintiff was employed by one Sir Charles Blois in carting and spreading beach or shingle on certain common lands belonging to the town of Wilberswick, in the county of Suffolk, without any authority, and to the injury of the inhabitants and persons entitled to pasturage there, for the purpose of forming a road. The defendant was the Fenn-reeve, or person employed by the town to make entries of cattle depastured on the town lands, and to receive the monies paid for them, to impound cattle found damage feasant there, and generally to do all acts connected with the management of the town property. The defendant, acting in his capacity of Fenn-reeve, and finding the plaintiff thus trespassing on the common, repeatedly desired him to desist, telling him that he would otherwise be treated as a wilful trespasser; and, on his refusal so to do, ordered a constable to take him into custody, and caused him the same day to be taken before a Magistrate, who declined to receive the complaint, and discharged the plaintiff.

It was contended, for the defendant, that he was justified in causing the plaintiff to be apprehended, by the statute 7 & 8 Geo. 4. c. 30, the 24th section of which enacts—

“That, if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or punishment was thereinbefore provided, every such person, being convicted thereof before a Justice of the Peace, shall forfeit and pay such sum of money as shall appear to the Justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of 5*l*.”

The jury, under the direction of the learned Judge, found a verdict for the plaintiff—damages 20*s*. Leave was given to move the Court that this verdict might be set aside and a nonsuit entered, if the Court should be of opinion that the case fell within the operation of the above statute.

Mr. Serjeant Wilde, in last Easter term, obtained a rule nisi, that the verdict might be set aside and a nonsuit entered, on the grounds urged at the trial, and also on the ground that the defendant was entitled to notice of action, under the 41st section (1) of the act referred to.

Mr. Serjeant Storks and *Mr. Serjeant Bompas* shewed cause.—There is no pretence whatever for saying that this defendant was acting under and by virtue of the statute 7 & 8 Geo. 4. c. 30, at the time of the trespass complained of. The words of the clause are, that notice shall be given in all cases where the action is brought “for any thing done in *pursuance* of the act:” it is not like the common case of parties acting under colour of their office. In order to justify a person for acting even in execution, or in *pursuance*, of any act of parliament, it must clearly be shewn that such party, at the time, intended so to act. Here, however, there is not a shadow of fact or reason to suppose that this defendant was so acting. The contrary appears through—

(1) By which it is enacted, for the protection of persons acting in the execution of the act—“That all actions and prosecutions to be commenced against any person for any thing done in pursuance of the act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact committed, and not otherwise; and notice in writing of such action, and of the cause thereof, shall be given to the defendant one calendar month at least before the commencement of the action.”

out the case: it cannot by any possibility be assumed that he intended to act in pursuance of the statute; unless the plaintiff had been informed of that fact when he was taken before the Magistrate, how could he be supposed to know that it would be necessary for him to give the notice required by that act? In the case of *Cook v. Leonard and another* (2), which was an action for assaulting and imprisoning the plaintiff, the defence at the trial was, that, by an act for paving, lighting, &c. the town of Stroud (where the alleged assault was committed), power was given to the constables, &c. to apprehend idle and disorderly persons, &c.; and it was enacted, "that no plaintiff should recover in any action commenced against any person for anything done in execution of, or under the authority of that act, unless notice in writing should be previously given to the person intended to be sued, twenty-eight days before such action should be commenced:" it was held, that a notice was necessary in those cases only in which the party against whom the action was brought had reasonable ground for supposing that the thing was done in execution of or under authority of the act: and Mr. Justice Bayley there said, "Where a statute gives protection to persons acting in execution, or in pursuance of it, all persons acting under its provisions are entitled to that protection, although they exceed their authority by so doing. There must, however, be some limits to that rule, and it seems to me, that there are cases which warrant this distinction. If an officer does any act, part of which is, and part of which is not, authorized by the statute; or, if a Magistrate act in a case which his general character authorizes him to do, the mere excess of authority in either case does not deprive the officer or Magistrate of that protection which is conferred upon those who act in execution of it: but where there is a total absence of authority to do any part of that which has been done, the party doing the act is not entitled to that protection. There are certainly some strong cases where Magistrates, acting beyond the limits of their authority, have been held to be within this protection. Thus it has been held, that a Magistrate acting upon

the subject-matter of complaint brought before him, though it arise out of his jurisdiction, is entitled to notice of action; but, in that case, the act of parliament would have authorized him to do the act he did, provided the subject-matter of complaint had arisen within his jurisdiction. In *Weller v. Toke* (3), one Magistrate having committed the mother of a bastard child for not filiating the child, it was held, that he was entitled to the notice under the 24 Geo. 2. c. 44, though, by the statute of Eliz. c. 43. s. 2, jurisdiction over the subject-matter was committed to two Magistrates. In *Bird v. Gunston* (4), the act of parliament authorized the Magistrate to commit a driver of a cart for riding on the shafts in the highway. The Magistrate committed the party for being on the shafts while the cart was standing still; it was held, that, although the commitment was illegal, the Justice was entitled to notice of action. These cases fall within the general rule applicable to this subject, viz. that, where an act of parliament requires notice before action brought, in respect of anything done in pursuance or in execution of its provisions, those latter words are not confined to acts done strictly in pursuance of the act of parliament, but extend to all acts done *bona fide*, which may reasonably be supposed to be done in pursuance of the act. But where there is no colour for supposing that the act done is authorized, then notice of action is not necessary. Thus, in *Lawton v. Miller* (5), a custom-house officer seized a man going abroad, thinking that he was an artificer. It was admitted, that a custom-house officer had no right to seize an artificer, but it was contended that he was entitled to notice of action. A verdict was found for the plaintiff, with liberty to the defendant to move to enter a nonsuit, and upon motion the Court refused the rule. In *Morgan v. Palmer* (6), the Mayor of Yarmouth, who was also a Justice, exacted from a publican a fee of 4s. upon renewing his license; the latter brought an action to recover it back, but it was held, that the fee was not taken in discharge of the official duties of the Mayor as Magistrate, and therefore, that

(3) 9 East, 364.

(4) 24 Geo. 3.

(5) Easter, 1818, M88.

(6) 2 B. & C. 729; n. c. 2 Law Journ. K.B. 145.

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(5) Easter, 1818, MSS.

(6) 2 B. & C. 729; a. c. 2 Law Journ. K.B. 145.

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he was not entitled to notice. Then, to apply the principles to be collected from these cases to the present:—Had the defendant in this case any colour for acting as he did? Had he any reasonable ground for supposing that he was acting in pursuance or execution of the act of parliament? I think that they had no reasonable grounds for thinking that the act of parliament gave them any power to act as they did; and that being so, I am of opinion, that the rule for a new trial must be made absolute." So here, if the defendant had acted *bona fide* under an act of parliament, he would have been entitled to notice, even although he had in some degree exceeded the protection thereby afforded him. In the case of *Looker v. Halaomb*, which was an action similar to the present, and brought for an act alleged to have been done by virtue of the act now under consideration, Lord Chief Justice Best, in his judgment, says (7): "An act of parliament, which takes away the right of trial by jury, and abridges the liberty of the subject, ought to receive the strictest construction; nothing should be holden to come under its operation that is not expressly within the letter and spirit of the act. If the Courts were to decide upon a different principle, the law which has been the subject of discussion this day would become an intolerable grievance, placing the liberty of the subject in the hands of any owner of property who might think himself aggrieved by a claim of right."

Mr. Serjeant Wilde, in support of the rule.—The facts of the case clearly show that the defendant was acting under a supposition that he was authorized by the statute in question to do the act complained of. The defendant was the Fenn-reeve appointed by the town, and, as such, it was his duty to take care of the town lands, and to prevent encroachments thereon. The plaintiff was found cutting turf there, and doing damage to the land; and although, under the former act, it was held to be necessary, that the trespass should be malicious as well as wilful, the words being "wilful and malicious," yet by the late act the words are extended, and are "if any person shall wilfully or maliciously, &c." The defendant, therefore, had reasonable

ground for supposing that he was authorized to take the plaintiff before a Magistrate, and therefore was entitled to notice. If he had been warranted by the act in what he did, there would be no occasion for any notice; for in that case, proof of the facts would be a sufficient answer to the action. The true question then is, was this defendant acting *bona fide* in the supposition that the plaintiff was doing an injury to the land? If so, he was clearly entitled to notice, although he might be mistaken in the course he adopted for preventing the injury. In *Gaby v. the Wills and Berks Canal Company* (8), where a canal company were empowered to supply the canal with water from all streams whatsoever within the distance of two thousand yards, except as thereinafter mentioned, with a proviso, that nothing therein should extend to authorize them to take water from certain specified streams between the 10th of June and the 10th of September, except only, that, if one of those streams should overflow, the same might be taken into the canal so long as such overflowing should continue, and that all actions should be brought for anything done in pursuance of the act, or in the execution of the powers and authorities before given, within six calendar months after the fact committed; or, in case of a continuation of damages, within three calendar months after the committing such damages should have ceased,—it was held, that the taking, and continuing to take the water by the company from the specified streams during the prohibited times, might nevertheless be so far a thing done in execution of the powers and authorities given them by the act, as to entitle the company to the protection of the act as to the time of commencing the action against them. In giving judgment in that case, Lord Ellenborough said, "We are called upon to put a general construction on the terms of this act of parliament, and to say whether the thing done by the company can be considered as so far done in pursuance of the act, or in the execution of its powers and authorities, as to be within the limited protection of the act, though what has been done by them is not borne out in its full legality by the course that they have pur-

(7) 4 Bing. 188.

(8) 8 Maul. & Sel. 580.

sued. The way in which the statute 24 Geo. 2. c. 44. was construed by Lord Kenyon (9), seems to have been much like the construction we are now giving to this act; for he thought, that, if a person does an act within the limits of his official authority, but exercises that authority improperly, or abuses the discretion placed in him, *ea tenus* the statute extends. I do not know precisely what is the difference intended by the legislature, between the words 'in pursuance of the act,' and 'in execution of the powers and authorities before given;' but suppose the legislature might mean by the one a mere literal pursuance of the act, and by the other, when the parties have reason to believe that they are acting in execution of it. That does not apply to a constable, because he has no authority but what he derives from his warrant. A copy of his warrant may be demanded of him, and obedience to it is his defence, and will be his protection under the statute; but he is not to cover himself under it where the warrant gives him no power, because that would be allowing too much to the ordinary ministers of the law."

By the Court.—We are of opinion, that this was a case in which the defendant was entitled to the notice required by the act to be given; for, if he had acted legally in causing the plaintiff to be apprehended, he stood in no need of a notice; but, having exceeded the authority given him by that act, he was entitled to the protection that the law intended to throw round him. The law on this subject is clearly established, particularly since the case of *Gaby v. the Wills and Berks Canal Company*. If the notice was confined to cases where the matter might be justified, there would be no occasion for the clause. The defendant had a right to proceed under the statute. The plaintiff, therefore, should have given the proper notice before he commenced his action; and as he did not do so, he ought to have been nonsuited.

Rule absolute.

(9) In the case of *Alcock v. Andrews*, 2 Esp. Rep. 542.

1829. } THE KING v. THOMAS SYL-
Jan. 26. } VESTER.

Game Laws—Servant of qualified person.

The unqualified servant of a qualified person is not justified in firing off a gun for the destruction of game, though in the presence and by the authority of his master, who is himself not using a gun at the time.

This came before the Court in the form of a rule to shew cause why a *certiorari* should not issue to remove a conviction, in order to the same being quashed.

The defendant was convicted under the 5th Anne, c. 14. s. 4. for keeping and using a gun to kill and destroy game. The facts were, that on the 2nd of September 1828, the defendant (not being qualified) was seen with a gun in his hand shooting at a partridge. But in his defence it was proved that he was in the presence of Mr. Lee, a qualified person, who stated that the defendant was employed by him as his servant to accompany him into the field sporting. This person did not shoot, nor use any gun for the purpose. He stated that the partridge was shot for his use by the defendant as his servant. The Justice conceived that this did not justify the defendant under the act; and accordingly convicted him in the penalty of 5*l*.

Mr. Campbell, in support of the conviction.—The defendant was not protected by the presence of Mr. Lee. If the case of *Lewis v. Taylor* (1) should be cited, it may be admitted as an authority that an unqualified person may join in the amusement of hunting. The case of *The King v. Taylor* (2) was to the same effect; but those cases have no bearing upon the present. Hunting, as was observed by Lord Ellenborough in the former case, is not a solitary amusement; but here, who was the person that had the pleasure and the amusement of the sport? Undoubtedly it was the defendant.

Mr. Talfourd, *contra*.—The statute does not name a gun; but an "engine" for the destruction of game, within which description it may be admitted the gun may be classed. But it was decided, in the case of

(1) 16 East, 49.

(2) 15 Id. 408.

Walker v. Mills (3), that an unqualified person, who, by the orders, and in the presence of his master, a qualified person, set on his master's ground a trap for hares, and afterwards finding a hare therein, carried it according to the order of his master, who was not present when the hare was found, was not liable to the penalty. It was there admitted, even by the counsel against the defendant, that if his master had placed the trap, and had taken his servant with him to examine what was in it, there would have been no ground for charging him.

[*Mr. Justice Bayley*.—You see the opinion of the Court was, that the defendant had not been using the snare.]

Nor had the defendant here been using the gun, except for the purposes of his master. Something has been said about the pleasure and amusement of the sport; but these could not have been fully enjoyed by the servant. He merely supplied the mechanical means of discharging the gun, probably with accuracy of aim; but his pleasure and amusement must be very mitigated, seeing that his master might have stopped his sport at a moment, whenever he pleased, either from caprice or from any other cause. This, however, is a topic which shews, as was said by the Lord Chief Justice Dallas, in the case of *Walker v. Mills*, that "cases of this description generally run into very nice distinctions." In such a case, even if the authority were not (which it is submitted it is) in favour of the defendant, the Court would not entertain the conviction against the defendant upon a nice distinction, but would give him the benefit of any doubt.

Mr. Justice Bayley.—If the case could be carried to any ulterior court, we might probably think it better to let it be so carried, and not express any decided opinion on a subject of so much importance. But, as it cannot be so carried, it may be better that we decide it at once. I think, then, that the cases which have been cited are materially different from the present. In the cases of *The King v. Taylor*, and *Lewis v. Taylor*, it was properly decided that the master was the person who was using the dog. So, in the case of *Walker v. Mills*, it

was the master who was using the trap. The master was present at the setting of the trap, which was placed by his order upon his own land. Now, here, the thing used is the gun; but it is not the master who kills. My difficulty in reconciling those cases with the present would be, that if you were to lay down that a gun might be used by a servant, I do not see why a master might not have twenty servants at one and the same time, using each a gun. I see no limit to it; the gun, from the nature of the case, requires a personal use of it. The use of a dog, or of a snare, is different.

Mr. Justice Littledale.—I am of the same opinion; I think the act of using is the act of the person who fires the gun.

Mr. Justice Parke.—I think the case differs materially from those of the using of the dogs and the snare. It is the person who pulls the trigger, that, for such a purpose as this, is the person who uses the gun. The case of *Walker v. Mills*, respecting the snare, is very different; for there the snare was placed by the order and in the presence of the master, who was annoyed by rabbits and vermin in different parts of his land.

Rule discharged.

[See the cases and notes on this subject in *Chitty's Game Laws*, p. 74, and *Chitty's Collection of the Statutes*, 409.]

1829. }
Feb. 13. } THE KING v. JOHN TOMLINSON.

Poor Rate—Inequality—Lands, Houses, and Coal Mines.

1. *The Court will not disturb a poor-rate on the ground of an alleged inequality, unless that inequality manifestly appear on the face of the rate.*

2. *In calculating the annual value of the subject of rate, there is no objection to the allowing for the increased expense attending the repairs and gradual decay of houses, and the gradual exhaustion of coal-mines, when compared with the fixed and permanent annual value of land.*

Therefore, a rate upon lands, houses, and coal mines, made upon two thirds of the net annual rent of the lands, and upon only one

half of the net annual rent of the houses and coal-mines, was held to be good.

The defendant, with other parishioners of the parish of Stoke-upon-Trent, in the county of Stafford, was rated for the relief of the poor. He appealed, contending that the rate was disproportionate, in not assessing the proprietors of certain coal-mines within the parish, upon the same scale as occupiers of land were rated. The Sessions, after making some alterations, not material for the present purpose, confirmed the rate, subject to a case, which, after stating the before-mentioned circumstances in detail, thus proceeded :—

In the above rate, which was made upon a recent survey and valuation of the rateable property in the parish of Stoke-upon-Trent, the occupiers of farms, lands, and tithes, and also of market-tolls throughout the said parish, were assessed in respect of such property respectively, upon two thirds of their estimated net yearly rent payable to the landlord; and the occupiers of houses, pot-works, and every other description of building, and also the occupiers of collieries and coal-mines, were assessed in respect of such property respectively, upon only one half their estimated net yearly rent, or royalty, payable to the landlord. In the same rate the lessees of certain water-works were assessed in respect of their water-works and water-pipes within the parish, upon only one half of their estimated yearly rental value; but the rate was amended by the Court as to them, by assessing them upon two thirds of such rental value, being in the same proportion as in the case of land.

The question for the consideration of the Court was, whether, as the occupiers of farms, lands, tithes, market-tolls, and water-works, throughout the said parish, were assessed upon two-thirds of their estimated net yearly rent payable to the landlord, the several undermentioned occupiers of collieries and coal-mines ought not to be rated in the like proportion upon two thirds of the estimated net yearly mine-rent, or royalty, paid to the landlord, instead of upon one half as charged in the said rate.

If the Court should be of opinion that the said occupiers of collieries and coal-mines ought to have been assessed in the said rate upon two thirds of the estimated

net yearly mine-rent, or royalty, paid to the landlord, it was agreed between the parties, that the said rate should be amended by charging the said several occupiers of collieries and coal-mines in the said rate, in the sums set opposite their respective names in the first column of figures hereunder written, instead of the sums mentioned in the second column of figures, and now charged to them in the said rate.

[Then followed a list of the names and sums charged in the rate, as allowed by the Sessions, with a list of sums to be substituted in case the Court should be of opinion that the Sessions had proceeded on a wrong principle.]

Mr. Shutt and *Mr. Godson*, in support of the rate.—The Sessions are to judge of the proportionate value of the different species of property; and unless the Court perceive that the rate has proceeded on an erroneous principle, they will confirm it. In the case of *The King v. Brograve* (1), the Court observed that they could not disturb the rate, unless they perceived it to be manifestly unequal. And, with reference to a distinction in the mode of rating, according to the different nature of the properties, Lord Mansfield observed, "There should be a difference made between lands and houses, for there are several charges incident to houses, (as repairs, window taxes, and such like deductions and outgoings,) which do not fall upon lands to lessen their value." And in *The King v. the Inhabitants of Sandwich or Swannage* (2), the Court confirmed an order of Sessions, which had looked to local circumstances in proportioning the rate. Lord Mansfield there observed, that there could be no general rule as to the proportion between lands and houses; and that it must depend upon local circumstances. So, in *The King v. Hardy* (3), the Court held, that unless they could see that upon the face of the rate it was unequal, they would not interfere. This opinion, so often expressed by Lord Mansfield, was adopted by Lord Kenyon, in its terms, in the case of *The King v. the Aire and Calder Navigation* (4). From these authorities, then, it is clear that the other side are to shew an in-

(1) 4 Barr. 2491.

(2) 2 Doug. 562.

(3) 2 Cowp. 579.

(4) 2 Term Rep. 665.

equality in point of principle. Every reason, however, which can be suggested, is in support of the principle upon which this rate has been made. The difference in point of expense and hazard in the working of coal-mines, and the cultivating of land, must be obvious; and, independent of this, it is to be remembered, that, in the case of coal-mines, the capital itself in the course of time becomes exhausted.

Mr. Alderson and Mr. Whateley.—There is a manifest inequality upon the face of this rate; the rate is made upon the net value of each description of property. The calculation, to arrive at the net, has given the proprietors of collieries all the advantage of the deductions they claim in respect of the nature of their property, and yet they have the same advantage again in respect of their being rated at only half, instead of two thirds, of the annual value. In the case of *The King v. Sellers and Others, Inhabitants of Leckham* (5), the Court quashed the rate where it appeared to be unequal, although the Sessions had found that this mode of rating contained a relative equality.

The Court took time to consider, and this day—

Mr. Justice Bayley delivered the judgment.—After stating the facts, the learned Judge proceeded.—The question then was, whether this rate had been made upon a good principle? Whether there was anything upon the face of it to shew that it was unequal? It was not denied, that in general the Sessions are the proper judges of the question as to relative equality; but it was admitted on the other hand, by those who were in support of the rate, that if the Sessions had proceeded upon a wrong rule, the rate could not be supported. The question, then, at last becomes reduced to this: Can we say, that they have proceeded upon a wrong rule? We are of opinion, that there may be a fair difference in the proportion by which you fix the annual rent of each description of property; and we see no objection to the classing of houses and collieries together. And we think there is, in this respect, no difference, whether the person rated be the occupier, or the tenant,

or the owner. When a rate is made upon collieries and houses, and other property of that description, and is also made upon lands, we think an allowance may fairly be made for the cost of reproducing the subject (where it is capable of being reproduced), which is in a course of exhaustion, and which will, in many cases, become entirely expended. This applies in a particular manner to collieries. We think, therefore, that the Sessions were warranted in making a difference in the principle which should guide the rating of each description of property; and we see nothing upon the face of the rate which leads to a belief that the proportion is wrong. Some reliance was placed by the counsel against the rate, upon the word "net"; and it was contended, that this must mean the sum which is left after every deduction. This, if well founded, is an objection that would affect the whole of the rate; but we cannot give such an interpretation to the word. For the purposes of this rate, it may mean "net, after deducting taxes and the charges of collection;" and this construction, which seems to be a reasonable one, will support the rate. The term "rent" does not of necessity import annual profit, or yearly value. For these reasons, we are of opinion that the judgment of the Sessions was right, and that their order should be confirmed.

Order of Sessions confirmed.

1829. }
Feb. 9. } THE KING v. BENJ. THOMAS.

Poor Rate—Canal Companies—Occupation.

1. *In general, where a Canal Company have authority given them by act of parliament to make a public river navigable, with the usual powers to carry the object into effect, they are not, for the purposes of poor rate, "occupiers" of the land which is the bed of the river.*

2. *But where, in pursuance of those powers, they make cuts and locks upon land which has been purchased by them, they are liable to be rated as occupiers, in respect of those cuts and locks.*

vigation of the river Avon, were rated for the relief of the poor of the parish of Keynsham, in the county of Somerset. Upon appeal, the Sessions made an order, subject to the opinion of the Court, upon a case of which the following is the substance.

CASE.

The rate was in these terms—"Benjamin Thomas, and the other proprietors of the navigation of the river Avon, from Hanham Mills to the city of Bath; for locks, sluice, cut, and land covered with water, being part of the river Avon in this parish; and for profits arising from the same by carriage of merchandize and persons thereupon; being a proportionate part of the tolls collected and received in respect of merchandize and persons carried upon the river Avon, from and to Hanham Mills, to and from the city of Bath.

The notice of appeal stated in substance, that the proprietors of the navigation were not occupiers of the locks, sluices, and cut, or the land covered with water. The objections were stated in several forms; some collectively, and others distinctly. The facts bearing on the question respecting the liability of the proprietors were the following:—

The river Avon was made navigable soon after the passing of the 10th Anne, cap. 8, entitled, "An act for making the river Avon, in the counties of Somerset and Gloucester, navigable from the city of Bath; to or near Hanham Mills," and made so under the authority of that act by the proprietors of the navigation, the predecessors of the appellants. By the 47 Geo. 3, entitled, "An act for enabling the proprietors of the navigation of the river Avon, in the counties of Somerset and Gloucester, from the city of Bath, to or near Hanham Mills, to make and maintain a horse towing-path, for the purpose of towing or haling, with horses or otherwise, boats, lighters, and other vessels, up and down the said river," further powers were given to the said proprietors.

The river has continued to the time of the rate navigated and navigable; and the proprietors have received the tolls, rates, and duties given by the said acts, or either of them, from all passengers and goods passing on the river. No part of the towing path mentioned in the said act of

the 47 Geo. 3. is within the respondent parish.

A certain cut was, before the passing of the last-named act, made in the respondent parish, as part of the navigation of the river; and a certain lock within the said parish, and in the said cut, was at the same time constructed at the expense of the proprietors, for the purpose of the navigation, and under the provisions of the said statute of Anne, and both have been and still are used for the same purposes by persons paying tolls, rates, and duties to the proprietors. And the proprietors have, and still do, under the powers of the said statute of Anne, from time to time as need requires, clear, scour, and cleanse the bed of the river.

The clear annual amount of the tolls, rates, and duties, received by virtue of the said statute of Anne, on the navigation, which is eleven miles in length, is 4000*l.* per annum.

The length of the river in the respondent parish is three miles.

The length of the cut in the said parish is three hundred yards. No specific toll, rate, or duty, is payable for passing the lock or cut.

For the purposes of the tolls, rates, and duties, the cut and lock are parts of the navigation of the said river. The cut and lock are substitutes for the natural river.

None of the appellants reside within the parish of the respondents.

The question for the Court was, whether the appellants were rateable for the whole, or any part of the subject matter of the rate.

If the Court were of opinion that the whole was rateable, the rate to be confirmed.

If they were of opinion that the cut and lock only was rateable, the rate to be amended by reducing,

Annual value, 5*l.*

Amount of assessment, 2*s.* 6*d.*

If they were of opinion that the lock only was rateable, then the rate to be amended by reducing,

Annual value, 2*l.* 10*s.*

Amount of assessment, 1*s.* 3*d.*

If they were of opinion that no part was rateable, the rate to be quashed.

The case was twice argued, once before

Mr. Justice Bayley and Mr. Justice Little-dale, at the Sittings before Michaelmas term 1828; and a second time in full court this term.

Mr. Jeremy and *Mr. Moody* contended that the proprietors were liable to the full amount of the rate.

Mr. Campbell, *Mr. Rogers*, and *Mr. Bere*, appeared for the proprietors.

The arguments urged on behalf of the parish, to shew the liability of the proprietors, were in substance as follows:—

The proprietors, by the provisions of the acts of parliament, have that description of interest in the bed of the river, which renders them occupiers of the soil. *Hollis v. Goldfinch* (1) is distinguishable from the present case, although it will be mainly relied upon by the other side. The Court, in construing the particular local act in that case,—held, that the soil did not pass to the proprietors of the navigation; observing that the whole purpose of the act might be accomplished without a purchase of the soil. Here, it is difficult to suppose, that all the powers could be exercised without, at least, an occupation of the soil. The proprietors are expressly empowered to widen, deepen, cleanse and scour the bed of the river. They are empowered to exercise a complete control over the whole of the river throughout its course; and to make erections and buildings; and they have constructed locks and sluices in such parts as they have considered necessary. The case of *Buckeridge v. Flight* (2) is material with reference to the nature of the interest which the proprietors took in the soil. It was a case decided by Lord Alvanley respecting a share in this very company. The question was, whether it passed by a testamentary paper not executed in the presence of three witnesses. It came before his Lordship upon the Master's report, which set out the facts and the act of parliament then in force. After noticing Lord Coke's definition of an hereditament, he says, "What constitutes in point of law a real hereditament? The definition given by Lord Coke will, without the least doubt, apply to this case; and when the cases I mentioned are considered, it will appear, the Judges who

decided them had no intention to shake that definition, which is fully comprehensive enough to include the present subject. There, Lord Coke is speaking of the statute *De Donis*; and according to that passage, every hereditament which in any degree arises out of land, affects the same, or is exercisable within the same, has all the properties of real estate. There are certainly hereditaments which may be made to descend from ancestor to heir, that do not in any degree affect the realty; as, personal annuities, and offices, not having any concern with land. They may descend as tenements, but may be liable to alienation exclusive of the provisions of that statute. When we come to try the question by the test of that definition, it would be strange to say that this right of making all these cuts and erections, and reserving certain tolls payable by all persons and goods navigating that part of the river, does not savour of the realty. It not only does, but it partakes of it. It is not the soil, which I hold would hardly pass to the grantee, but it is a right arising out of the soil; the land itself includes every profit that can be made out of the land. Therefore, this act cannot be construed to have taken out of the proprietors, and given to this corporation, the soil: but it has given them a right in and over the soil, and certain real rights arising in and out of the soil.

"The act establishing the new river was referred to as the foundation of the rights of that company; but that act is vastly inferior to the powers they exercise. I cannot find anything in it but a right of making a cut of a certain width to convey water to London. That is all that is given by that act. There must be some subsequent act; for they lay pipes in *alieno solo*, and go much further; and it is acted upon as real estate; and recoveries are suffered, and fines levied upon it. There is no difference between that property and this. I am told of a late case in the Court of King's Bench, in which such a right as this was held to be real estate. If this is so, and Lord Coke's definition is right, it only remains to try this question by that test. I have no difficulty in saying, that whenever a perpetual inheritance is granted, which arises out of lands, or is in any degree connected with, or, as it is emphatically expressed by Lord Coke,

(1) 1 B. & C. 205; 2 D. & R. 316; 1 Law Journ. K.B. 91.

(2) 2 Vesey, jun. 662.

exercisable within it, it is that sort of property the law denominates real; and cannot pass by a will without three witnesses."

So that the judgment of Lord Alvanley is clearly in favour of the argument, that the interest taken by these proprietors in the soil was an interest savoring of the realty. This mode of interpreting acts of this description, and dealing with property of this nature, is also supported by the cases of *The King v. the Trent and Mersey Navigation Company* (3); *Rex v. Palmer* (4); the opinion of Mr. Justice Buller in *Rex v. Jolliffe* (5); *Rex v. Bell* (6). The case is also distinguishable from *Rex v. Weaver Navigation* (7) and *Rex v. the Inhabitants of Liverpool* (8). In those cases the judgment against the rate went chiefly on the ground of the tolls being applicable to public purposes. In the case of a Gas Company, the use of the soil for the purpose of introducing the pipes, was held sufficient to render the Company liable as occupiers: *Rex v. the Brighton Gas Company* (9). In *Rex v. Nicholson* (10), which was the case respecting tolls of a ferry, Mr. Justice Bayley treats the proprietors of canals as occupiers of the soil. The same principle, in favour of the present rate, is to be deduced from the case of *The King v. Coke* (11) (the light-house case). The case of *Dyson v. Collick* (12) is an authority to shew that these proprietors might have maintained trespass for breaking and entering their cuts or sluices; and this is a proper test to try the question of occupancy.

The arguments urged to shew that the proprietors were not rateable were in substance as follows:—

The proprietors are not rateable at all; either in respect of the bed of the river, or the cut, or the sluice. They are not the owners or the occupiers of any land within this parish.

(3) 1 B. & C. 545; 2 D. & R. 752.

(4) 1 B. & C. 546; a. c. 2 D. & R. 793.

(5) 2 Term Rep. 94.

(6) 7 Term Rep. 598.

(7) 7 B. & C. 70, in note; 5 Law Journ. Mag. Cases, 102.

(8) 7 B. & C. 61; 5 Law Journ. Mag. Cases, 145.

(9) 5 B. & C. 466; 3 D. & R. 308; 4 Law Journ. K.B. 214.

(10) 12 East. 330.

(11) 5 B. & C. 797; 8 D. & R. 666; 5 Law Journ. Mag. Cases, 8.

(12) 5 Barn. & Ald. 600.

The act of parliament which created their powers gave them no interest of any kind in the land; they gave merely an easement. The trying whether trespass could be maintained is undoubtedly a good criterion; but trespass could not be maintained by these proprietors; for the occupation was never divested out of the owners of the land, and they are the persons who could maintain trespass. All that the proprietors have a right to do, is to enter as occasion may require, and deepen, widen, and cleanse. The river is open and navigable to all his Majesty's subjects upon payment of tolls, which, under certain restrictions, may be demanded. It is impossible to distinguish this from the case of the ferry which has been cited; and in which it was held, that the owner of the ferry was not rateable. The same was in principle laid down in *Rex v. Ellis* (13), where the owner of a fishery was held rateable, because the words of the grant gave him an interest in the soil. There may be a fishery in the present case; but the owner of the fishery unconnected with the soil would not be liable to be rated. Why, then, are these proprietors to be rated, who have merely a right of going along the stream or against the stream, with power occasionally to widen, deepen, and cleanse the bed? They have the power to make the cuts without buying the land. The cases of *Hollis v. Goldfinch* and *The Duke of Newcastle v. Clark* (14) are decisive to shew that trespass could not be maintained by the proprietors.

The following cases were also cited as bearing upon the question, and as tending in principle against the liability: *Rex v. the Severn and Wye Railway Company* (15); *Rex v. Bell* (16); *The Mayor and Burgesses of Nottingham v. Lambert* (17); and *Davison v. Gill* (18).

The Court took time to consider.

Between the time of the argument and that of the judgment, the case of *The King v. the Mersey and Irwell Navigation Company*, which follows this, was heard and decided.

(13) 1 Mau. & Sel. 652.

(14) 8 Taunt. 602; 2 Moore, 666.

(15) 2 Barn. & Ald. 646.

(16) 5 Mau. & Sel. 221.

(17) Willes, 115.

(18) 1 East, 64.

On the 9th of February the judgment was delivered by—

Lord Tenterden.—The rate was originally made on the lands covered with water, being part of the river Avon, and upon a cut or canal, and upon a lock; and the Court of Quarter Sessions struck out that part of the rate which related to the land covered with water, being part of the river Avon, and quashed the rate as to that, and confirmed it as to the cut and the lock, and thus reducing the sum from 100*l.* : altering 100*l.* to 5*l.*, and 2*l.* 10*s.* to 2*s.* 6*d.* There was another case of *The King v. the Trustees of the Mersey and Irwell Navigation*, also argued during the present term, in which the question was, respecting land covered with water, being part of the navigable river, which was the same as in the present case. We thought, upon the argument of that case, that the navigable river was not land in the occupation of the trustees; and consequently, that part of the rate, in that case, could not be sustained, and we think the same in the present case. We agree with the Quarter Sessions in deciding, that the cut, or navigable canal, which was actually made by this company upon land purchased by them, and the lock which is erected on it, are, according to all the authorities, fit subjects for the poor rates; and that being the opinion of the Court, and our opinion being conformable to that of the Court of Quarter Sessions, the effect is, that the rule for setting aside the order of the Court of Quarter Sessions must be discharged.

Order of Sessions confirmed.

1829. } THE KING v. THE MERSEY AND
Feb. 4. } IRWELL NAVIGATION COMPANY.

The company were rated for the relief of the poor of the township of Barton-upon-Irwell, in the county palatine of Lancaster. The annual value at which they were rated was reduced, on appeal, by the Sessions to 2600*l.* The rate was in other respects confirmed, subject to the opinion of the Court on a case of which the following is the substance.

CASE.

By an act of parliament passed in the seventh year of the reign of King George the First, intituled, "An act for making

the rivers Mersey and Irwell navigable from Manchester to Liverpool, certain undertakers therein named were empowered to make them navigable and passable. The act, as given in the case, contained a number of provisions, which it does not appear necessary to state in detail. They were the powers usually given in canal acts: power to take tonnage at certain rates; to make towing-paths; to erect gates, bridges, &c.; and to prevent overflow. The company were incorporated by act of parliament of the 4th Geo. 3. Then came the following statement of facts.

The appellants, and the undertakers, from whom they derive their title, have, at very heavy costs and charges, and in pursuance of the powers granted them by the said act, made and maintained, and still do maintain and continue navigable, the said rivers from Liverpool to Manchester. They have made and kept in order, by repairing with gravel and sand, towing-paths by the side of the whole line of the navigation, by cutting away the brows, levelling of the lands, and erecting bridges over brooks and ditches crossing the towing-path; they pay rent for the towing-path along some parts of the line. Wherever they have not bought land, they pay rent for the towing-paths. The towing-paths are not fenced off from the adjoining lands, except in a few places; and in these instances, the fences have been made and are maintained by the owners of the adjoining land, and not by the appellants: but gates have been erected by the company, at the fences between adjoining fields, where the land-owners have required it, to prevent cattle trespassing, and such gates are maintained by the appellants. The banks between the river and the towing-path, have been repaired sometimes by the appellants, but chiefly by the land-owners, who have in that case been supplied by the appellants with stone and materials at a low price, to induce them to make such repairs.

When the navigation is impeded, the appellants scour and dredge the river, applying the gravel and sand so taken out to the repairs of the towing-paths, and selling the surplus when they have more gravel and sand than is necessary for that purpose. In several parts of the navigation, the appellants have made new navigable cuts, con-

necting different parts of the river. Three such cuts, of the breadth of eight yards each, and being altogether nine hundred and thirty-eight yards in length, have been made and are now used by the appellants in the township of Barton-upon-Irwell. The land necessary for these cuts belongs to the appellants; and was taken by them, under the powers of the act, and compensation made to the land-owners pursuant thereto; the length of the navigation within the township of Barton-upon-Irwell, is nine miles seven furlongs.

Six miles and a half of the towing-path is within the township of Barton-upon-Irwell; and the residue thereof is in other townships.

There are several weirs and locks on the navigation, erected and maintained by the appellants within the township of Barton-upon-Irwell; and the surplus water held up by one of the said weirs is taken from the appellants by the proprietors of a neighbouring mill, who pay an annual rent to the appellants for it.

A very large traffic is carried on along the navigation in flats and other vessels, belonging in part to the appellants, and the residue to other persons, who employ them in the carriage of goods between Manchester and Liverpool.

The tonnage actually received by the appellants from other persons, together with the tonnage which would be received by them if the vessels so employed by themselves were the property of other persons, amounts to a large sum; and the proportion thereof payable in respect of the length of the navigation and towing-paths, in the township of Barton-upon-Irwell, amounts to the sum of 2600*l*.

The appellants contended that they were not rateable at all for or in respect of the property rated; or, if rateable at all, that they were only rateable for and in respect of the cuts, and not in respect of the rest of the navigation and towing-paths. And, that in such case, they ought only to be rated in the proportionate part of the said sum of 2600*l*., which should be considered payable in respect of the lengths of the said cuts. And further, that they were not rateable for tonnage upon their own vessels, which paid no such duty.

But the Court of Quarter Sessions held, that the appellants were liable to be rated

for the whole line of navigation within the township of Barton-upon-Irwell in respect of the land taken and used by them for the Mersey and Irwell navigation, the towing-path, weirs, locks, cuts and sluices; but assessed the annual value of the profits at 2600*l*., and ordered the sum to be reduced accordingly.

It was agreed, that the several acts of parliament for making and regulating the said navigation, should be taken as part of this case, and referred to as such.

The case was argued by

Mr. Courtenay, Mr. Starkie, and Mr. Armstrong, in support of the order of Sessions.

Sir James Scarlett, Mr. John Williams, Mr. Colman, Mr. Brown, and Mr. Aglionby, for the company.

The arguments were the same as those which were urged in the case of *The King v. Thomas*, except that, on the part of the company, it was stated, that the present rate could not be maintained, even for a part, inasmuch as the whole subject matter was rated altogether; while, in *The King v. Thomas*, the rating was separately apportioned on the cut, the sluice, &c. But to this it was observed, by *Mr. Justice Bayley*, that the Court might send the case back to the Sessions, to introduce the proper sums if they found it practicable, as was done in the case of *The King v. the Hull Dock Company* (1).

Lord Tenterden.—I think the company are not rateable as occupiers of the land covered with water; the navigation of the ancient river. The order of Sessions therefore must be quashed; but *non constat* that the rate should be altogether quashed. For some parts, I think they may be rateable: the cuts and the other subject matter, free from the objection as to the land covered with water, the navigation of the ancient river.

Mr. Justice Bayley.—At first I was disposed to think that they were liable for the ancient river; but, on consideration, I think they are not. My first impression was, that they might be treated as occupiers of the land covered with water, but I think they cannot. The soil does not belong to them;

(1) 3 B. & C. 516; s. c. 5 D. & R. 359.

they have but a qualified right, a mere easement. Where they buy the land and make cuts, they may be considered as occupiers; and so where they erect weirs and dams: but the case must go back to the Sessions, that the rate may be altered, if it can be done. We should be doing great injustice if we were to quash the whole rate.

Mr. Justice Littledale.—I do also think that the case should go back to the Sessions, that they may if possible mould the rate so that it can be supported. I think, however, the parish will have great difficulty in making any part of this subject matter the subject of a rate. How can it be said that the locks produce so much? At all events, I am clearly of opinion that they are not liable in respect of the ancient river; and I therefore agree that the order which confirms the whole rate should be quashed.

Mr. Justice Parke.—I am of the same opinion. Some of the earlier cases on this subject do not appear to me to have proceeded on sound principle; but the case of *The King v. the Inhabitants of Tynemouth* (2) settled the question; and decided that a mere easement is not rateable. Now this company had, I think, only a special limited power as to the bed of the river. No one can be properly considered as an occupier for this purpose, unless he has an exclusive right to a portion of the soil. That is the case with Gas Companies, who have the right to lay their pipes in the soil: as to the locks and the towing-paths, if the company have the property in the land, they are rateable. The quantity and amount are for the decision of the Sessions. Many acts which have been done by this company are, I think, referable to their powers, and not to their supposed occupancy.

Order of Sessions quashed.



1828. } THE KING v. THE JUSTICES OF
June 25. } WORCESTERSHIRE. *

Poor Laws—Former Adjudication.

Where, upon the hearing of an appeal, a former order of Sessions, quashing an order of removal between the same parishes, is re-

(2) 12 East, 46.

* This case was accidentally omitted in its proper place, Vol. 6.

lied upon by one party, it is competent to the other party to give evidence of the grounds upon which that order of Sessions was made; and if it appear that they were independent of the merits, the order is not conclusive.

Two Justices, by order, dated 3rd of November 1827, adjudged John Allport, Jane his wife, and their four children, to be settled in the parish of Shrawley, in the county of Worcester, and the order directed their removal to that parish, from the parish of Abberley in the said county, to which they had become chargeable. The execution of this order was suspended, by reason of the illness of the pauper, John Allport. Whether the order had been served on the parish officers of Shrawley, did not distinctly appear. They, however, gave notice of appeal for the Epiphany Sessions. The respondent parish officers, conceiving the appeal to be premature, did not attend at the Sessions; and there the order of removal was quashed as informal, at the instance of the appellants.

Subsequently, on the 29th of February 1828, the respondent parish officers obtained another order of removal, in effect an dterms similar to the former one; and under this order the paupers were removed. Another notice of appeal was given, and at the Easter Sessions both parties appeared by counsel. The appellants put in the order of Sessions, made at the Epiphany Sessions, which ordered the first order of removal to be quashed. The counsel for the respondents offered to give evidence to shew on what ground, and for what reasons, the Court had quashed that order; but the Court refused to hear the evidence, observing that the first judgment was conclusive between the parties.

Early in this term *Mr. Shutt* had moved for a rule to shew cause why a writ of *mandamus* should not issue, commanding the Justices to enter continuances, and at the next Sessions to receive evidence of the grounds on which the former order of removal had been quashed; and to hear and finally determine the merits of the appeal. On moving for the rule, he cited the case of *The King v. the Inhabitants of Wheelock* (1). In that case, the respondents' order

(1) 5 Barn. & Cress. 511.

had been quashed for want of proof of the chargeability of the person removed; and the Sessions had quashed the order of removal generally, refusing to make a special entry of the ground upon which they had quashed the order. The respondents, apprehensive that this judgment might conclude them when they obtained another order of removal, applied to this Court for a mandamus to compel the Sessions to make a special entry of the ground upon which the order was quashed. But the application was refused, Mr. Justice Bayley, observing "The respondents are not at all events concluded by the judgment of the Sessions; but may, on the trial of another appeal against another order of removal of the same party, explain by evidence to the Sessions the particular ground on which the former order of removal was quashed."

Mr. Godson now shewed cause.—The case cited is inapplicable. On an order of removal being served, the parties have a right to appeal against it; and the other side, having had due notice of the appeal, ought to have attended to support their order. If this were not the course of proceeding, the inquiry as to the settlement might be unnecessarily and inconveniently delayed. This was discouraged by the case of *The King v. the Inhabitants of Lampeter* (2), where it was laid down, that early notice should be given of a suspended order of removal; and the inquiry as to the settlement followed up. The other side having obtained an order of removal, which they did not appear to support, ought to be concluded by the judgment. If it were held otherwise, a removing parish might obtain orders *ad infinitum*.

Mr. Shutt, in support of the rule.—We deny that the first order was served; and we complain that we were not heard at all.—[Here he was stopped.]

Lord Tenterden—Let the Sessions hear evidence upon the question, whether the first order of removal was served or not. And, if they find that it was not served, let them hear the present appeal on the merits.

Mandamus accordingly.

(2) 3 Barn. & Cress. 454.

1829. } THE KING v. THE JUSTICES OF
Jan. 26. } HERTFORDSHIRE.

Parish Accounts—Select Vestry.

1. *Accounts rendered by parish officers under the 17 Geo. 2. c. 38. should state the items of expenditure: and are not sufficient, if they state merely the gross amount of expenditure for every fortnight, or other given period.*

2. *Such accounts, so insufficient, are not rendered sufficient by the circumstance of the parish being governed by a select vestry under the 59 Geo. 3. c. 12; and the items composing the aggregate charge having been submitted to, and examined and allowed by them; and having been also seen and examined by the Magistrates on passing the general accounts. All the items should appear in the accounts passed before the Magistrates; so that each parishioner, on obtaining a copy of those accounts, will see each item.*

This case came before the Court in the form of a rule calling upon two of the Justices of the Peace of the county of Hertford, to shew cause why a writ of mandamus should not issue, directed to them, commanding them to hear and determine the complaint of William Clarkson against the late churchwardens and overseers of the poor of the parish of Baldock in the said county, for not properly signing, passing and delivering to the present churchwardens and overseers a proper account in writing of their receipts and payments of money as such churchwardens and overseers, in the year in which they were in office, and for not properly verifying the same accounts.

The following were the material facts:—

The parish of Baldock is governed by a select vestry under the 59 Geo. 3. c. 12. The churchwardens and overseers have been in the habit of passing their accounts in conformity with the 17 Geo. 2. c. 38; but in making up those accounts they furnished merely the total of each fortnight's disbursements; thus—

May 31—Cash expended from	} 34 18 . 9
the 17th inst. to this day inclusive	
June 14—Cash expended from	} 32 16 10
the 31st of May last to this day inclusive	

but did not give the items constituting the sums so expended. The select vestry is held every fortnight; and the accounts are submitted to them, and entered in detail in a book kept by the select vestry; and the fortnight's total, as before given, carried to the parish ledger.

The accounts of the churchwarden and overseers, upon the occasion in question, were taken before two Justices, and allowed in the usual manner, no opposition being made. All the books and accounts, as well the vestry as the parish books, were produced; and the Justices examined them, and called for and received explanation of some of the items.

Mr. Clarkson, the present applicant, was a rated parishioner; and he having applied for a copy of the account passed and allowed, was furnished with a copy; shewing in a general way, and in aggregate sums (of each fortnight's expenditure), the disbursement of the parish money. He, however, objected to this account, as being too general; and he desired to have a statement of the particulars of these disbursements, but this was refused to him. He thereupon obtained a summons, calling the parish officers before two of the Justices; and, upon the hearing of the complaint, the Justices expressed their opinion that this mode of passing the accounts was sufficient, and they dismissed the complaint. Mr. Clarkson observed upon that occasion, that, if he had been aware that all the accounts in detail had been produced before the Justices on the passing of the annual accounts, and had been examined by them, he would not have troubled the Magistrates with the complaint. But being still dissatisfied with the principle upon which the accounts were made up and passed, he applied for and obtained the present rule. It was obtained on the authority of the case of *The King v. the Justices of Worcestershire* (1), in which the rendering of gross accounts of receipts and payments, without any detail, was declared by the Court not to be a proper compliance with the statute 17 Geo. 2. c. 38.

Mr. Brodrick and Mr. Chitty now shewed cause; contending, that the case differed from that of *The King v. the Justices of Worcestershire*, inasmuch as there the ac-

count rendered consisted merely of a statement of the gross annual receipt and the gross annual disbursement of the year, without any detail whatever. Here, the account was given, shewing the amount, but certainly not the detail of every fortnight's expenditure. But the main difference between the two cases is, that this parish is governed by a select vestry according to the 59 Geo. 3. c. 12. The third section places the disposal of the funds under the direction of the select vestry; and the accounts allowed by them are to be laid before the inhabitants at large, assembled twice a year in general vestry. The select vestry, subject to that control, have the management of the poor as well as of the rates. Besides, the present complaint of Mr. Clarkson has been heard; and, as he expressed himself satisfied with the mode in which the accounts were allowed by the Justices, no mandamus ought to issue.

Mr. B. Andrews, contra.—The sole question is, whether the 17 Geo. 2. c. 38. has been repealed, as regards these accounts, by the Select Vestry Act, 59 Geo. 3. c. 12. If it has not, the principle of the case of *The King v. the Justices of Worcestershire* is applicable to the present. The keeping of the accounts in this general way opens a door to fraud, and deprives the parishioners of the means of information intended to be given by the 17 Geo. 2. The meeting in general vestry twice a year gives no relief, in case of improper conduct: as the time for appeal may have passed away in many cases; and in others the party appealing may not have the materials given by these accounts from which he can prepare proper notices.

Lord Tenterden.—I am of opinion that in this case no mandamus ought to issue. In the case of *The King v. the Justices of Worcestershire*, the Justices thought they had no authority to interfere. Here, it was not so. The Justices appear to have thought they might take all the books together; and, in examining the books of the select vestry for purposes of explanation, might pass the general accounts as sufficient. In that opinion, I think, they were mistaken; for it appears to me that there is nothing in the Select Vestry Act which authorizes the

(1) 3 Dow. & Ry. 299.

rendering of the annual accounts in a different form than that in which they were to be rendered, independent of the Select Vestry Act. The accounts, therefore, ought to have been rendered differently; but as the present applicant expressed himself satisfied with the examination which the Magistrates had made themselves, I think that, in the exercise of our discretion, it may be proper to discharge this rule.

Mr. Justice Bayley.—I am also of opinion, that the mandamus ought not to be granted; but, I think, at the same time, it is necessary that the Justices should know that these accounts are not rendered in a proper way; and that they are improperly kept. Each item should be given. Every parishioner has a right to see the whole account upon the face of those which are rendered by the overseers. It is therefore upon the special ground that Mr. Clarkson, upon the hearing of the complaint, stated, that he was satisfied with the examination of the Magistrates, and that if he had known of that detailed examination he would not have troubled them; I say, it is upon that special ground I think this rule should be discharged.

Mr. Justice Littledale.—I think the mode of keeping the accounts has not been altered by the Select Vestry Act; and that the accounts upon this occasion were not kept, or rendered, in conformity with the 17 Geo. 2. But, for the reason already given, in this particular case, I think the rule should be discharged.

Mr. Justice Parke.—I am of the same opinion. I think that the 59 Geo. 3. does not warrant the keeping or the rendering of the accounts in a way different from that in which they should be kept and rendered under the 17 Geo. 2. But, on the particular ground which has been stated by my learned Brothers, I think this rule ought to be discharged.

Rule discharged; but costs to the Magistrates refused.

1829. }
Jan. 29. } THE KING v. HALPIN.

Libel—Truth—Affidavits in mitigation.

1. Where a libel charges a person with

having committed an indictable offence, the defendant, upon being brought up for judgment for publishing that libel, is not at liberty, in mitigation of punishment, to shew, upon affidavit, that the person was guilty of that offence, except by shewing a record of his conviction.

2. *But the defendant, in such a case, is at liberty to shew, upon affidavit, that he published the libel, believing the statement to be true; and to shew what were the reasons operating upon his mind at the time, which induced him so to believe.*

The defendant was indicted for a libel upon a private individual, imputing to him conduct which deeply affected his character, and insinuating that he had been guilty of an unnatural offence. The defendant having been convicted, was last term brought up for judgment. Upon that occasion he tendered affidavits in mitigation of punishment. They were made by the defendant himself and by other persons; and they spoke to facts which, in themselves, and in the mode of stating them, would lead to the inference that the charges contained in the libel upon the prosecutor were true. The counsel for the prosecution objected to the reception of these affidavits; and the Court ordered the case to stand over until this term, that they might take this important subject into consideration, and that the counsel on both sides might be prepared to argue it, as well upon principle, as by reference to analogous cases. They expressed at the same time a wish that the defendant should mould his affidavits so as to render them unobjectionable on the part of the prosecution.

The defendant this day was again brought up for judgment; and having made no material alteration in his affidavits, and claiming as of right to have them read, and the counsel for the prosecution repeating the objection,—

Mr. Curwood and Mr. Busby were heard on behalf of the defendant.—These affidavits are admissible upon principle as well as upon authority. The principle lies in one sentence, and needs only to be stated to ensure assent. The Court, in estimating the *quantum* of punishment necessary to be inflicted for the purposes of justice, will not fail to make a distinction between a case

where the libeller has published slander—he wickedly knowing at the time that the statement was false,—and a case where he has honestly (though, perhaps, in some instances, mistakenly,) believed the statement to be true. It is scarcely possible to place two cases in points more extreme. Then, with regard to authority. The judgment of Mr. Justice Bayley, in *The King v. Burdett* (1), is favourable to the reception of such affidavits, where the subject matter of the charge is not a specific indictable offence; and the authority of that learned Judge would therefore apply to such of the affidavits as refer to the facts which do not charge an indictable offence. But the whole of the observations of Mr. Justice Bayley in that case, against the admissibility of the affidavits then tendered, went to the point that they reflected upon parties *who were not before the Court*; and to the injustice which would be worked if it were allowed to a defendant, collaterally, to charge third parties who had no opportunity to defend themselves. Here, the parties before the Court are, the prosecutor and the defendant; and the affidavits seek merely to impeach the conduct of the prosecutor, who, if he thinks proper, may apply to the Court for time to answer them. In the case of *The King v. Finnerty*, which occurred in the year 1811 (2), the affidavits of the defendant were not received, but they went to libel the whole of the Irish Government as well as Lord Castlereagh, the prosecutor, whose conduct, as one of that Government, was a part of the subject of the libel. But in the case of *The King v. Draper* (3), where the subject matter of the affidavits related only to the conduct of the individual libelled, the Court allowed them to be read. It was stated by Mr. Justice Best, in the case of *The King v. Burdett*, that those affidavits, in *The King v. Draper*, were read by the consent of the prosecutor; but, whether the prosecutor consented or not, can make no difference in the principle. The course of proceeding, taken by the prosecutor in this case, renders it necessary that

the Court should give the defendant some opportunity of putting them in possession of the facts by affidavit; otherwise they will be totally unacquainted with them. If the prosecutor had proceeded by information, he would have been obliged to declare upon his oath that the facts charged against him were not true. If he had proceeded by action, the defendant might have pleaded the truth in justification; but by proceeding in the form of indictment, he has taken the course which gives no opportunity to the defendant of presenting the facts to the Court but by affidavit. There was, however, a case of *The King v. Boltz* in this court in the year 1826, in which an affidavit on the part of the defendant similar to the present, was allowed to be read (4). The libel there imputed to the prosecutor, among other things, that he had seduced the defendant's wife; and an affidavit of the wife, speaking to the fact of the seduction, and confessing her guilt with the prosecutor, was read on behalf of the defendant in mitigation of punishment.

[*Mr. Justice Bailey*.—If you can shew the conviction of the party for any offence charged, you may do so.]

Mr. Campbell and Mr. Serjeant Ludlow, contra.—These affidavits impute to the prosecutor the commission of almost every crime. In the case of *The King v. Finnerty*, which has been cited, affidavits which, in justification of the truth of the libel, went to charge Lord Castlereagh, the prosecutor, with having seen and sanctioned great cruelty committed in Ireland, while he there held office, were rejected; and the same course was taken by the Court in the case of *The King v. Burdett*, where, the defendant endeavoured to prove upon affidavit the truth of the libellous matter.

Lord Tenterden.—In *Finnerty's* case the defendant was sent back by the Court to reform his affidavits; and he came back with the offensive matter retained in them. That is the same case as the present. An

(1) 4 Barn. & Ald. 324.

(2) It will be found in the Magazines and other publications of that date. An account, apparently correct, is very fully given in "*Cobbett's Register*," vol. 19.

(3) "*State Trials*," vol. 30. p. 1063.

(4) This case is reported on a different point in 5 B. & C. 334; 8 D. & R. 64; 4 Law Journ. K.B. 262. The reading of the affidavit alluded to in the above argument, caused no discussion; and the circumstance was, therefore, not noticed by any of the reporters.

affidavit from the defendant that he published the matter in question, believing it to be true, and shewing to us rational grounds for his belief, *operating upon his mind at the time, we will hear*; but, I think, we ought not to carry the permission to the defendant any further. Here, the affidavits charge the prosecutor with crimes for which, if he was guilty, he ought to have been prosecuted.

Mr. Justice Bayley.—I concur in opinion with my Lord as to the extent to which we ought to go in receiving these affidavits. To receive them all, would be to put the prosecutor upon his trial for the offences charged by this libel; for which offences he is, if guilty, amenable in the due course of justice; and would be diverting our attention from the subject properly under our consideration.

Mr. Justice Parke.—I think justice will be answered if the defendant be allowed to state in his affidavit that which he believed at the time when he published the libel, and the reason upon which that belief was founded. I think there is neither reason nor authority for carrying it any further; and the authority of *Finnerty's* case appears to me against our doing so.

[In pursuance of these opinions only such affidavits were read as answered the description given by the Court.]

1829. } THE KING v. THE JUSTICES OF
Feb. 6. } SOUTHAMPTON.

Sessions Practice—Appeal.

Where an order of removal has not been executed so as to give time for notice of trial of an appeal at the next Sessions, the appeal need not be entered until the Sessions following the next: but it should be then entered and tried; notice of entering and trying being previously given.

An order of removal was served upon the appellant parish on Wednesday the 15th of October last. There is a vestry meeting held in that parish every Friday in the year; and one of the rules in that parish is, that the overseers have no power to enter into or instruct for any law proceedings

without the sanction of the vestry. At the meeting of the vestry on the Friday following the service of the order, it was resolved to appeal against it. The Sessions were held on that Friday and on the following day, and had been advertised in the newspapers circulated in the neighbourhood. The appellant parish was but four miles from the town at which the Sessions were held. At the January Sessions the appellant parish proposed to enter and hear the appeal; but the Sessions refused, on the ground that the appeal ought to have been entered and respited at the October Sessions.

A rule had been obtained, calling upon the Justices to shew cause why a mandamus should not issue, commanding them to enter and hear the appeal.

Mr. Dampier and *Mr. Short* shewed cause.—They relied upon the case of *The King v. the Justices of Herefordshire* (1) as in point. There the appellant parish was twenty miles from the Sessions town. The Court observed, that the appeal might be entered; and if there was not time to prepare for hearing, it might be respited. The case of *The King v. the Justices of Essex* (2) may be relied upon by the other side; but there the order was served on a Saturday; the following Sessions being Tuesday; and the appellant parish was thirty-seven miles from the Sessions town. Lord Ellenborough observed, that the parish officers were not bound to devote Sunday to the examination of the question, whether they would appeal or not; and consequently that they had but the Monday, which was not time enough. Here, there were two days to consider; and the Sessions town was but four miles off.

Mr. C. F. Williams (contrà) was stopped;—and

The Court observed, that, under the circumstances, the appellants were not bound to enter and respite the appeal at the October Sessions.

Rule absolute.

(1) 3 Term Rep. 504.

(2) 1 Barn. & Ald. 210.

1829. } THE KING v. THE JUSTICES OF
Feb. 10. } DEVON.

This was a case somewhat similar to the last. The appeal was by the parish of Pitminster, in Somerset, against an order of removal obtained by the parish of Upottery, in Devon. The parishes were eight miles distant from each other; the appellant parish being distant about thirty miles from Exeter, where the Sessions were held. The order of removal was made on the 2d of April; and the appellant parish had notice of its being made, though it was not executed until the 8th. The Sessions commenced at Exeter on the 15th, and continued until the 18th inclusive; during any part of which time, according to the practice of the Devon Sessions, the appeal might have been entered. The same practice requires eight days of notice of trial of an appeal. The officers of the appellant parish did not apply to their attorney on the subject until the 19th, the day after the Sessions had ended; but, between the making of the order of removal and its execution, there had been a change of parish officers in both parishes. At the July Sessions the appeal was entered, and the appellants having previously given due notice of trial, were then prepared to try; but, on its being objected by the respondents that the appeal ought to have been entered at the April Sessions, and was consequently out of time, the Sessions refused to hear the appeal. A rule was obtained by *Mr. Coleridge*, calling upon the respondents to shew cause why a mandamus should not issue to the Justices commanding them to enter continuances and hear the appeal. This had been obtained on the authority of a case, *The King v. the Justices of Southampton*, which is not reported, but a note of which was supplied by *Mr. Selwyn*. It occurred in Trinity Term 1817; and is the case alluded to in a note to *The King v. the Justices of Essex* (1). The facts of that case were shortly these: the order of removal was made on the 2d; served on the 7th; the parishes five miles apart; the appellant parish distant fifteen miles from the Sessions town; the Sessions were held on the 14th; the appeal was not entered until the following Sessions and

the Sessions subsequently decided that this was too late, and refused to hear the appeal. In support of the appellant's case for a mandamus, it was urged, that it would have been useless to enter the appeal, as there was no time to have it tried. The Court granted a mandamus, on the ground that the removing parish had unnecessarily delayed the service of the order, and had abridged the appellant's time for considering whether they would appeal or not.

Against the present rule *Mr. Crowder* and *Mr. Praed* now appeared to shew cause.—The statute which gives the appeal, (the 13 and 14 Car. 2. c. 12. s. 2.) speaks of the "next" Sessions; and, according to the meaning given to that expression in *The King v. the Justices of Herefordshire* (2), and other cases (3), it means the next Sessions at which it is practicable to enter the appeal.

[*Lord Tenterden*.—Does it appear in any of those cases what was the practice of the particular Sessions as to the notice of trial required?]

It does not; but there is no argument even raised in them to shew, that the next Sessions meant the next at which the appeal could be tried according to the practice. But it is manifest, from the shortness of the periods in those cases between the execution of the order and the first day of the Sessions, that a sufficient notice of trial could not have been given according to the practice of any Sessions. Nor does the judgment in either of those cases appear to have had any reference to the question, whether or not the appeal could be tried; nor does that circumstance appear to have entered into the consideration of the question "what is the next Sessions?" Indeed, in the case of *The King v. the Justices of Herefordshire*, Lord Kenyon expressly stated, that the appeal ought to have been entered, although it seemed that it could not be tried at that Sessions.

[*Lord Tenterden*.—I do not see what can be the use of entering an appeal at a Sessions at which it cannot be tried.]

That point was taken in the case of *The King v. the Justices of Southampton*, which is relied upon by the other side; but the

(2) 3 Term Rep. 504.

(3) *Rex v. Justices of Wilts*, 2 Bott. 717. *Rex v. Justices of Flintshire*, 7 Term Rep. 200.

(1) 1 Barn. & Ald. 212.

judgment of Lord Ellenborough did not turn upon it. That judgment went upon the circumstance that there had been improper delay in the officers of the removing parish by not executing the order in a reasonable time. There was no such improper delay in this case; for the officers of the appellant parish had notice of the order, and were therefore not taken by surprise; and the change of parish officers accounts for the short delay which actually occurred.

Mr. Coleridge and Mr. Escott (contra) relied chiefly upon the case of *The King v. the Justices of Southampton*, as expressly in point; and they observed, that the mere entry and respite of the appeal, under such circumstances, could be of no possible advantage to the respondents. There is no publicity given to the appeal by the mere entering and respiting; nor are the respondents bound to notice it until they receive notice of trial.

The Court took time to consider; and, on the following day,

Lord Tenterden delivered the judgment.—After stating the facts, his Lordship observed, “the single question appears to be, whether the appellants appealed to the “next Sessions” within the meaning of the act of parliament. I have consulted my learned Brothers; we have referred to the different cases; and we are all of opinion, that the true meaning of appealing to the next Sessions is, the next Sessions at which, according to the practice of the particular Sessions, a notice of trial can be given to try at that Sessions. If this should cause any difficulty, the Sessions have the power to alter their practice, and increase the number of days’ notice of trial. The case of *The King v. the Justices of Southampton*, which does not appear to have been reported, was like the present in its facts; and was similarly decided. There certainly can be no good in entering an appeal, when the appellants were not called upon to give, and had not the power to give, a notice of trial which should make that appeal effectual at that Sessions.

Rule absolute.

1829. } THE KING v. ROBERT FITZGERALD
 } DINGE JENNER, ESQ.

Larceny—Malicious Injury to Property.

Where property is taken under a bonâ fide claim of title, in an open manner, such taking is not the subject of an indictment for larceny.

Therefore, where a party had cut and carried away part of a tree, under a claim of right to do so, as a commoner, from the lord’s waste, in the presence of his gamekeeper, a conviction, under the 7 and 8 Geo. 4. c. 29. s. 39, “for cutting, destroying, and damaging the same, and stealing the whole or the greater part thereof,” was held wrong.

The malicious damage contemplated by the statute 7 and 8 Geo. 4. c. 30. s. 20, is, that which is committed for “mischief’s sake”; and therefore any injury arising from the exercise of a supposed right is not within its provisions.

Rule to shew cause why a criminal information should not be exhibited against the defendant, a Justice of the Peace for the county of Gloucester.

The material facts as collected from the affidavits upon which the rule was obtained, and on the part of the defendant, were as follows:—

By a decree of the Master of the Rolls, on the 10th of February 1652, it was decreed that a part of a tract of land called Michaelwood Chase, within the manor of Alkington, should thereafter be held and enjoyed in severalty, and discharged of common, by the then lord of the manor, his heirs and assigns; and that the residue of the said tract should for ever remain to the freeholders, tenants, and inhabitants of the said manor as their free common; and that they should, from time to time, &c., take away all such gorse, fern, and bushes, except such as grow near to any young trees, which were to be left standing for the preservation of such young trees from the cropping and reach of cattle, to be employed to their own use without giving any recompence to the lord of the manor.

In the summer of the year 1827, Christopher Dimmery, a freeholder of the aforesaid manor, caused to be cut on the waste a considerable quantity of the bushes and underwood, some of which were of the

thickness of five inches, whereupon William Fitzhardinge Berkeley, esq., the present lord of the manor, brought an action against Joseph Dimmery, the son and servant of the said Christopher, wherein a verdict passed for the defendant.

On the 2d of October 1828, one John Dash, on the direction and as the servant of Daniel Long, a freeholder of the manor, went to the chase with a horse and cart, and in the presence of Thomas Williams, a gamekeeper of the lord of the manor, cut down a load of hazel and thorn, and (according to the affidavits in support of the criminal information) two sticks or branches of holly which were growing from a thick stool, and conveyed the same to the premises of the said Daniel Long, which underwood did not protect any young tree. On the 16th of October John Dash was summoned, and attended before the defendant on a charge of cutting down and stealing a holly-tree in Michaelwood Chase, the property of the said W. F. Berkeley, when the said John Williams produced the butt of a holly-tree, which he deposed was the same which had been cut. In his defence, John Dash denied that the butt produced was the one he had cut; and the said Daniel Long, after stating that he had authorized the cutting of thorns to fence his apple-trees, and reminding the defendant of the result of the action against Dimmery, shewed the defendant the decree of the Master of the Rolls respecting the rights of the freeholders. The defendant then convicted the said John Dash in the mitigated penalty of 15s. and costs, distinctly informing him at the time of his right to appeal. Dash then left the room, and after consulting with his friends, returned and said, "I will not appeal, I will go to prison." The following commitment was thereupon drawn up:—

"County of Gloucester (to wit).—To the constables of the tithing of Alkington in the parish of Berkeley in the said county, and also to Daniel Bennett, especially appointed and sworn to execute this warrant, and to each and every of them, and also to the keeper of the house of correction at Horsley in the said county.

"Whereas John Dash, of the said tithing of Alkington, in the said county, labourer, is convicted by and before me, Robert Fitzhardinge Jenner, esq., one of his Majesty's Jus-

tices of the Peace acting in and for the said county, upon the oath of Thomas Williams, a credible witness, for that he, the said John Dash, did, on the 2d day of October inst., at Michaelwood, in the said tithing of Alkington, in the said county, cut, destroy, and damage a holly-tree growing and being in Michaelwood aforesaid, the property of William Fitzhardinge Berkeley, of Berkeley Castle, in the said county, Esquire, and did then and there steal the whole or the greater part of such tree, of the value of 1s. and upwards, contrary to the form of the statute in such case made and provided; and, thereupon, I, the said Justice, adjudge the said John Dash to forfeit and pay for his said offence the sum of 13s. 6d. over and above the value of the article so cut, damaged, and destroyed as aforesaid; and for the value of the said article so stolen the further sum of 1s. 6d., making together the sum of 15s.; and also the sum of 6s. 6d., the costs and charges attending the conviction; and I directed that said sum of 15s. and costs should be paid to said W. F. Berkeley, the party aggrieved by said offence, who was not examined in proof of the same. And whereas the said John Dash hath made default in payment of the said sum of 15s. and costs, —These are, therefore, to require you, the said constables, and also the said Daniel Bennett, to apprehend and forthwith convey the said John Dash to the said house of correction at Horsley, and deliver him to the said keeper thereof, together with this precept; and you, the said keeper, are hereby commanded to receive said John Dash into your custody in the said house of correction, there to be imprisoned for the space of five weeks, unless such sum of 15s. as aforesaid, and also the said costs, shall be sooner paid and satisfied; and for your so doing this shall be your sufficient warrant. Given under my hand and seal this 16th day of October 1828.

(Signed) R. F. Jenner."

The decision of the Court was now delivered by—

Lord Tenterden.—This is a conviction which, upon examination, appears to us to have been framed upon two distinct acts of parliament, applicable to different offences.

The first of those acts (1) was intended to apply to larcenies perfected; but the other act (2) was made, not to meet cases of theft, but of quite a different kind, namely, those of malicious damage; or, to express the thing more intelligibly, where the mischief should be done only for *mischief's sake*. The clause provides "that, if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling or shrub, or any underwood, wherever the same may be respectively growing, the injury done being to the amount of 1s., such offender, being convicted before a Justice of the Peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding 5*l.* as to the Justice shall seem meet." This conviction, however, confounds together the two acts of parliament. It represents the party charged, first to have unlawfully and maliciously cut and destroyed, and then to have stolen the tree. Upon the charge of stealing, it need hardly be observed, it is impossible to support the conviction. According to the general principle of the common law, where a person comes to take a thing, openly claiming and believing it to be his own, he cannot be convicted of larceny; and I should have thought that this was so well known that no mistake was likely to be made. The same rule may be applied on the subject of malicious mischief. If the party charged acted under a real and *bond fide* claim to do that which he has done, he committed no offence within the statute. We think, then, that the conviction and commitment were not justified; but at the same time there are circumstances in the case that prevent us from making the rule absolute. The defendant, it is possible, may have been misled by the man denying that the tree produced was the one he had cut; and, provided it was the one he had cut, there was no justification under the decree. There is another circumstance which also weighs with the Court in favour of the defendant; and that is, that after the conviction he informed the party that he had a right to appeal. This however, acting probably under the officious advice of others, he refuses to do,

(1) 7 and 8 Geo. 4. c. 59. s. 59.

(2) 7 and 8 Geo. 4. c. 30. s. 20.

SUPPL. 1829.

and declares that he will rather go to prison. This looks so much as if he thought he had got the Magistrate into a scrape, and betrays such an improper spirit, that, although we are of opinion that the conviction was wrong, yet we think that ample justice will be done by discharging the rule on payment of costs by the defendant. At the same time we would suggest to the defendant, as he appears not to have well discerned the distinctions I have mentioned, not to act alone, but to call in the aid of another Justice upon future occasions.

Rule discharged, on payment of costs by the defendant.

1829. } THE KING v. THE TRUSTEES OF THE
Jan. 31. } DUKE OF BRIDGEWATER.

Poor Rates—Canal Proprietors.

Where a poor-rate is assessed in proportion to the rent paid by occupiers of lands, the owners and occupiers of a canal must be rated, not in respect of the full amount of all the profits of their occupation as owners, but according to the rent at which the canal might be let to a tenant.

The defendants were assessed in a rate for the relief of the poor of the township of Preston-on-the-Hill, in the county of Chester. On appeal, the Sessions sent the following case to this Court.

The assessment upon the appellants was as follows:—

Occupiers.	Description of Property.	Rent.	Sum as assessed.
Trustees of the late Duke of Bridgewater.	Land taken for the canal, towing-paths, &c., with the profits arising therefrom; and the wharfs, clay-shed, stables, offices, guaging docks, &c. adjacent.	1480 <i>l.</i>	185 <i>l.</i>

The Sessions amended the rate by reducing the amount of property upon which such rate was made, from the sum of 1480*l.* to the sum of 1164*l.* 15*s.* 2*d.*, and confirmed the rate, so amended, subject to the opinion of this Court, upon the following

CASE.

The rate was duly made in point of form. The grounds of appeal were, that the prin-

ciple upon which the appellants were rated, was erroneous; inasmuch as it appeared they were rated in proportion to the full amount of their gross receipts as owners, as well as occupiers, of the rated property in the respondent township: whereas, it appeared that the property of other inhabitants, who were occupiers of farms and premises, and who were named in the said rate, and upon whom notices, containing the grounds of appeal, had been served, was rated only in proportion to the amount of the respective rents paid by them as occupiers of their said farms and premises, whereby the property of the appellants in the said township was greatly over-rated in proportion to the other property therein.

And the other grounds of appeal were, that the profits arising from the occupation of farms and farming stock, were either improperly omitted to be assessed according to the full value thereof, or were greatly under-rated in proportion to the assessments made upon the tolls and income arising from the property of the appellants. And, lastly, that certain allowances and abatements, other than such allowances as were necessarily made to the appellants in the management of their property for collection, repairs, and every other attendant expense, were made as far as regarded the above-mentioned persons and profits, by assessing them on the rent only; which allowances and abatements were not made in the case of the appellants.

By several acts of parliament, passed in the 32d and 33rd years of George the 2d, and in the 3rd and 4th years of the reign of George the 3rd, the late Duke of Bridgewater was empowered to make and extend certain canals communicating chiefly between Manchester, in the county of Lancaster, and the river Mersey at Runcorn Gap, in the county of Chester; and, in consideration of the great charges and expense to which the Duke was necessarily put, these acts authorized him to receive certain tolls upon the tonnage of all coals, goods, &c. which should pass along the said canals, but exempting from toll all stones and gravel for any highway in either of the above-mentioned counties, and all manure carried by any persons occupying lands near the said canals. The appellants are the trustees of the late Duke of Bridgewater, and do

not any of them reside within the respondent township, but are the owners and occupiers of the canal, upon a portion of which, to the extent of one mile and three sixteenths of a mile, passing in and through the said township, part of the above rate, amounting to the sum of 644*l.* 15*s.* 2*d.* for land taken for the canal, towing-paths, &c., with the profits arising therefrom, was made. With respect to the remaining sum of 510*l.* for warehouses, wharfs, clay-shed, stables, offices, guaging docks, &c. adjacent, there is no question to come before the Court. The appellants derive no profit whatever from their land in the respondent township, except from the tonnage payable to them by virtue of the above-mentioned acts of parliament; but they are carriers on the canal, and receive freight for goods carried in their own vessels through the respondent township, but the tonnage duty upon the goods so carried by the appellants is included in the above sum of 644*l.* 15*s.* 2*d.* Personal property and profits in trade are not assessed for the relief of the poor in this township.

The occupiers of land and houses in the said township are rated in the present assessment, as in all former assessments, at four-fifths of their respective rents, taking those rents as the criterion of the value of the land. The full amount of the tolls arising to the appellants from the canal and towing-paths in the said township, independently of their receipts as carriers for freights, but including the tolls upon the goods so carried by them, is 1272*l.* 4*s.*; from which 466*l.* 5*s.* being deducted for repairs and collection, &c., leaves the sum of 805*l.* 19*s.*; upon the four-fifths of which, namely, the sum of 644*l.* 15*s.* 2*d.*, the appellants, as owners and occupiers of the part of the canal in question, were rated in respect of the tolls received or earned by them, as part of their receipts as carriers, except the tonnages on such freights being comprised in the rate.

The question for the consideration of the Court was, whether the sum of 644*l.* 15*s.* 2*d.*, being four-fifths of the amount of the clear annual balance arising from all the tolls of the canal within the respondent township, after deducting all expenses of collection, repairs, and every other attendant expense of that description, be or be not a

proper criterion of value upon which such rate ought to have been made with reference to the profits necessarily arising from farms and other rateable property, in the possession of the respective occupiers thereof in the said township, who were assessed upon four-fifths of the amount of their respective rents alone. And if this Court should be of the latter opinion, then the order of Sessions to be quashed.

Mr. F. Pollock and *Mr. Deacon* endeavoured to support the rate.—These proprietors are not assessed upon their gross receipts. The rate may stand upon the opinion expressed by Lord Ellenborough in *The King v. Brown* (1), and upon *The Queen v. the Inhabitants of Barking* (2).

[*Mr. Justice Bayley*.—But can you make a rate different on the owner from that which you would upon the tenant?]

There is no legal objection to the doing so.

[*Mr. Justice Bayley*.—If the Sessions were to say the property would let for so much, there would be no doubt.]

At all events the Court will send the case back to the Sessions to ascertain that fact. The other side will, probably, rely upon a mere *dictum*, in the case of *The King v. Atwood and others* (3).

Sir James Scarlett, *Mr. Cottingham*, and *Mr. Lloyd* (contra) were stopped by the Court.

Mr. Justice Bayley.—I have no doubt about this. You are to make your rate upon all lands, tenements, and hereditaments; and you are to adopt, in making your rate, one and the same rule applicable to every description of occupier. Whether the person rated happen to be owner and occupier also, or only occupier, still, the *quantum* of land for which he will have to pay will be the same; and unless you adopt the same rule applicable to every description of occupier, you do not do that justice which in a rate ought to be done, namely, to rate every person equally. It is said, that, in this case, unless you confirm the rate in question, upon what principle are you to proceed? I have no difficulty in stating what principle,—namely, apply one

and the same rule to every description of occupier. Whether you occupy land in the character of owner, or pay a rent for the privilege of occupying it, the value of the occupation is considered as being the amount of the rent which you pay; and that is not supposed to be the full amount of the produce of the land, nor is it supposed to be the produce of the land, *minus* the expenses; but that is supposed to be the amount of the produce of the land, leaving to the farmer the power of living by his earnings out of the residue of that property. Well, now; in the case of the owners and proprietors of a canal, or owners and occupiers, you say you have a right to rate them, not merely for what the canal would let, but upon the whole amount of *all* the profits which result to them from the occupation of the land. I do not say the amount for which the party should be rated in this instance, might not come to pretty nearly the same amount at which he is rated. I do not say if the Sessions had taken that rule, they might not, by possibility, have come to the same result; but all I can say is, that, in this particular instance, they have not adopted that rule, which rule is the only rule that ought to have guided their conduct. I lay out of the question entirely, the consideration of these canal proprietors being carriers also upon that canal; because, whether they be carriers or not, you are not to look to that—you are to look only to the fact of the occupation, and not the profits which they make in carrying on trade; and, unless you impose a rate in this particular parish upon the profits of trade, why you ought not to rate them in respect of the profits which result to them in the character of carriers upon this canal. They do very right in accounting to themselves for the tonnage of the goods which they themselves carry; because that tonnage is properly referable to the profit which their land contributes to make; but beyond that, it appears to me, that the fact of their being carriers upon this canal does not at all vary the nature of the principle upon which I think this case ought to be decided—that you are to adopt the same rule with respect to every description of occupation of land, and that the rent should be considered the criterion of value in the case of farms and other lands; and I think

(1) 8 East, 528.

(2) 2 Lord Raym. 1280.

(3) 6 B. & C. 277; 5 Law Journ. M.C. 47.

it ought also to be the criterion of value in respect of *this* canal. What would a tenant give for the privilege of receiving all the tonnages upon this canal?—and upon this principle, it appears to me, the case ought to go down again, that the rate should be amended in that respect. It is therefore to be amended according to the principle which I have already stated, namely, that, according to the case of *The King v. Attwood*, the Sessions are to judge what it was likely to let for. It is not likely to let for the full value, I should think.

Rule—That the order of Sessions be quashed for the insufficiency thereof, and that the Sessions do amend the rate by reducing it to such sum as the tolls in question are worth to be let by the year.

1829. }
Feb. 6. } PELLEW v. HUNDRED OF WON-
FORD, DEVON.

Hundred, Action against—Notice—Examination—Reversioner.

1. *A person who was not the occupier, but was entitled to the reversion, of premises feloniously set on fire, held entitled to recover damages against the hundred under 9 Geo. 1. c. 22.*

And semble, that the occupier might also maintain an action; each party recovering not more than 200l.

2. *Where the fire took place on Saturday, and the notice directed by the above act, was given on Monday:—Held, that the notice was properly given within "two days" after the damage, as required by the statute.*

3. *Where the person entitled to the reversion had no servant in the care of the premises on his behalf:—Held, that he was the proper person to give in the examination required by the above act, although he was not on the spot at the time of the fire.*

4. *Where the person who gives in such an examination has, at the time, a suspicion of a particular individual, but does not know who is the person that committed the offence, it is not necessary for him to state in his examination, his suspicion of that individual.*

This was an action on the case, brought to recover satisfaction for damage by fire

to certain barns and outhouses, which were described in the declaration as being, at the time of the fire, in the occupation of one John Otton; and the reversion thereof, after a certain term of years then running and unexpired, was then and there belonging to the said plaintiff. It came on for trial at the last Spring Assizes for the county of Devon, when the plaintiff was nonsuited, subject to the opinion of the Court on the following.

CASE.

The plaintiff, before and at the time of the fire hereinafter mentioned, was and still is the proprietor of an estate called Canon-teign, in the parish of Christow, and within the Hundred of Wonford and county of Devon.

Upon this estate stood a large house, formerly a mansion, but for many years past used as a farm-house; and this house, with an extensive range of barns and other outhouses belonging thereto, formed the Barton of Canonteign. The house, barns, and outhouses, except one stable and another of the outhouses used as a dog-kennel, long before and at the time of the fire were in possession of John Otton, as tenant to the said plaintiff. Otton, with his wife and family, resided in the house, occupying the greater part of it. The other part of the house was occupied by John Pennington, the plaintiff's gamekeeper, who had lived there some years with his wife and family; and he also used the said stable and dog-kennel, but had nothing to do with the other outhouses.

The plaintiff himself resided at Stoke-lake, in the parish of Hennock, about four miles from Canonteign.

On the morning of Saturday the 9th of July 1825, the plaintiff, with some other gentlemen, his friends, went from Stoke-lake to Canonteign Barton, and taking Pennington with them, were afterwards engaged in shooting rabbits in a part of the estate, distant about a quarter of a mile from the Barton, on the top of a high hill, which commanded a view of the mansion and of all the outbuildings. While they were so engaged, at about two o'clock, P. M., fires were observed to break out in several parts of the premises: first, in one of the barns, then in another barn, distant three hundred yards from the first, afterwards in the

dog-kennel, which was separated from the said last-mentioned barn, and then in other of the outbuildings.

The fires were immediately seen by the plaintiff, and he, as well as the persons with him, hastened to the spot, and were actively employed for a considerable time in endeavouring to extinguish the flames. The barns and outhouses were, however, burnt down. The plaintiff did not leave the place till about five o'clock, *p. m.*, when it was supposed the fire had been subdued; but it broke out again in part of the ruins, and was burning a little between one and two o'clock on the following morning.

On the day of, and long previously to, the fire, Otton, his wife and family, and Pennington, and his wife and family, were all living upon the premises as aforesaid; and Otton had in his employ upon the premises several farming servants, who lived in the house with him, and some of whom, and also Otton, and several persons known to the plaintiff, were present in the Barton amongst the buildings when the fire broke out, and when the plaintiff, his friends, and Pennington came there from the hill; and one of the said persons, not a servant of Otton's, shortly afterwards discovered a ball of flax on fire under some straw in the one of the outbuildings not then in flames, of which fact the said plaintiff was then informed. The damage done to the barns and outhouses, in the possession of Otton, greatly exceeded the sum of 200*l.*, and there was no doubt but that the fire was wilful and malicious.

The plaintiff, on the evening of the same day, after his return home, mentioned to one of his friends the name of a person whom he suspected to be the author of the fire; and he retained the same suspicion long after the time of his examination hereinafter mentioned. This person was Otton, the tenant, who was at the ensuing assizes tried on the prosecution of the plaintiff for the offence, and was acquitted.

On Monday, the 11th of July (before two o'clock, *p. m.*) notice of the offence was given by the plaintiff to four inhabitants of the village of Christow, that being the nearest village to Canonteign, but in the same parish.

On the 14th of the same month the plaintiff gave in his examination upon oath to a

magistrate of the county, being the magistrate resident nearest to Canonteign, at the distance of about a mile and half from that place; the examination was in these words:

"Devon to wit.—The deposition and information of the Hon. Pownall Bastard Pellew, of Stokelake, in the parish of Hen-nock, in the said county of Devon, taken on oath before me, Montague Edmund Parker, esq., one of His Majesty's Justices of the Peace in and for the said county, and inhabiting near the hundred where the offence hereinafter mentioned was committed, the 14th day of July 1825:—

"Who saith, that, on Saturday last, the 9th day of this instant July, the barns and outhouses, part of the Barton of Canonteign, situate in the parish of Christow, in the hundred of Wonford and said county of Devon, and now in the possession of the said John Otton, and the property of him the said Pownall Bastard Pellew, were unlawfully, wilfully, maliciously, and feloniously set on fire. And this deponent further saith, that he does not know the person or persons who committed the said offence, or any of them.

"Pownall Bastard Pellew."

"Taken and sworn before me, the day and year first above written.

"Montagu Edmund Parker."

At the following Christmas, Otton gave up his interest in the estate, and the plaintiff took possession of it. The repairs which have been done to the buildings injured or destroyed by the fires, have been done under the plaintiff's orders and at his expense.

The offenders have not been apprehended and convicted of the above-mentioned offence, nor any of them.

The action was commenced against the hundred within one year next after the offence had been committed.

The question for the opinion of the Court was, whether the plaintiff was entitled, under the circumstances of the case, to maintain his action. If the Court should be of opinion that he was so entitled, the nonsuit to be set aside, and a verdict to be entered for such sum as the Court should direct.

The case was argued, in Easter term, by *Mr. Praed* for the plaintiff, and *Mr. Follett* for the defendants.

The defendants raised four objections:—First, that the plaintiff, having only a re-

versionary interest in the premises, was not entitled to maintain the action.—Secondly, that, as the fire took place on Saturday, and the notice was not given until Monday, the notice was not given within two days, as required by 9 Geo. 1. c. 22.—Thirdly, that the plaintiff, under the circumstances, was not the proper person to give in an examination before the magistrate.—Fourthly, that, supposing he was the proper person, the matter of the examination was insufficient. There was also a point mentioned as to the damage, inasmuch as, there being a nonsuit, the Court had no means of apportioning the amount to which the plaintiff was entitled; but it was afterwards agreed, that, in case the Court should think the action was maintainable, no difficulty should be raised on this subject, and that the verdict should be entered for 200*l*.

Mr. Praed, for the plaintiff.—To the first point. The words of the act 9 Geo. 1. c. 22. s. 7. are large enough to include the plaintiff. The words are, that the inhabitants "shall make full satisfaction and amends to all and every the person and persons for the damages they shall have sustained or suffered by the setting fire &c., which shall be committed or done by any offender or offenders against this act." The words then being large enough to include a reversioner, there can be no reason why he should be excluded from the beneficial provisions of the act. The act itself is considered to be partly remedial, and partly penal: *Hyde v. Cogan* (1), *Radcliffe v. Eden* (2). This is a species of injury, for which, by the common law, the reversioner might bring an action as well as the tenant in possession (3). Indeed, the reversioner is the person more likely to be injured by such an act than the mere tenant for years.—The second point is, that, the fire having taken place on the Saturday, and the notice not being given until the Monday, the notice came too late. Upon this question there is no express decision; but a note of *Mr. Serjeant Williams* to the case of *Pinkney v. the Inhabitants of Rotel* (4) will be relied on by the other side. The learned annotator there states,

with reference to the statute of Winton—"It has been adjudged, that the day when the robbery was committed is to be included in the year; as, if a robbery be committed on the 9th of October, the action must, at the latest, be brought on the 8th of October following; for, if it be not commenced until the 9th, it is then too late." And, for this, he cites the case of *Norris v. the Hundred of Gwtry* (5). But, on reference to *Hobart*, it will be seen, that the Court, upon that point, were divided in opinion; and that *Hobart* himself thought the action was in time. The only other case upon this subject, in which the dates are given, is that of *Nesham v. Armstrong* (6). There, the premises were destroyed on the 20th of the month; and the notice was given on the 22d; and no objection was taken. The cases upon analogous subjects, with reference to the date, would be favourable to the plaintiff. In the case of *Ex parte Fallon and Wife* (7), the twenty days given by the then annuity act for inrolling an annuity deed, were held to be exclusive of the day of execution. So, in the case of *Lester v. Garland* (8), where a given time was allowed to do a particular act directed by a testator,—it was held, that the days were to be reckoned exclusive; and, that the act being done on the last day, so reckoned, was sufficient. Besides, here a Sunday intervened; and if that be calculated against the plaintiff, it would go to abridge very unreasonably his time for giving notice. Then, to the third point. The plaintiff was the proper person to give in the examination before the Magistrate. The cases of *Nesham v. Armstrong*, which has already been cited, and *The Duke of Somerset v. Mere* (9), are different from the present. Here, there was no servant in the care of the premises on behalf of the plaintiff.—The last point respects the contents of the examination itself. The plaintiff suspected a particular person; but he did not know whether that person was guilty; and the mere insertion of his suspicion would have gone for nothing, and would not have satisfied the directions of the act. This

(1) Doug. 696.

(2) Cowp. 485.

(3) 1 Saunders, 322, in note.

(4) 2 Saunders, 375.

(5) Hob. 159.

(6) 1 Barn. & Ald. 146.

(7) 5 Term Rep. 283.

(8) 15 Ves. jun. 248.

(9) 4 B. & C. 167; 6 D. & R. 247.

was held in the cases of *King v. the Inhabitants of Bishop Sutton* (10), and *Thurtell v. Inhabitants of Mutford* (11).

Mr. Follett, for the defendants.—First, the plaintiff, being only a reversioner, is not entitled to maintain this action. In ordinary cases it may be admitted that the reversioner may maintain it; but, as there can be no doubt that the tenant in possession might have maintained it, the limit of the damages to the amount of 200*l.* shews that the legislature did not intend that both tenant and reversioner should recover. If it be laid down that the reversioner may recover, there seems no reason why other persons, having intermediate interests between the tenant in possession and the ultimate reversioner, should not maintain these actions; and if so, there might be several actions against the hundred, in each of which 200*l.* would be recovered. Under the Riot Act this is allowed, because there are not, as there are in this case, any words of restriction. It is said, that the reversioner is the person most likely to be injured. It may be so; but, as malice is an essential ingredient in the offence, it seems most probable that the plaintiff was not the person intended to be injured; for the malice is in general directed against the person who is in the visible occupation of the property. Malice originally intended towards another person will not be sufficient, though followed by injury to the plaintiff, to entitle him to maintain the action:—To the second point. The notice was not sufficient. The cases cited on the other side are not within this description. The cases of *Bellasis v. Hester* (12), and *Rez v. Adderley* (13), decide, that, for the purposes of legal computation, there shall be no fraction of a day; and that, where the time is to govern an act to be done, the first day shall be counted as one to make up the computation of the time. And the learned annotator of *Saunders*, in his note to p. 378 of the second volume, observes, that the days in the present case are to be reckoned as both inclusive. This he does, not so much on the authority of the particular case which

he cites from *Hobart*, as from the principle to be deduced from it. The reason of the thing requires promptitude of action; for the object of requiring the notice is, to give the inhabitants an opportunity of discovering the offender, and relieving themselves, by his conviction, from their liability. The same rule, of computing the day on which the act is to be done as one of the days, was observed in the case of *Glasington v. Rawlins* (14). The question there was, whether the day on which a trader was arrested, and under which arrest he lay in prison two months, was, according to the meaning of the bankrupt laws, to be considered as one of the days; and the Court held, that it was.—Thirdly, the plaintiff was not the proper person to give in the examination. The act requires it to be given in by the party who has sustained the injury, or by his servants having the care of the property. If the mere reversioner may give in this examination, the object of the act may be defeated; for he, rarely being on the premises, cannot be supposed to be able to give any important information on the subject.

[*Lord Tenterden*.—Suppose the house were left in the care of a servant during the absence of the master; and the servant lost his life in the fire.]

[*Mr. Justice Bayley*.—The servant, too, may refuse to give any information.]

Those are extreme cases. They shew that it is not every case of this description which will entitle the party to bring an action. He must bear the loss if he cannot comply with the provisions of the act.—Then, to the fourth point. The matter disclosed by the examination was not a sufficient compliance with the provisions of the act. The plaintiff had a strong suspicion in his mind as to the person who had committed the offence; and he ought to have stated that suspicion. A man may always swear he does not *know* who did such an act unless he saw it done. The case cited on this point from *Strange's Reports*, only shews, that the saying the party entertains a suspicion is not enough; but the present objection is, that he should have said he suspected, and have given his suspicion in detail; but have added, that he did not *know* who was the person.

(14) 3 East, 407.

(10) 2 Stra. 1247.

(11) 3 East, 400, both of which are cited in 1 Saunders, 322.

(12) 1 Ld. Raym. 280.

(13) Doug. 463.

The Court took time to consider ; and, on the 11th of February, the judgment was delivered in the following terms by

Lord Tenterden, who, after stating the four questions raised by the argument, proceeded as follows :—The first question depends upon the construction to be given to the 7th section of the act in question. The words of that section provide, that all and every person and persons who shall sustain damages, shall recover ; but the amount is afterwards limited to 200*l*. The expression is general, "all and every;" and it has nothing to distinguish any particular interest : and we cannot see anything in the subject-matter from which we can collect an intention to exclude the reversioner, who has often the greater interest. It was argued, that, by holding that the reversioner might recover, we should be holding, that the occupier as well as the reversioner might recover. It may be so; and I see no reason why it should not. The second question (15) was, whether the plaintiff was the proper person to be examined before the Magistrate. That depends on the 8th section of the act, which provides, that, within four days after the notice, the person or persons "shall give in his, her or their examination upon oath, or the examination upon oath of his, her or their servant or servants that had the care of his or their houses," and so on. Now, if, in the present case, the plaintiff was not the person to give in the examination, he would be deprived altogether from having any remedy under this act. He had no servant in the care of the premises ; for they were in the possession of a person who was the plaintiff's tenant. The words of the act are in the alternative : that the party or his servants shall give in the examination ; and from the context it is evident that the legislature meant that the persons who were, from the state of things at the time, the most likely to be able to give the information, should be the persons to be examined before the magistrate. If the party himself know nothing, and his servants do, they are the proper persons to be examined. The third question was, whether, supposing the plaintiff

to be the proper person to be examined, the matter stated in his examination was sufficient. The examination states that he does not know who was the person that committed the offence. The case before us states, that at that time he had a suspicion as to who was the person. The act says nothing about suspicion ; but says, that the parties shall state whether they do know who committed the fact. When the parties appear before the Magistrate for the purposes of this examination, it is competent for the Magistrate to sift and examine them. But it can, in our opinion, answer no good purpose for the party to state merely his suspicion. The making such a statement may be injurious ; for it may injure the character of an innocent individual, or may give notice and facilitate the escape of a guilty one. The last question is, whether the notice was given in sufficient time. This is the objection that had the greatest weight with us. The fire took place on a Saturday, and the notice was not given until the following Monday. It was urged that both days should be reckoned inclusive ; and that the notice should have been given on the Sunday. Cases were quoted on this subject on both sides. Most, if not all of them, are collected in the case of *Lester v. Garland*. All the cases cannot be reconciled ; nor is it easy to deduce any clear rule from them. The rule must be collected from the nature and circumstances of each particular transaction. There is however one criterion, which is suggested by the very learned Judge in the case that I have mentioned, which may deserve consideration. It is this :—if the required act be to be done by the party himself, you may limit him in the calculation of the time. If it be to be done by another person, you might narrow the time too much by reckoning each day as inclusive.—Now, here, the time is two days. If, as it has been argued, the two days expired on the Sunday, what should we say if the act required was to be done in one day ? Why, by that rule we should say that the notice must be given on the very day on which the fire took place ; and if we were to hold this, we might almost exclude the party from giving any notice ; as the fire might take place at a very late hour in the night. Here, it may be, that the servants have to give the notice ;

(15) The order of the points in the argument was different ; but the reader will at once perceive the application of the judgment to the points themselves.

and it is not too much in such a case, and for the purpose of such a calculation, to treat such a notice as an act done not by the party himself. The act to be done is therefore to be considered as an act which takes an entire day. For these reasons we are of opinion, that the notice was in time. The effect of this is, that the plaintiff will be entitled to recover; and it was admitted, that if the Court should be of opinion that he was, the verdict ought to be entered for 200*l*.

Postea to the plaintiff.

[*Note.*—The act upon which the above case proceeded, was repealed by the 7 & 8 Geo. 4. c. 27. But, for the purpose of ascertaining the rules by which such acts are construed, the case may be considered as important. The remedies against the hundred by the above act, and by the 7 & 8 Geo. 4. c. 31, are now limited to cases where the damage has been occasioned by persons riotously and tumultuously assembled; and the amount of the compensation is unlimited. See *Abridgment of Statutes*, vol. v; and the cases well collected in *Chitty's Collection of the Statutes*, vol. i. p. 569.]

1829. } THE KING v. LORD VISCOUNT
April 22. } GRANVILLE.

Poor Rate—Coal Mines.

The lessee and occupier of coal mines, is rateable upon the improved value thereof, occasioned by steam-engines which he has erected, and which are used for draining the mines and raising the coals to the surface, and for railways laid down by him, and employed for facilitating the carriage of the coals.

Lord Viscount Granville appealed against a rate, made the 22d of February 1829, for relief of the poor of the parish of Stoke-upon-Trent, whereby he was rated for a colliery, including engines and railways, at 61*l*. 17*s*. 5*d*., being a rate made upon the sum of 989*l*. 18*s*. The Court of Quarter Sessions confirmed the said rate, subject to the opinion of this Court upon the following

SUPPL. 1829.

CASE.

The appellant is the lessee and occupier of a colliery in the parish of Stoke-upon-Trent. In the year ending on the 31st of December last, he paid to his landlord, for royalty or mine-rent upon the coals raised from the said colliery, the sum of 802*l*. 8*s*., which sum is a fair mine-rent for the tenant to pay upon the quantity of coals raised in that year. The said sum of 802*l*. 8*s*. forms part of the sum of 989*l*. 18*s*. upon which the appellant is charged.

The appellant some time since erected certain steam and other engines in the colliery, which are used solely in draining the mines and raising the coals to the surface, and he also laid down a railway which is solely employed in facilitating the carriage of the coals: these form the machinery with which the mines are worked, and without which they could not be worked, and there would be no mine-rent at all unless such machinery was used.

The sum of 187*l*. 10*s*. the remainder of 989*l*. 18*s*., on which the appellant is charged, is a charge over and above the amount of the mine-rent, introduced into the assessment in respect of the engines and railway. And it is calculated, that if the colliery were now to be let by the appellant to a sub-tenant, along with the engines and railway, the total sum of 989*l*. 18*s*. would not be more than a fair rent for such sub-tenant to pay. If the Court shall be of opinion that the appellant ought to be rated for his engines and railway, in addition to what he ought to pay as mine-rent to his landlord, then the rate is to stand; but if not, then the rate is to be reduced to 50*l*. 3*s*.

Mr. M'Mahon, in support of the order of Sessions.—The case of *The King v. Bilston* (1), which led to this appeal, is clearly distinguishable, inasmuch as the engine there held not to be rateable, was used for the sole purpose of draining the ironstone mine, and was admittedly a burthen, and a drawback from the profits. Here, however, the machinery enables the occupier of the mine to raise a larger quantity of coal to the surface, and the railway affords a greater facility of carriage. In both

(1) 5 B. & C. 851; s. c. 8 D. & R. 734; s. c. 5 Law Journ. M.C. 32.

truly for re-examination, or whether she was committed in order that a confession as to the intercepted letter, might be forced from her. Upon the other ground, I think, the power of the Magistrate exercised upon this occasion, deserves to be further considered.

Mr. Justice Parke.—I am of the same opinion upon both grounds. I think, the second question, the reasonableness of the time, is a mixed question of law and of fact. The case in *Cro. Eliz.* may have gone upon the ground that the person was committed to the Magistrate's own house; but it certainly has been treated by Hale as having decided the question of the reasonableness of the time. It is a question very fit to be considered hereafter.

Rule absolute.

[See also *Wright v. Court*, 6 D. & R. 623.]

1829. }
May 5. } THE KING v. W. WILLIAMS.

Witness—Competency—Forcible Entry.

1. In an indictment for a forcible entry and detainer, the party who has been turned out of possession is not a competent witness for the prosecution.

2. In an indictment for a forcible entry, the defendant cannot be allowed to adduce any evidence against the title of the prosecutor, or in support of his own.

This was an indictment for a forcible entry and detainer. There was but one count, which described the prosecutor as being in possession, for a term of years, of the messuage from which the defendant expelled him. The indictment concluded "against the form of the statute in such case made and provided."

The case was tried, before Mr. Baron Vaughan, at the Summer Assizes for Monmouth, in the year 1828, when two questions arose, which were the subject of discussion afterwards.

1st. The person who was expelled, the prosecutor, was offered as a witness on the part of the prosecution.—It was objected that he was not a competent witness; inasmuch as he was interested in procuring a

conviction, that he might obtain restitution of his possession. The learned Judge admitted him as a witness; but reserved the point.

2d. The defendant offered evidence to shew that the lease to the prosecutor, under which he entered into possession, was not valid.—The admissibility of this evidence was objected to; and the learned Judge refused to admit it; and ruled that it was immaterial what estate, either the prosecutor or the defendant might have, as the question was not one of title.

The defendant being convicted,—

Mr. Serjeant Russell, in Michaelmas term last, moved for a rule to shew cause why the verdict should not be set aside. Upon the second point, he contended, that, although this evidence might not be admissible in case the indictment were an indictment at common law, yet, where it was an indictment seeking restitution under the statute, the evidence was material. The statute 21 Jac. 1. c. 15. provides for restitution to tenants for term of years; and it therefore became necessary to inquire whether the party had such an estate. An estate by wrong would, probably, be sufficient; but the defendant in this case was precluded from giving any evidence to negative the statement of the estate in the indictment.

Lord Tenterden.—The statute was passed in furtherance of the common law.

Upon this point, therefore, the rule was refused. But upon the first point a rule to shew cause was granted; against which—

Mr. Maule now shewed cause.—The case cited in support of the objection to the competency of the prosecutor, was *Rex v. Beavan* (1). It would appear from that case, that Mr. Justice Littledale expressed a dictum in favour of the objection; but the case never went any further. There are two classes of cases which bear upon this subject; one which is against the admissibility of the witness, the other in favour of it. The argument against the admissibility is founded upon the assumption that the Court must grant restitution. But the granting of it is discretionary; and the fact of

(1) 1 Ryan & Moo. N.P.C. 242; 2 Russell on Crimes, 601.

the party having been examined as a witness for the prosecution, may be a good reason for the Court not granting restitution. In *Rex v. Cole* (2), where the Court, by a particular statute, had a discretionary power to inflict either a corporal punishment or a fine, Lord Kenyon was of opinion, that the informer was a competent witness; although, if a fine were imposed, the informer would derive a benefit therefrom. The objection was held to apply to his credit, and not to his competency. In *Rex v. Teasdale* (3), which was an indictment under a particular statute, Lord Kenyon allowed the informer to be a witness, although he was entitled to a part of the penalty. There are two similar cases cited in note c. to the case of *Mead v. Robinson* (4). The admissibility seems also to be recognized in *Buller's Nisi Prius*, 289, note a, where, in an indictment for perjury, the party injured is a competent witness; because a conviction would not be evidence in any civil proceeding between the same parties.

Mr. Serjeant Russell, *contra*.—The argument on the other side assumes that it is discretionary with the Court to give or withhold restitution. But no authority has been cited in support of the assumption. The prosecutor has an interest in the result of the trial; and his interest appears upon the very face of the record. It is the duty of the Court to order restitution in case of a conviction, as appears by the words of the statute. The cases upon this subject are collected in 1 *Phillipps on Evidence*, 64; and shew, beyond all question, that an interest in the result of the trial goes to disqualify the person from being a witness; and does not merely affect his credit. This principle is so strongly established that it was found necessary, by act of parliament, to qualify inhabitants of parishes and counties to be witnesses, in cases which affected their interest merely as contributors to the rates.

The Court took time to consider; and, on the 4th of July, the judgment was delivered by—

Mr. Justice Bayley.—After stating the question, and noticing the cases cited in the

argument, the learned Judge observed, that the instances in which informers had been admitted as witnesses were those in which it was the policy of the law to enforce the provisions of the different statutes which created the offence; and to encourage individuals to give information of a violation of the laws. The object of the law would, in many cases, be defeated if the evidence of those persons were not received. And it was to be observed, that in none of those cases would the conviction be evidence in any action in which the informer and witness sought to obtain the penalty. This principle, that of encouraging the enforcement of particular statutes; such as those prohibiting gaming, bribery, the seduction of artificers, and the exporting machinery out of the country, appeared, from the opinion of Lord Kenyon in the case of *Rex v. Teasdale*, to be that which admitted the competency of the witness; and this principle could not, therefore, be applied to a case like the present, where the interest of the witness would be to obtain restitution by reason of a private wrong to himself. The principle itself was laid down very distinctly by Mr. Justice Dennison in the case of *Bush v. Ralling* (5). There all the earlier cases were reviewed; the question before the Court being upon the admissibility of a witness, who was a *particeps criminis*, and was seeking, by the conviction of his companion in guilt, to shelter himself against the same degree of punishment. The doctrine laid down in that case was reviewed and confirmed in *Heward v. Shipley* (6), in which the judgment of Lord Ellenborough shews that the Court proceeded upon the ground that the admissibility of the witness was necessary to give effect to the law. The general rule, therefore, that a person who is interested in the event of the proceeding in which he is called as a witness, is not broken in upon by the admission of the witnesses in the cases which have been mentioned. The rule itself applies to the present case, where the party called as a witness was interested on his own private account in procuring a conviction; and he was therefore improperly received as a witness.

Rule absolute.

(2) 1 Esp. N.P.C. 169.

(3) 3 Esp. N.P.C. 68.

(4) Willes, 425.

(5) Sayer, 289.

(6) 4 East, 180.

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Rule absolute.

(2) 1 Esp. N.P.C. 169.

(3) 3 Esp. N.P.C. 68.

(4) Willes, 425.

(5) Sayer, 289.

(6) 4 East, 180.

1829. } THE KING v. ANN GREEN AND
April 22. } OTHERS.

Poor Rate—Alms Houses.

The objects of a charitable foundation in the actual occupation of the almshouses for their own benefit, and liable to be removed at the pleasure of the patrons, are rateable in respect of such occupation.

A poor rate by which the defendants were rated, was confirmed by the Kent Sessions; subject to the opinion of the Court on the following

CASE.

The master and wardens of the Merchant Tailors of the fraternity of Saint John the Baptist, in the city of London, are and have long been patrons of a charitable establishment for the relief of the widows of poor freemen of the Company of Merchant Tailors. About three years ago the company purchased land in the parish of Lee, whereon they erected thirty almshouses for the reception of such poor widows. The appellants are poor women and are resident in the said almshouses, as almswomen, and objects of the said charitable establishment, and pay no rent for the same, and are also removable at the pleasure of the Master, Wardens, and Court of Assistants of the said Company of Merchant Tailors. The land upon which the said almshouses are built, comprising about two acres, is the freehold property of the said Merchant Tailors Company, and the same was purchased, and said almshouses erected and built thereon, at the sole expense of the said company out of their corporate fund. Before the purchase of the land as aforesaid, the same was rated on the occupier thereof, at the rate of 2*l.* 5*s.* per annum, and the parochial rates were regularly paid in respect thereof upon such rating.

The question for the opinion of the Court was, whether the appellants, the said almswomen, were liable to be rated for the relief of the poor of the said parish of Lee.

Mr. D. Pollock, and *Mr. Law*, against the rate.—The appellants do not come within the fair meaning of the statute, 43 Eliz. c. 2; by that statute, persons are to be rated according to their ability to pay; but the poor persons who are the objects of this charity have no ability. It might as well

be contended that lunatics in the hospital for their reception are rateable. There is no difference between the two cases, as regards the principle.

[*Mr. Justice Littledale*.—Is not the case of *Rex v. Munday* (1) directly in point against you?]

It will be relied on by the other side, certainly: but it is not quite in point; for there the occupation was a beneficial one, the land was occupied by cattle; here the occupants are absolute paupers. In *Rex v. Waldo* (2) a similar attempt to rate a charitable institution was unsuccessful. The occupation, according to 1 *Nolan*, 182, must be beneficial; i. e. it should yield some return in the parish for which the rate is made, the assessment being made on the property of the subject assessed; mere occupation is not sufficient, and it makes no difference, that the land, before its present use, paid rates: *Rex v. St. Luke's Hospital* (3), *Rex v. St. Bartholomew's Hospital* (4).

Mr. Bolland, contra, was stopped.

Mr. Justice Bayley.—I take this to be a very clear case, as well upon the words of the statute of Elizabeth, as upon the authorities; which are decided on the subject. The statute of Elizabeth makes every inhabitant liable, according to his ability in the parish. The houses were then rateable according to the act; and how can the occupation of them, by persons who are allowed to occupy by the charity of others, take away the liability to contribute to the rate? The case of *The King v. Munday* seems to me not to be distinguishable, in principle, from the present. The difference is merely, that in that case, the occupation was beneficial to a greater degree than it is here. The difference is merely *plus or minus* in that respect between the two cases. Lord Kenyon and the rest of the Court there thought, that the occupiers of almshouses and lands belonging to a charitable foundation were liable to be rated in respect of their occupation. If they pay rent they are clearly liable; and if they do not pay rent, what is the necessary consequence? Why, that their "ability" according to the expression

(1) 1 East, 582; 1 Nol. 186.

(2) Cald. 358; 1 Nol. 184.

(3) 2 Burr. 1053.

(4) 4 Id. 2435; 1 Nol. 184.

in the statute of Elizabeth is the greater. The rate, therefore, in the present instance, ought to be confirmed.

Mr. Justice Littledale.—I am of the same opinion, for the reasons given in the case of *The King v. Munday*; which I cannot distinguish, in substance, from the present.

Mr. Justice Parke.—I concur in opinion with my learned Brothers. The circumstance of the occupiers being poor, and residing in houses furnished them by charity can make no difference: it does not render the occupation less valuable; the 54th Geo. 3. c. 170. prevents their gaining a settlement by reason of this description of residence in the parish.

Order confirmed.

1829. } THE KING v. THE JUSTICES OF
Jan. 26. } MONMOUTH.

Sessions—Notice of Appeal.

A notice of appeal against an order of removal, signed by the attorney for the overseers of the appellant parish, is sufficient.

This case came before the Court in the form of a rule calling upon the Justices of Monmouth to shew cause why a mandamus should not issue, directed to them, commanding them to enter continuances, and hear an appeal against an order of removal.

The question at the Sessions was,—whether the notice of appeal was sufficient. It was signed not by the overseers of the appellant parish, but by their attorney. On objection being taken, that this was not sufficient, the Sessions thought the objection a good one, and refused to hear the appeal; but they offered the appellant's counsel to state a case for the opinion of this Court upon the question whether the notice was sufficient.

Mr. Taunton and Mr. Watson now shewed cause against the present rule for a mandamus. The question, as to the sufficiency of the notice, was discussed at the Sessions; and they are the proper tribunal to judge of its sufficiency. Whether they were right or wrong, the Court will not, in this form of proceeding, review the decisions of the

Sessions. The cases of *The King v. the Justices of Carnarvon* (1), and *The King v. the Justices of Monmouth* (2), and subsequent cases, have decided that this Court will not review the decision of the Sessions, except upon a case sent up by the Sessions themselves for the opinion of the Court. There is no hardship in the application of this rule to the present parties, for they were offered a case. But, even supposing the Court will entertain the question as to the sufficiency of the notice, the signature of the attorney, instead of that of the overseers, was not sufficient. The authority of *Mr. Nolan's Poor Laws* (3), may be relied on by the other side; and it would certainly appear that that learned writer was of opinion, that such a signature would be sufficient. But the case he cites, that of *Jory v. Orchard* (4), does not bear him out in the position he lays down. That was a case in which the act of parliament there in discussion, expressly admitted, of the notice being signed by the attorney of the party. The act, in this case, requires the notice to be given by the overseers.

Mr. Campbell and Mr. Blewitt, contra.—The Sessions have not heard the appeal; and the present form of proceeding, therefore, properly calls upon them to hear it. The Court are not called upon to review their judgment, but to desire them to hear and decide.

[Upon the point respecting the sufficiency of the notice they were stopped.]

Lord Tenterden.—I am clearly of opinion that this objection ought not to have prevailed. Then, as to the form of the present proceeding, the Magistrates offered a case, in order that their decision might be reviewed; and this is the proper mode of reviewing it; by ordering them to hear the appeal.

Rule absolute.

(1) 4 Barn. & Ald. 86.

(2) 4 B. & C. 844; 7 D. & R. 334.

(3) 2 Nolan, 524.

(4) 2 Bos. & Pul. 39.

1829. } THE KING v. THE INHABITANTS
Jan. 31. } OF MUCCLESTONE.

Evidence—Subscribing Witness.

Upon a question of settlement by apprenticeship, the indenture was produced, apparently executed by all parties: and the name of "George Jones" affixed to the attestation, as the attesting witness; but without any description. It was proved, that diligent search had been made in the place where the indenture was executed, but no person of that name could be there found; and that inquiry had also been made of the parties to the indenture, but no information as to the witness could be obtained from them:—but that between two and three miles from the place, there was a George Jones, who had been applied to, and who said he knew nothing at all about the matter. He was not produced.

Upon this evidence, the Sessions refused to receive the parties themselves to prove the execution of the indenture; being of opinion that enough had not been done to prove the handwriting of the attesting witness. The Court of King's Bench held the Sessions to have decided rightly.

This was an appeal against an order of two Magistrates, bearing date the 9th of July 1828, for the removal of Margaret, the wife of Edward Lawrence, and their two children, from the Shropshire part of the parish of Mucclstone, to the Staffordshire part of the same parish.

The appeal was tried at the last Michaelmas Sessions for the county of Salop, when the respondents, having proved a birth settlement of the pauper's husband in the appellants' division of the parish of Mucclstone, the appellants proposed to shew that he had subsequently gained a settlement in a third parish, by service under an indenture of apprenticeship; and for this purpose tendered in evidence an indenture of apprenticeship, which was in the custody of the respondents, but had not been shewn to the appellants, bearing date in 1815, and which purported to have been made between the Rev. Offley Crewe, rector; James Smith, churchwarden; William Furnival, and John Leighton, overseers of the poor of the parish of Mucclstone; and Edward Lawrence the pauper's husband, on the one part; and Thomas

Simcock, of Eccleshall in the county of Stafford, tailor, on the other part; by which the said Edward Lawrence, of his own free will, and with the approbation of the said Offley Crewe, James Smith, William Furnival, and John Leighton, bound himself apprentice to the said Thomas Simcock for the terms of seven years. The signatures of all the above-named parties appeared on the face of the indenture, and that of "George Jones," without any addition or place of residence, as an attesting witness.

On the part of the appellants, it was proved that diligent inquiry had been made for George Jones in Mucclstone, Eccleshall, and the neighbourhood, and from all the parties to the indenture, and that he could not be found. It was proved, that a person of the name of George Jones now lived at Sugnall, between two and three miles from Eccleshall, the place where the indenture was executed. No evidence was given to connect him with the indenture; and it was further proved, that when asked whether he was a witness to it, he said he knew nothing of the matter. The indenture was not shewn to him.

The counsel for the respondents then objected that the case could not proceed, on the ground that the appellants had not proved sufficient search for George Jones, the attesting witness, to let in secondary evidence. They also contended, that parol evidence, of what George Jones, now living at Sugnall, said, ought not to be received; but that he ought to be produced. The Court overruled the objection, and permitted the case to go on.

The appellants then gave evidence of similar search having been made to obtain evidence of the handwriting of the attesting witness, but without success; and it was admitted by the respondents that none of the parties to the deed could prove it. The appellants then tendered all the parties to the indenture to prove their own signatures; but the respondents' counsel objected to such evidence being received, on the ground that in the absence of the attesting witness the Court could only receive evidence of his handwriting.

The Court refused to receive the parties to the deed as witnesses to prove their own signature; being of opinion that sufficient search had not been made for proof of the

hand-writing of the attesting witnesses ; and confirmed the order, subject to the opinion of the Court of King's Bench as to the admissibility of the indenture in evidence, under the above circumstances.

Mr. Bolland and Mr. Whateley, in support of the order of Sessions.—The indenture was not sufficiently proved to let in parol evidence ; and it is an established rule, that the parties to a deed cannot be called to prove the execution even by themselves, where there is a subscribing witness. The case of *The King v. the Inhabitants of Morton* (1) shews, that diligent search must be made before any secondary evidence can be let in. The calling the parties, until all inquiry after the subscribing witnesses had been exhausted, would be letting in a species of secondary evidence.

Mr. Campbell and Mr. Corbett, contrà.—There was no evidence given of the existence of the person whose name appeared to the instrument as the subscribing witness. The common practice is, that, after diligent but unsuccessful search for a subscribing witness has been proved, secondary evidence may be let in. In the present case, diligent inquiry was made, and George Jones, the witness, could not be found.

[*Mr. Justice Bayley*.—But there was a George Jones not far off.]

That is immaterial. There might be fifty George Joneses ; it surely could not be expected that all were to be examined.

[*Mr. Justice Bayley*.—But you did not shew the indenture to him.]

Nor was it necessary, unless the man had some doubt upon the subject ; he knew nothing about it whatever. The parties then were good witnesses. The rule, as laid down in the case, in *4 Maule & Selwyn*, is not disputed. It is contended to be here inapplicable ; for it does not appear that there was a subscribing witness in existence.

Mr. Justice Bayley.—I think the Sessions was the proper tribunal to decide whether enough had been done to let in secondary evidence ; and it requires a very strong case to induce us to review their decision. In this case, the name of George

Jones appeared as the subscribing witness : there was a George Jones in the neighbourhood, and it did not appear that the instrument in question had been shewn to him. The Sessions thought enough had not been done to verify the hand-writing ; and I cannot say that they have decided erroneously. You might have taken the indenture round, and asked the neighbours, if they knew the hand-writing. You did not even shew it to the George Jones whom you found. I think, therefore, that enough was not done.

Mr. Justice Littledale.—I think also, that enough was not done to let in the secondary evidence. The indenture was not shewn to the person who was found answering to the same name as the subscribing witness. It should have been shewn to him, and to other people in the neighbourhood. How much would have been sufficient, it is not necessary for us to decide. We think enough was not done to call upon the Sessions to let in the secondary evidence.

Mr. Justice Parke concurred.

Order of Sessions confirmed.

1829. }
June 22. } MILLS v. COLLETT, CLERK.

Magistrates — Committal for Felony — Framing of Depositions — Notice of Action.

*Where a person is charged, on oath, with an offence amounting to felony, and a Magistrate issues his warrant ; and, on the party being brought before him, the charge is proved, and he is committed to prison, — the Magistrate is not liable in trespass for false imprisonment, although the charge turns out to be unfounded. — Where, therefore, a party was charged with cutting down a tree adjoining a dwelling-house, under the statute 7 & 8 Geo. 4. c. 30. s. 19, and committed to gaol, but the person who laid the information did not prosecute : — Held, that the Magistrate was not liable in trespass, although the party charged was the occupier of the land on which the tree grew.**

* For the construction of this act, as to what will constitute an offence under ss. 19 & 20, and as to the consequences of a Magistrate not exercising a proper discrimination, in regard to whether the party charged is, or is not, guilty of an offence under the same, — see *Rex v. Jenner*, ante, Mag. Cases, 79.

Magistrates should not allow depositions to be framed so as to meet the enacting words of a statute.

In a notice of action to a Magistrate, the residence of the plaintiff's attorney was described, at the foot of the notice, as of Half Moon-street, Piccadilly, London. Quære—whether it was sufficient, Half Moon-street being in Middlesex.

This was an action of trespass for an assault and false imprisonment. The first count of the declaration stated, that the defendant, on the 18th of October 1827, made an assault upon the plaintiff, at Chediston, in the county of Suffolk, and forced and compelled him to go from and out of a certain dwelling-house there, into a public highway, and from thence to a certain prison, situate at Beccles, in the county aforesaid, and there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable or probable cause, for the space of four months then next following; whereby the plaintiff was not only greatly exposed and injured in his credit and circumstances, but hindered and prevented from performing and transacting his lawful and necessary affairs and business. The second count was for an assault and false imprisonment;—and the last for a common assault.

Plea—Not guilty.

At the trial, before Mr. Baron Vaughan, at the last Assizes for the county of Suffolk, it appeared, that the defendant was a magistrate of that county, and that the action was brought against him for committing the plaintiff to Beccles gaol, on a charge of felony, made before the defendant by one Robert Baas, churchwarden of the parish of Chediston, in the county of Suffolk, under the 7 & 8 Geo. 4. c. 80. s. 10(1), for unlaw-

(1) By which it is enacted, "that, if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy, or damage, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the amount of the injury done shall exceed the sum of 1*l.*) shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court,

fully and maliciously cutting down a timber elm tree, adjoining a dwelling-house, and standing on a farm in the plaintiff's occupation, which he held under the parish of Chediston.

It appeared by the evidence adduced for the plaintiff, that, in October 1827, he occupied the farm in question; and that, on the 18th of that month, a warrant having been issued by the defendant, and the Rev. Mr. Browne, another Magistrate for the county of Suffolk, upon a complaint made against the plaintiff, upon oath, by Mr. Baas (2), the plaintiff voluntarily appeared before the Magistrates at Yoxford, when, two witnesses having deposed to the facts laid in

to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment; and if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of 5*l.*) shall be guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned."

(2) Suffolk, { The information and complaint of Robert Baas, of Chediston, in the county of Suffolk, gentleman, made on oath before us, two of his Majesty's Justices of the Peace in and for the said county of Suffolk, the 17th day of October 1827, who saith, that, on the 15th day of October instant, in the parish of Chediston, in the said county, Simon Mills, of Chediston aforesaid, farmer, and Abraham Stannard, of the parish of St. James, Southwoldham, in the said county, labourer, did wilfully and maliciously cut, break, bark, root up, or otherwise destroy and damage a certain timber elm tree, growing in a yard adjoining to the dwelling-house belonging to a farm, in Chediston aforesaid, of the value of 1*l.* and upwards, the property of John Badely, doctor of physic, contrary to the statuten made in the seventh and eighth years of the reign of King George the Fourth, intituled "An Act for consolidating and amending the Laws in England relative to malicious Injuries to Property;" and thereupon, he, the said informer, prayeth the judgment of us, the Justices aforesaid, in the premises.

Robert Baas.

Taken and sworn { Anthony Collett, (L.S.)
before us, { L. R. Browne, (L.S.)

the information (3), the plaintiff was committed

Suffolk, { To the Constable of Halesworth, and
to wit. { to all other Constables in the said
county, duly to execute.

Whereas information and complaint, upon oath, have been made before us, two of His Majesty's Justices of the Peace in and for the said county, by Robert Beas, of Chediston, in the county aforesaid, gentleman, that, on the 15th day of October instant, in the parish of Chediston, in the said county, Simon Mills, of Chediston, in the county aforesaid, farmer, and Abraham Stannard, of St. James, Southhelmham, in the said county, labourer, did wilfully and maliciously cut, break, bark, root up, or otherwise destroy and damage a certain timber elm tree, growing in a yard adjoining to the dwelling-house belonging to a farm in Chediston aforesaid, of the value of 1*l.* and upwards, the property of John Badely, doctor of physick, contrary to the statute made in the seventh and eighth years of the reign of King George the Fourth, intituled "An Act for consolidating and amending the Laws in England relative to malicious Injuries to Property;" these are, therefore, to require you forthwith to apprehend the said Simon Mills, and bring him before us, at the Tuns Inn, in Yoxford, in the said county, forthwith to answer unto the said information and complaint, and to be further dealt with according to law.

Herein fail not. Given under our hands and seals, the 17th day of October, in the year 1827.

Anthony Collett, (L.S.)
L. R. Browne, (L.S.)

(3) Suffolk, { The deposition of John Storkey, husbandman, of the parish of Linstead
to wit. { Parvor, in the county of Suffolk,
taken and made upon oath, before us, two of his Majesty's Justices of the Peace for the said county, this 18th day of October 1827, who saith, that, on Monday last, the 15th day of the present month of October, on the premises occupied by Simon Mills, in the parish of Chediston, in the said county, the property of John Badely, doctor of physick, namely, in the yard adjoining and belonging to the dwelling-house of the said premises, he saw Simon Mills, of Chediston aforesaid, and Abraham Stannard, labourer, of the parish of St. James, Southhelmham, wilfully and maliciously cutting, barking, rooting up, and otherwise destroying a certain timber elm tree, the property of the said John Badely.

John Storkey, his + mark.

Before us, { L. R. Browne, (L.S.)
{ A. Collett, (L.S.)

Suffolk, { The deposition of Robert Balls,
to wit. { wheelwright, of the parish of Chediston, in the county of Suffolk,
taken and made upon oath, before us, two of his Majesty's Justices of the Peace for the said county, this 18th day of October 1827, who saith, that he knows the certain elm timber tree cut down by Simon Mills, of Chediston aforesaid, farmer, and Abraham Stannard, of the parish of St. James, Southhelmham, labourer, on the premises of the said Simon Mills, and that it is worth more than 1*l.*

Robert Balls.

Before us, { L. R. Browne, (L.S.)
{ A. Collett, (L.S.)

ted (4) to Beccles gaol, to take his trial at the following Quarter Sessions, and the prosecutor and witnesses were duly bound over in recognisances to prosecute and give evidence; that the plaintiff remained in custody until the Epiphany Sessions, which were held on the 14th of January following, when he was discharged, for want of prosecution.

The plaintiff's counsel admitted, in his address to the jury, that no malice or improper motive was imputable to the defendant, but contended, that he had committed an error in judgment, for the consequence of which the plaintiff was entitled to compensation at the defendant's hands. No evidence was called for the defendant; but it was submitted for him, that, under the circumstances, the plaintiff must be non-suited, upon the following grounds:—

First, that, the offence charged against the plaintiff being constituted a felony, by the statute 7 & 8 Geo. 4, the Magistrates had full power and authority to commit, and were not responsible to the plaintiff, or liable to any action for the consequences of any error in judgment as to the law of the case.

(4) Suffolk, { Launcelot Robert Browne, and Anthony Collett, clerks, two of the
to wit. { Justices of our Lord the King,
assigned to keep the peace within the said county of Suffolk, to the constable of Chediston, in the said county, and to the Keeper of the House of Correction at Beccles, in the said county:

These are, in His Majesty's name, to require and command you, the said constable, forthwith to convey and deliver into the custody of the said Keeper of the said House of Correction, the body of Simon Mills, late of Chediston, in the said county, farmer, he being charged before us, the said Justices, upon the oath of Robert Beas, of Chediston, in the county of Suffolk, gentleman, with having, on the 15th day of October instant, wilfully and maliciously cut, broken, barked, rooted up, or otherwise destroyed and damaged a certain timber elm tree, growing in a yard adjoining to the dwelling-house belonging to a farm in Chediston, of the value of 1*l.* and upwards, the property of John Badely, of Chelmsford, in the county of Essex, doctor of physick; and you, the said Keeper of the said House of Correction, are hereby required to receive the said Simon Mills into your custody, in the said House of Correction, and him there safely to keep until he shall be delivered from thence by due order of the law.

Given under our hands and seals, the 18th day of October 1827.

L. R. Browne, (L.S.)
A. Collett, (L.S.)

Secondly, that the plaintiff had not complied with the positive directions of the statute, 24 Geo. 2. c. 44, made for the rendering Justices of the Peace more safe in the execution of their office, and which enacts, that, at the back of all notices of action against Magistrates, the name and place of abode of the plaintiff's attorney or agent should be indorsed: the notice of action in this case being only signed at the foot by the plaintiff's attorney:—and

Lastly, that the place of abode of the plaintiff's attorney, subscribed at the foot of the notice, was not correctly stated, viz. No. 6, Half Moon-street, Piccadilly, being described as in London, instead of *Middlesex*.

The learned Baron proposed either to direct a verdict for the plaintiff, with leave for the defendant to move to enter a nonsuit; or to nonsuit the plaintiff, with liberty for him to move to set it aside, and enter a verdict in his favour; but, upon the defendant's counsel pressing for a nonsuit, upon the ground of the mischief of allowing a point of such extreme importance to Magistrates, as to their responsibility in committing in cases of felony, to remain in doubt, the learned Baron proposed, that, with a view of saving the parties the expense of bringing the question to trial a second time, the jury should, at all events, decide upon the *quantum* of damages to which the plaintiff should be entitled, in the event of the opinion of the Court being in his favour: whereupon the defendant's counsel addressed the jury on the subject of damages, and contended, that the defendant was not only justified in what he had done, but would have been guilty of a dereliction of duty, if he had not committed the plaintiff, inasmuch as the offence, which the statute constitutes a felony, had been sworn to by a credible witness, and confirmed by two others. The jury assessed the damages at *one farthing*; and Mr. Baron Vaughan directed a nonsuit to be entered, with liberty to the plaintiff to move to set it aside, and enter a verdict for the amount of the finding.

Mr. Serjeant Storks, in the last term, accordingly obtained a rule *nisi*, that the nonsuit might be set aside, and a new trial had, or that the verdict might be entered for the

plaintiff, with one farthing damages; and, in addition to the objections raised on the trial, submitted, that there was no ground whatever to imprison the plaintiff for a felony, as he was in the actual occupation of the farm on which the tree was cut down, and that the Legislature did not contemplate that the statute 7 & 8 Geo. 4. should apply to a case of landlord and tenant, or a person occupying premises, unless it were shewn, that trees were expressly excepted out of the demise; and the defendant must have been aware, that the plaintiff was the occupier of the farm, as that fact appeared in the depositions of Balls and Storkey, on which the commitment was founded.

Mr. Serjeant Wilde and *Mr. Serjeant Russell* now shewed cause.—The first material question which arises in this case, is, whether, under the circumstances, the defendant has been guilty of any error of judgment, or put a misconstruction on the 19th section of the statute 7 & 8 Geo. 4. c. 30. The provisions of that section were substituted for the 9 Geo. 1. c. 22. s. 1. (Black Act), which made the offence capital, where the malice was personal to the owner; and the 6 Geo. 3. c. 36, and 6 Geo. 3. c. 48;—by the first of which, the offence, if done in the *night time*, was felony; and by the last, if done at any time, was punishable by summary conviction for the first and second offences. The present case is clearly within the meaning and operation of the late act: for, in *East's Pleas of the Crown* (5), it is said, "The word 'maliciously' has not a different signification than it had under the statute 6 Geo. 3. c. 36, upon which it was considered as bearing its most general signification, and as applying to an act done *malo animo*, from an unjust desire of gain, or a careless indifference of mischief. Malice, in a legal sense, does not signify, according to its common acceptation, a desire of revenge, or a settled anger against a particular person." Then, even supposing that there were an existing tenancy in this case, it would not deprive the Magistrate of his jurisdiction. The plaintiff had clearly been guilty of a wrongful act, as against the owner of the tree, and he offered no excuse for cutting it down. Felony may be committed in respect of demised property, as in arson, under the statute, although

not at common law. So, by the statute 7 & 8 Geo. 4. c. 29. s. 45, (6) tenants and lodgers stealing or taking any property from houses or apartments let to them, are liable to be punished in the same manner as in the case of simple larceny. Suppose the plaintiff had cut down valuable or ornamental trees,—for instance, in an avenue,—it would clearly fall within the meaning of the act. Enough, therefore, appeared on the face of the information and depositions to induce the Magistrate to suppose, that he had jurisdiction; and it was not for him to decide. But, even if the defendant, acting as a Magistrate, had been guilty of an error in judgment, he is not liable to an action; for, in *Hawkins's Pleas of the Crown* (7), it is said, “that Justices of the Peace are not punishable *civily* for acts done by them in their *judicial* capacities; but, if they abuse the authority with which they are intrusted, they may be punished criminally, at the suit of the King, by way of information. But, in cases where they proceed *ministerially*, rather than *judicially*, if they *act corruptly*, they are liable to an action at the suit of the party, as well as to an information at the suit of the King.” Again, it is said by *Hawkins* (8), “Perhaps there may be this difference between the warrant of a Justice of Peace, for such causes which he has not authority to hear and determine as judge, without the concurrence of others, and such warrant for an offence which he may so determine, without the concurrence of any other,—that, in the former case, in-

asmuch as he rather proceeds ministerially than judicially, if he *act corruptly*, he is liable to an action at the suit of the party, as well as to an information at the suit of the King. But, in the latter case, he is punishable only at the suit of the King; for that, regularly, no man is liable to an action for what he doth as judge.” At all events, there must be either malice, or a corrupt motive, imputable to a Magistrate, to make him amenable to an action; for, in *Windham v. Clere* (9), which was an action on the case against the defendant, as a Justice, for maliciously issuing his warrant, it was alleged, that the plaintiff was accused of stealing a horse,—*ubi re verd* (whereas, in truth) plaintiff never was accused, nor did steal the horse, and the defendant knew him to be guiltless, the plaintiff had a verdict; and *Clench and Gawdy* held, that the action was maintainable; and they said, “If a man be *accused* to a Justice of the Peace for an offence, for which he causeth him to be arrested by his warrant, although the accusation be false, yet he is excusable; but, if the party be *never accused*, but the Justice of his malice and his own head cause him to be arrested, it is otherwise.” So *Morgan v. Hughes* (10) is an authority, that where a Justice *maliciously* grants a warrant against a person, without an information, upon a supposed charge of felony, an action of *trespass* will lie: but in *Lowther v. the Earl of Radnor* (11), it was held, that trespass does not lie against Justices acting upon a complaint made to them, upon oath, by the terms of which they have jurisdiction, though the real facts of the case might not have supported such complaint, if *such facts* were not laid before them at the time.

With respect to the objection that has been raised as to the notice, it must be strict and precise, according to the terms of the statute: and in *Lovelace v. Curry* (12), it was held, that no action can be brought against a Justice of the Peace for an act done by him in that character, without giving him a month's notice of the writ or process intended to be sued out, as well as of the cause of action; and

(6) Which, for the punishment of depredations committed by tenants and lodgers, enacts, “that, if any person shall steal any chattel or fixture let to be used by him or her, in or with any house or lodging, whether the contract shall have been entered into by him or her, or by her husband, or by any person on behalf of him or her, or her husband, every such offender shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in every such case of stealing any chattel, it shall be lawful to prefer an indictment in the common form, as for larceny, and in every such case of stealing any fixture, to prefer an indictment in the same form as if the offender were not a tenant or lodger, and, in either case, to lay the property in the owner or person letting to hire.”

(7) Book 2. c. 8.

(8) Book 2. c. 13. s. 20.

(9) Cro. Eliz. 130; s. c. 1 Leon. 187.

(10) 2 Term Rep. 225.

(11) 8 East, 113.

(12) 7 Term Rep. 631.

Mr. Justice Lawrence there said, "that the Court decided, in *Taylor v. Fenwick*, that the statute has prescribed a form which must be implicitly followed; and it admits of no equivalent. The statute was made to introduce a strictness of form in favour of Justices, and it must be observed literally." But the case of *Stears v. Smith* (13) is expressly in point, which was an action of trespass against a Magistrate, for breaking and entering the plaintiff's house, and searching it without authority, and injuring his goods. The plaintiff put in a notice, pursuant to the statute 24 Geo. 2, which was signed "John Spencer Young, New Inn, London;" that being the description of his place of residence, as required by the statute; and it was objected, that New Inn, where the attorney lived, (it being ascertained to be *New Inn*, near *St. Clement's*), was in *Westminster*, and not in *London*; and that, therefore, it was a misdescription of the attorney's residence:—Lord Ellenborough ruled the objection to be sufficient, and the plaintiff was nonsuited: and in *Aked v. Stocks*, which was an action against Magistrates for an unlawful conviction, and there was a variance in the warrant, as set out in the notice, Mr. Justice Park said (14), "These notices have always received a strict construction:" and Mr. Justice Gaselee expressed his concurrence; and, although in *Ditcham v. Chivis* (15), it was said, "The word London was not to be confined to the city of London:" yet that was the case of a contract by a coach proprietor to carry passengers from London to Blackheath, and those words were painted on the door of the coach, which was licensed to run from Charing Cross to Blackheath and back.

Mr. Serjeant Storks, in support of the rule.—Although no personal malice can be imputed to the defendant, yet the plaintiff is clearly entitled to damages for the injury he has sustained by his commitment and confinement in prison; and as he was the tenant or occupier of the estate on which the tree was cut down, he could not be considered as a wilful trespasser within the intent or meaning of the statute; and if so, the defendant had no jurisdiction or author-

ity to commit him.—With respect to the notice, the only object of it is, that the person to whom it is given may have the means of knowing who is the attorney or agent for the party who brings the action; and in common parlance, as well as in general acceptance, the word London applies to the suburbs, as well as the city itself; and the address in question was less likely to mislead, than if it were Middlesex, instead of London. In *Greenaway v. Hurd*, Lord Kenyon said (16), "It has been frequently observed by the Courts, that the notice which is directed to be given to Justices, and other officers, before actions are brought against them, is of no use to them, when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in these cases where they intended to act within it, but by mistake exceeded it:" and in *Crook v. Curry* (17), Mr. Baron Thompson held, that the attorney's name and place of abode being in the body, instead of on the back of the notice, was sufficient, on the grounds of the intent of the statute being, that the Justices might be able to tender amends to the party or his attorney; and that, if the attorney giving the notice described himself generally of the town in which he resided, as of Bolton-en-le-Moor, it was sufficient: and in *Osborn v. Gough* (18), where the place of abode of the plaintiff's attorney was described as at Birmingham, it was deemed sufficient; and Lord Chief Justice Alvanley there said, "The interpretation which I put upon the statute is this, that if the place indorsed upon the notice be the true place of the attorney's abode, it lies on the defendant to shew, that such description has not afforded him the opportunity of taking advantage of the act of Parliament."

By the Court.—The plaintiff has charged the defendant, a Magistrate, with false imprisonment; and the only question is, whether, under the circumstances, the Magistrate had jurisdiction to investigate the charge imputed to the plaintiff, and to commit him to prison. The information charges an offence within the statute, and a felony, for which a specific punishment is pointed

(13) 6 Esp. Rep. 138.

(14) 1 Moo. & Pay. 352; s.c. 6 Law J. M. C. 62.

(15) Id. 735.

(16) 4 Term Rep. 555.

(17) Burn's Justice, 24th edit. vol. 2. p. 171.

(18) 3 Bos. & Pul. 260.

out by the act. The question therefore is, whether, on a charge being made of a distinct and substantive felony, the case must be disposed of as in general questions of felony, in which a Magistrate is called upon to act. The case of *Windham v. Clerc*, as reported in *Leonard*, appears to us to be in point; and that the true distinction was there laid down by the Court, viz. that if a man be accused to a Justice of the Peace for an offence, for which he causes him to be arrested by his warrant, although the accusation be false, yet he is excusable; but if the party be never accused, but the Justice of his own malice and his own head cause him to be arrested, it is otherwise. The depositions appear to have been improperly taken, as they are framed in the very words of the statute. But that alone will not make the defendant guilty of having acted maliciously. It has been said, however, that, as it appears that the plaintiff was the occupier of the premises on which the tree was cut, it took the case out of the statute, and ousted the Magistrate of his jurisdiction. To that proposition, however, we do not accede. The trees growing on the farm might have been reserved to the lessor, or expressly excepted in the lease; and if they were cut down, the tenant would be clearly liable in trespass, although he might not in waste, as they did not form the subject-matter of the demise. Here, however, the plaintiff was charged with a direct offence within the terms of the statute, namely, as "having committed a wilful trespass," over which the Magistrate had a complete jurisdiction, and if he does not exceed it, he is not liable in an action of trespass; and here, he acted upon his general authority as a Magistrate; and as there was a direct charge that a felony had been committed by the plaintiff, he was bound to act. If the plaintiff had been charged with murder, and it should eventually turn out, that the murder was committed by another person, still the Magistrate would not be liable in trespass for having committed the party accused. As, therefore, this action cannot be maintained upon this broad principle, it is unnecessary to consider the objection which has been raised as to the sufficiency of the notice; and the rule for setting aside the non-suit must consequently be

Discharged.

1829. } THE KING v. THE INHABITANTS
April 23. } OF RINGSTEAD.

Settlement by Estate—Devise, construction of.

The interest of a remainder-man, after an estate for life, will not entitle him to a settlement, by reason of forty days' residence during the continuance of the particular estate.

Testator, after devising certain real property to his heir-at-law, devised "to my daughter, E. M., all that part of a messuage or tenement, with the appurtenances, which is now in the occupation of H. L., situated in Ringstead, adjoining the tenement in the occupation of J. M., to hold to her and her assigns, for and during the term of her natural life, if she shall so long continue a widow and unmarried; and, from and after the day of her decease, or day of marriage, which shall first happen, I give and devise the said part of a messuage or tenement, with the appurtenances; and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of J. M.; and also, all that my close or orchard lying above the said homestead, &c. unto the four children of my late son:—Held, that these four grandchildren of the testator, under this devise, did not take an immediate vested interest in any part of the premises mentioned therein, but a remainder expectant on the decease or second marriage of E. M., and consequently, that one of those grandchildren, a pauper, did not obtain a settlement by forty days' residence in the parish where those premises were situate during the life and before the second marriage of E. M.

Upon an appeal against an order of two Justices for the removal of Henry Manning, Rebecca his wife, and their four children, from the parish of Wellingborough, in the county of Northampton, to the parish of Ringstead, in the same county, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court on the following

CASE.

The birth settlement of the pauper, Henry Manning, was in the parish of Ringstead. His grandfather, Thomas Manning, being seised in fee of the premises hereinafter mentioned, by his will, dated the 6th of January 1800, duly executed and attested,—

after devising five acres of land in Ringstead to his eldest son and heir, John Manning, in fee, in the words following, that is to say, "I give and devise unto my son John Manning, all those my five acres, more or less, of copyhold, arable land, and ley ground, and one rood, more or less, of copyhold meadow ground, with their and every of their appurtenances, lying and being dispersed in the open and common fields and meadows of Ringstead aforesaid, now in my own occupation, and which I have duly surrendered to the use of this my will, to hold to him, his heirs, and assigns, for ever; subject, nevertheless, and I do hereby subject and charge the same estate to and with the payment of 25*l.* of lawful money of Great Britain, unto my daughter Mary, the wife of Thomas Plant, to be paid to her within twelve calendar months next after my decease,"—gave and devised as follows, that is to say, "I give and devise unto my daughter Elizabeth, the widow of my late son Thomas Manning, all that part of a messuage or tenement, with the appurtenances, which is now in the occupation of Henry Lawford, situated in Ringstead aforesaid, and adjoining the tenement in the occupation of James Manning, to hold to her and her assignees, for and during the term of her natural life, if she shall so long continue a widow and unmarried; and, from and after the day of her decease, or day of marriage, which shall first happen, I give and devise the said part of a messuage or tenement, with the appurtenances; and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of James Manning; and also all that my close or orchard lying above the said homestead, on the north side of a back lane, now in the several tenancies of myself, Samuel Hackett, and Mary Whitney, unto the four children of my late son, the said Thomas Manning, deceased, namely, Henry, John, Thomas, and Rebecca Manning, to hold to them and to their several respective heirs and assigns, for ever, as tenants in common, and not as joint tenants."

The pauper is the Henry Manning mentioned in this devise, and is the son of the said Elizabeth Manning. In 1806, he gained a settlement by hiring and service, in the parish of Raunds; having some years afterwards become chargeable to Ringstead, he

was removed, with his wife, to Raunds, by orders, dated the 8th of January 1817, which orders were never appealed against. Between 1817 and 1819, and before the sale of the property to Moss hereinafter mentioned, he resided above forty days in the parish of Ringstead.

On the 23d of April 1803, an indenture of feoffment was made between John Manning, the eldest son and heir-at-law of the testator (the testator being then deceased,) of the one part, and the said Elizabeth Manning, the widow, of the other part; whereby, after reciting the above-mentioned will, and declaring, that the testator did not thereby dispose of all, or any part of the homestead and appurtenances therein mentioned to be in the occupation of James Manning, or of the said close or orchard lying above the said homestead, and therein mentioned to be in the several tenancies of the testator, Samuel Hackett, and Mary Whitney, until after the death or second marriage of the said Elizabeth Manning; and that the same premises, upon his, the said testator's death, descended and came to the said John Manning, as his eldest son and heir-at-law, until either of the said events should take place,—he, the said John Manning, in consideration of 10*l.*, granted, bargained, aliened and sold, enfeoffed and confirmed all the said premises so undisposed of, with the appurtenances, to the said Elizabeth Manning, and her assigns, during the term of her natural life, if she should so long continue a widow and unmarried. Afterwards viz. on the 10th of June 1819, an indenture was duly executed between the said Elizabeth Manning, of the first part, Henry Manning, and Rebecca his wife, John Manning, and Hannah his wife, Thomas Manning, and Lydia his wife, and Robert Phillips, and Rebecca his wife (which said Henry Manning, John Manning, Thomas Manning, and Rebecca Phillips, are the four children of the above-mentioned Thomas Manning the younger, deceased, and devisees in fee named in the said will of the said Thomas Manning the elder, deceased), of the second part, William Moss, of the third part, and Caryl Sherard (a trustee for the said William Moss), of the fourth part; by which indenture (after reciting the above-mentioned will of the said Thomas Manning the elder, and the

above-mentioned indenture of feoffment, dated 26th of April 1803), the said Elizabeth Manning, Henry Manning, and Rebecca his wife, John Manning, and Hannah his wife, Thomas Manning, and Lydia his wife, and Robert Phillips, and Rebecca his wife, did each and every of them, in consideration of the sum of 180*l.* unto them in hand paid by the said William Moss, at or before the sealing and delivery of the said indenture (the receipt of which they did each and every of them thereby acknowledge), grant, bargain, sell, aliene, release, and confirm unto the said William Moss, all their estate and interest in the above-mentioned premises devised to them by the said Thomas Manning the elder. At the time of this conveyance, Elizabeth Manning was a widow and unmarried. The pauper, Henry Manning, was twenty-nine years old at the date of the conveyance; up to that time, he never received or claimed any of the rents or profits, and exercised no acts of ownership. The 180*l.* was divided into four shares, of which the pauper saw one of his brothers receive one share. The pauper received about 30*l.*

The question for the Court was, did the pauper, Henry Manning, gain a settlement by estate in Ringstead subsequently to his gaining one by hiring and service in Raunds?

Mr. Dwaris and *Mr. Amos*, in support of the order of Sessions.—Upon the supposition, that the will did not pass an immediate interest, but merely an estate in remainder, *Rex v. Eatington* (1) may be cited as deciding against the pauper's right to a settlement, by reason of forty days' residence in the parish of Ringstead. *Rex v. Houghton Le Spring* (2), and *Rex v. Staplegrave* (3), have, however, established, that an actual occupation, or right of immediate possession, is not necessary to render a person irremovable from his own property, or to entitle him to a settlement by residence within the parish where it is situate. In the latter of those cases, the interest of a reversioner, after an estate for 1000 years, was held sufficient to gain a settlement; and no distinction between such an interest and that of a remainder-man, after an estate

for life, can be suggested, so far as regards the policy, intent, and just construction of the statute 13 & 14 Car. 2. c. 12.

[*Mr. Justice Bayley*.—In those cases, the freehold remained in the reversioner.]

Conceding that if this were a remainder; the pauper did not gain a settlement, it may be contended, that the estate taken under the will vested immediately on the testator's death. The intention of the testator, according to the general rule of construction, must be ascertained from the whole of the will, from which it may clearly be collected he did not contemplate intestacy, as to any part of his property. His object was to give a fee-simple in the premises, in which Elizabeth Manning had no life interest, to his grandchildren; and that object will be effectuated by supplying such words as may be wanting to express it distinctly, and by construing those used distributively, and not jointly: *Doe v. Leach* (4), *Simpson v. Hornsby* (5), *Doe v. Brazier* (6), *Cook v. Gerrard* (7).

Mr. Campbell, *Mr. Humfray*, and *Mr. M'Donnell*, contra.—The correct principle upon which a settlement may be obtained by a party residing forty days where he has an estate, was laid down by *Mr. Justice Foster*, in *Rex v. Aythrop Kording* (8), namely, that "none shall be disseised of his freehold." It follows, then, that if the pauper did not take an immediate vested estate, that rule will not apply, and that he gained no settlement. The cases cited in support of a construction of the will, in favour of an immediate estate passing to the testator's grandchildren, are not in point. In *Simpson v. Hornsby*, as reported in 2 *Vernon*, 722, n. by the name of *Hutton v. Simpson*, relative to part of the lands devised passing immediately to the testator's daughter, a question was raised; and the parties in *Doe v. Brazier* were the residuary devisee and legatee, and the testator's nephews and nieces claiming under the will, and not as heirs-at-law. *Cook v. Gerrard* is the strongest case, and shews how far the Courts have sometimes gone in excluding even the heir; but the true rule is laid down by *Wilson, J.*,

(1) 4 Term Rep. 177; s. c. 2 Nol. P.L. 103.

(2) 1 East, 247.

(3) 3 Barn. & Ald. 577.

(4) 6 East, 486.

(5) Prec. Chanc. 439; s. c. 2 Vern. 722.

(6) 5 Barn. & Ald. 64.

(7) 1 Saund. 182.

(8) 1 Burr. Set. Ca. 412—14.

In *Habergain v. Vincent* (9), who says, "that, whether the estate was meant for the heir or not, the intention is not material, if it is not given to some other person; for there is no other way to exclude an heir than by giving it to somebody else: therefore, if, from the circumstance of part being so given, an inference could be raised, that the testator meant the heir should have no more; yet, even against that intention, the heir would take." So, in *Comyns's Digest*, tit. "Devise," n. 22, it is said, "there shall not be a strained construction of words to disinherit an heir; and, therefore, whatever is not expressly disposed of descends to the heir." Lord Hardwicke also, in giving judgment in *Coryton v. Hillier* (10), observes, that, "in construing a will, conjecture must not be taken for implication; but necessary implication means not natural necessity, but so strong a probability of intention, that an intention contrary to that imputed to the testator cannot be supposed." Similar principles in support of a construction favourable to the heir, where property is not clearly disposed of, are recognized and adopted in *Stanfield v. Habergain* (11), *Hopkins v. Hopkins* (12), *Jones v. Mitchell* (13), *Tregonwell v. Sydenham* (14), *City of London v. Garway* (15), *Wright v. Sidebotham* (16), *Denn v. Gasikin* (17).

April 23.—On this day the judgment of the Court was delivered by—

Mr. Justice Bayley.—The question was, whether the pauper had or had not obtained a settlement by estate; and the question on that point turned on the construction of a will;—if that will gave to him an immediate estate, he was settled in Ringstead; if otherwise, he was not. The words of that will were these:—"I give and devise unto my son John Manning, all those my five acres, more or less, of copyhold arable land, and ley ground, and one rood, more or less, of copyhold meadow ground, with their and

every of their appurtenances, lying and being dispersed in the open and common fields and meadows of Ringstead aforesaid, now in my own occupation, and which I have duly surrendered to the use of this my will, to hold to him, his heirs and assigns, for ever; subject nevertheless, and I do hereby subject and charge the same estate to and with the payment of 25*l.* of lawful money of Great Britain, unto my daughter Mary, the wife of Thomas Plant, to be paid within twelve calendar months next after my decease." And then he gives in the words following—"I give unto my daughter Elizabeth, the widow of my late son Thomas Manning, all that part of a messuage or tenement with the appurtenances, which is now in the occupation of Henry Lawford, situate in Ringstead aforesaid, and adjoining the tenement in the occupation of James Manning; to hold to her and her assigns for and during the term of her natural life, if she shall so long continue a widow and unmarried; and, from and after her decease or day of marriage, which shall first happen, I give and devise the said part of a messuage or tenement, with the appurtenances, and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of James Manning, and also all that my close or orchard lying above the said homestead, on the north side of a back lane, and now in the several tenures of myself, Samuel Hackell, and Mary Witney, unto the four children of my late son, the said Thomas Manning, deceased; namely, Henry, John, Thomas, and Rebecca Manning, to hold to them and their several and respective heirs and assigns for ever, as tenants in common, and not as joint tenants." The pauper removed, was Henry Manning. The widow was still living, and still continued a widow. If the devise in question, as to any part of the property, gave an immediate devise to Henry Manning, why then he had a settlement in Ringstead; if it did not give him any present estate until after the death or marriage of Elizabeth, the widow of Thomas Manning, then he was not settled in Ringstead: and therefore the question was, whether it did or did not give to him an immediate estate, as to that part of the property which was not given to Elizabeth for life. The words are "after her decease or day of marriage, which shall

(9) 2 Ves. jun. 225.

(10) 1 Ves. & Bea. 466.

(11) 10 Ves. 280.

(12) 1 Atk. 581.

(13) 1 Sim. & Stu. 290.

(14) 3 Dow. P.C. 194.

(15) 2 Vern. 571.

(16) Doug. 730.

(17) Cowp. 657.

first happen, I give and devise that part of the premises which was given to her, and also, all that the aforesaid tenement,"—namely, other premises, to the four children, of which Henry was one; and it was argued that those words "after her decease or day of marriage," should be confined in their operation to that part of the property which was given to Elizabeth for life; that it would not apply to the residue of that property; but that as to the residue, the parties would take an immediate estate. The words are "after her decease or marriage, I give and devise" what was previously given to Elizabeth, "and also all that the aforesaid tenement." There is no doubt, but that you may,—notwithstanding the words are after given events—you may take the words *distributively*, and apply part of them to that portion of the property, which is the subject to which that part of the provision is most peculiarly applicable, and suffer the rest of the property to pass immediately; but then it must appear upon the face of the will, or by the context, or by the purposes which are directed by the will, that that was the intention of the testator; because, if you give certain lands after the decease of a particular individual, who takes a previous estate in part of the lands, and in part of those lands only, if there is nothing in the context to limit those words to that part which that person previously took, they will be general, and apply to the whole. But, in order to warrant the construction of words out of their ordinary meaning, the intention of the testator must appear to be express, or, at least, so strongly probable, that it would be doing violence to the apparent intention to suppose, that he meant the words to be taken literally. Such is the familiar case of a devise by implication, in a question touching the rights of an heir-at-law. Suppose a testator devise to a person, who happens to be his heir-at-law, to take effect upon the death of A. Now here, A. will take an estate for life by implication: because, if it were otherwise, the heir-at-law would take before the death of A., which, it is evident, the testator did not intend. But, if a testator devise to B., who is not his heir-at-law, to take effect upon the death of A., no estate will pass by implication to A.; but the heir-at-law will take during the life of A. In the case last

put, the probability that the testator meant A. to take for life is not strong enough to warrant the depriving of the heir-at-law. In the present case, there is no express devise of the property during the life of Elizabeth; and the question, therefore, is, whether she took an estate for life by implication. The devisees were not the heirs-at-law of the testator. They were strangers; and, therefore, according to the rule, that the heir-at-law is not to be disinherited, except by express words, or necessary implication, the devise to the grandchildren, after the death of Elizabeth, gave them an interest which could not take effect until her death. As a consequence, the heir-at-law takes the estate during her life. The cases which were relied on, on one side, were the cases of *Cook v. Gerrard*, *Sympton v. Hornsby*, and *Doe v. Brasier*. The case of *Cook v. Gerrard*, was a case in which the testator (Thomas Kempe) had two estates, one in possession, and another in reversion, expectant on the death of A. B.; he devised that estate which he had in possession, to his widow for one year; and then, because he was desirous to continue the possession of his capital messuage, called Shayne's Hall, and of divers lands thereunto belonging (a part of which was included in the before-mentioned devise), in the name and blood of the Kempes, he devised the whole to the lessor of the plaintiff, to hold immediately after the expiration of the year from his decease, and the decease of A. B.; and there, it was said, that, inasmuch as there was one estate which was given to the widow for one year, and another estate which the testator had no right of disposing of until after the death of A. B., the purposes of the will shewed, that those words ought to be taken *distributively*; and at the end of one year, the property in possession, which had been given to the widow for one year, was to pass; and that "after the death of A. B." was to be applied to that part of the property only, which was property held in reversion, expectant upon the death of A. B. A writ of error was brought in the Exchequer Chamber to reverse this judgment; and, on the argument, there was a case cited from *Moor*, "Manor," 7, placita 24, in which a man having a manor, part in demesne, and part in services, he devised the demesne to his widow for life, and he

devised the services to his widow for fifteen years; and after the death of the widow, he devised the manor to some other person. Now, it having been decided in *Moor*, that the devisee over, could not take at the expiration of the fifteen years the services and chief rent; but that he must wait also for the whole, until after the death of the devisee for life,—inasmuch as that had been decided by that case, therefore, they insisted in this case of *Cook v. Gerrard*, that the words could not properly be taken distributively. Saunders, who, in *Simpson v. Hornsby*, was of counsel for having the words distributed, said, “your argument would be right, provided you had had both alternatives in the devise, and you had said after the expiration of the fifteen years, and after the death of the devisee for life, that the manor should go over: why then the services and rents would have gone over at the expiration of the fifteen years, the demesne lands would have remained until the widow died, but the limitation over, being upon the death—upon the death only,—being perfectly silent as to the term of fifteen years, no part could pass until after her death took place.” The judgment of the Court of King’s Bench was accordingly affirmed. [That case shews, that words may be taken distributively, in order to effectuate the intention of the testator; but not that they must be so taken. There were circumstances in the case of *Cook v. Gerrard* to shew, that the testator did not intend the heir-at-law to take the lands in demesne during the life of the person upon whose death the other lands would fall into possession.] In the case of *Simpson v. Hornsby*, (which is in *Precedents in Chancery*, 439, and in *Gilbert’s Equity Reports*, 115, and is also in 2d *Vernon*, 722),—I have referred to the case from the register’s book; and, although my Lord Cowper gave a positive opinion, the point did not of necessity arise; and it was utterly impossible, from the course which that cause took, to have the opinion of a court of error upon it, or of a court of appeal upon it: but the great distinction between that case and this, and the true ground on which, as I apprehend, that case of *Simpson v. Hornsby* was decided, was this: that there was a devise to Frances (the widow) for life, of a part of certain premises; and after her death, the testator de-

vised all those premises, together with other premises, to one of his two co-heiresses. Now, in that case, the testator had a widow, Frances, and he had two daughters of the names of Bridget and Jane, and he devised part of his property at Turpentre, in the county of Cumberland, to his widow for life, but he devised it with expressions which are to be met with in *Viner’s Abridgment*: describing it not only to be in full of her jointure and in bar of dower or thirds, at common law, or in equity, or by any local custom; and after the death of his wife, then he devised that, and all other his real estate not before devised, to his youngest daughter Bridget, in tail male; and on the death of Bridget, and failure of issue male of her, then to Jane, his eldest daughter, for life, with remainder to her issue in strict settlement. The testator died, and upon his death there were two bills in equity filed—one by Jane and her husband, claiming the property as having come to her; the other by the husband of Bridget, who died in the lifetime of the testator, on behalf of Bridget’s son—and each of them, namely, as well that filed by the husband of Bridget, on behalf of Bridget’s son, as that filed by Jane and her husband against the widow, praying an account of the rents and profits of that part of the estate, which had not been given to the widow for life. In both those suits, the widow died before the causes came to a hearing, and both of them were revived; and the only question as against the widow, was, not whether those estates were come into possession—because it was quite clear, that they had, before the hearing,—but whether her property was liable to account either to Bridget’s son, or to Jane, for the rents and profits of the estate not devised to the widow for life, which she had been receiving during her lifetime. In the first of those cases, (that brought by Jane and her husband,) the Court of Chancery decreed, that she was not entitled to an account of the rents and profits, because she had made no entry in the lifetime of Frances; and therefore, they thought that she was dispossessed of the estate, and could not come for the receipt of the rents and profits; and that bill was dismissed. I only mention the fact of such dismissal for the purpose of shewing, that, when that bill was dismissed, no question could arise on her part, as to rents

and profits. There was no question raised as to whether Jane was, or was not entitled, or the son of Bridget entitled, to the actual possession: that ceased to be a question by the death of Frances, the tenant for life; and then, inasmuch as that bill was dismissed, there could be no appeal brought upon the subject to vacate the opinion, which had been delivered by my Lord Cowper, as to the period of time at which the property vested either in Bridget or in Jane. In the other case, in the Court of Chancery, my Lord Cowper dismissed the bill also, as to the rents and profits, because, it was said, if Jane is entitled to the rents and profits, she has a clear title to them at law; on which account the Court refused to give any assistance, by interfering in any way, with reference to the rents and profits; and therefore, no other opinion could be taken by a court of equity, on the decision in that case. It was contended, that Bridget's son was entitled to the estate upon the death of Bridget, although she died in the lifetime of the testator; but the Court were of opinion, that Bridget's son was not so entitled. Then another question was raised—whether Jane was entitled, and when she became entitled; it was insisted, that Jane was not entitled until after the death of the widow; for that the widow had an estate for life by implication;—that the remainder over being given to one of the two co-heiresses, after the death of the widow, the co-heiresses could not be entitled to anything until after the widow's death: but the Court said, no; that is not the case: she does not take an estate for life in the whole by implication; because that which is given to her is declared to be in full of all claims and demands; and therefore, she cannot take the residue of the property devised, by implication; but that property will pass, immediately on the death of the testator, to the person who, by the will, is entitled to take it; because Lord Cowper said, “you are to read these words distributively, *reddendo singula singulis*. The property at Turpentro being given to the wife in full of all claims and demands, she could not take anything but the property at Turpentro. Then the words, “after the death,” were, as my Lord Cowper thought, of necessity confined to the Turpentro property only; and the residue of the property

was to be considered as being immediately given to the party entitled to take,—to Bridget, if Bridget had not died in the lifetime of the testator; and by the devise to her having lapsed, then that Jane took immediately on the death of the testator. Now the decision, therefore, in that case, by distributing the words, and separating them, and confining the words *after the death*, to the Turpentro property, and letting in the residue of the property, as an immediate devise, was considered by the Court as being a case of necessity appearing upon the face of the will; because the widow could not take it by implication, the other property being given to her in full of all her claims and demands;—the heir-at-law could not take it, because there was an express provision for the heir-at-law to take by devise; and it never could have been the intention of the testator, that any part of that property should pass to that heir-at-law by descent:—there was a necessity that the words should be taken distributively. The only other case, which is the case of *Doe v. Brazier*, a case recently before this Court, in which also there was, as it appeared to the Court, an absolute necessity that the words, “*after the death*,” should be confined to particular lands, and to particular lands only. The testator, in that case, gave unto his son-in-law, Charles Brazier, the rents, issues, and profits of one particular tenement for life; and, from and after his decease, he gave and bequeathed the same rents, issues, and profits, together with the rents, issues, and profits of all his other houses and lands unto his nephews and niece therein mentioned for their lives, and the life of the survivor; and, from and after the decease of the survivor, he gave and devised all his houses and lands to trustees, upon trust for sale, and to pay the produce of such sale unto such of the children of his nephews and niece as should be living at the decease of the survivor; and then devised all the residue of his estate to Charles Brazier. Now there, the Court were of opinion, that it must have been the intention of the testator, that the words “*from and after the decease*,” should be confined to that property which had been given to Charles Brazier for life, and that the residue of the property would pass immediately to the respective

devisees; and they read it, "from and after the decease of the said Charles Brazier, I give and bequeath the same rents, issues, and profits:"—that is, what had been previously given to Charles Brazier for life, "together with"—they said, that that was equivalent to saying, "I also give and bequeath:" and they thought that was necessary, in order to carry into effect the purposes of that will. Amongst other reasons that were given, one was, that he gave nothing but life estates to particular persons. The testator only gave life estates; and every one of those persons might have died in the lifetime of Charles Brazier. There was a direction for sale, as soon as those life estates were gone; and therefore, it could not have been the intention of the testator to postpone the sale until Charles Brazier died, because his death was perfectly unconnected with that event. Another reason given was, that as, in that case, there was a residuary clause, which residuary clause shewed the intention, that the heir-at-law should take nothing, it could not be the intention of the testator that any property should, in the intermediate time, during the lifetime of Charles Brazier, vest in the residuary devisee; and, therefore, the Court considered that as a case in which they were forced to that construction by the particular penning of the will, altering the grammatical construction to a certain extent, but to a very limited extent, for the purpose of meeting that necessity. Now, in this case, when you come to look at the document in question, it does not appear, that there is any necessity apparent on the face of this instrument, which would require you to read the words distributively, or in any respect to vary the plain, common language of the will. For these reasons, we are of opinion in this case, that the devisee did not take an immediate estate; that he was entitled to nothing until the tenant for life should die. The tenant for life was not dead during the period of time the pauper was settled at Raunds; and, therefore, we are of opinion, the settlement was not in Ringstead, but remained in Raunds. Upon these grounds, it being quite clear, upon the authority of *Rex v. Easington*, that, in order to have a settlement, you must have,—not a future estate,—not an estate in reversion or remainder; but a present estate;—and

we being of opinion, that this party did not take a present estate; consequently, the removal to Ringstead was wrong.

Order of Sessions quashed.

1829. { THE KING v. THE INHABITANTS
OF DITCHEAT. *

Poor Laws—Settlement by tenement—Occupation.

1. *Whether, in order to gain a settlement by the 6 Geo. 4. c. 57, the house should be entirely occupied by the tenant for the year, or whether an occupation of part, the remainder being occupied by lodgers, is sufficient?*

Held, by Mr. Justice Bayley, that the occupation should be entirely by the tenant.

By Mr. Justice Littledale, and Mr. Justice Parke, that an occupation of part, the remainder being occupied by lodgers, is sufficient.

2. *A renting of a tenement for a year, and an occupation for a year, which year began before the 22d of June 1825, (6 G. 4. c. 57.) but ended after that day, will be sufficient to confer a settlement, provided the other requisites of the 6 Geo. 4. be satisfied.*

Two Justices, by order, removed Martha Jerrard, wife of Thomas Jerrard, then in St. Thomas's Hospital, in Surrey, and their children, from Ditchet in Somerset, to the parish of Lyncombe and Widcombe, in the same county. The Sessions, on appeal, quashed the order, subject to the following

CASE.

The pauper's husband rented a tenement in Lyncombe and Widcombe by the year, viz. from Lady-day 1825, until Lady-day, 1826, at the yearly rent of 15*l.*, with liberty to quit at any time on giving a quarter's notice. After the first month's occupation, the pauper's husband left the pauper living in the tenement, and went to London, and remained there about seven months, during which period she remained in the tenement, and until she quitted it as after mentioned; and she paid the year's rent, the receipts for which were given, as if it had been received from her husband. A

* S. C. 9 B. & C. 176.

few days after the 25th of March 1825, the pauper's husband let an apartment in such tenement to one Gay, at the yearly rent of 8*l.* payable quarterly, with liberty to quit at any time, giving a quarter's notice; and the same was occupied by Gay from the time of his taking, until the 25th of March 1826, and his rent paid to that time. The pauper's husband gave notice at Christmas 1825, to quit at Lady-day 1826. The landlord permitted the pauper to occupy part of the tenement until Midsummer 1826, on paying him 38*s.* for the same; and the pauper quitted at Midsummer, 1826. The pauper's husband never paid any parochial rates, although rated.

Mr. Moody, in support of the order of Sessions.—The residence in the parish by the husband was not sufficient; that of his wife and family has been sufficient in point of time; but that will not serve for the purpose of a settlement: *Rex v. St. George, Southwark* (1), *Rex v. South Lynn* (2). And with reference to the time, it is to be observed, that the statute 59 Geo. 3. c. 50. having been repealed by the statute 6 G. 4. c. 57, which passed on the 22nd of June 1825; the settlement of the pauper was not completed on that day. The whole time must elapse under one statute or the other; the words of the latter statute are all prospective; and therefore the time which was begun under the repealed statute, cannot be added to the time under the latter. This was the construction given to the first statute, and ought to be applied to this case: *Rex v. St. Mary-le-bone* (3). If the legislature had intended to introduce a different principle of calculation, the words would not have been all future and prospective; but even if the two periods could be connected, all the conditions required by the 6 Geo. 4. c. 57, which passed on the 22nd of June 1825, must be shewn to have existed from that time. That is not so in this case, because, the house was not occupied by the party hiring the same. The statute 6 Geo. 4. c. 57. repealed the statute 59 Geo. 3. c. 50; and it is a principle of construction, that the same rules be applied

to statutes made in *pari materia*: *Rex v. North Collingham* (4). By the 59 Geo. 3. c. 50. it was necessary that the house should be held, and the land occupied by the person hiring the same for the term of one whole year at least. By the 6 Geo. 4. c. 57. that distinction is abolished; and the words are, "that the house or building or land shall be occupied under such yearly hiring; and the rent for the same actually paid for the term of one whole year at least." The word "occupied" in the latter statute, must have the same construction as that which was given it by the decisions on the 59 G. 3. c. 50; and it was held in several cases, that the term "occupied" in that statute was not satisfied unless the party had the exclusive occupation of the land. But if the tenement were a house, and part was let out in lodgings, a settlement could be gained by reason of the word "held." *Rex v. North Collingham*. In that case the Lord Chief Justice Abbott said, "As to the second question, it is to be observed, that a different expression is applied to land and to houses; the house is to be held, but the land is to be occupied. It was probably intended that a party taking lodgers, properly so called, should not be thereby prevented from gaining a settlement." The same principle was adopted in *Rex v. Tonbridge* (5); there Mr. Justice Bayley says, "It is not in terms found that there was a joint occupation; but as Maynard was to participate in the occupation, we think it must be taken that he did; and if so, the pauper cannot be considered as occupying more than a moiety of the garden." *The King v. Great Bolton* (6) is to the same effect.

[*Mr. Justice Parke*.—There is another difference in the two statutes; in the former, the occupation must be by the party hiring the same. In the 6 Geo. 4. c. 57. the words "by the party hiring the same" are omitted.]

But, the legislature must have intended those words to be supplied; otherwise the conditions requisite for a settlement might be performed by other persons than the party acquiring the settlement, and this con-

(1) 7 Term Rep. 466.

(2) 5 Id. 664.

(3) 4 Barn. & Ald. 684.

(4) 1 B. & C. 584; 2 D. & R. 743.

(5) 6 B. & C. 88; 5 Law J. Mag. Cases, 13.

(6) 8 B. & C. 771; 6 Law J. Mag. Cases, 81.

sequence would follow; that a party might take the premises for a year, and the next day assign them, and himself be absent, and altogether unconnected with the premises for the rest of the year, and yet gain a settlement.

Mr. Jeremy and Mr. Rogers, contra, relied chiefly on the last point. The intention of the legislature must be collected from the words of the act. But, previous to looking at the words, it may be proper to consider what the state of the law was before the 6 Geo. 4. c. 57, and what alteration was introduced by that statute, particularly as to occupation. By the statute 13 and 14 Car. 2, the term for which the tenement was taken, for which it was occupied (after forty days), or by whom it was actually occupied, was immaterial. The 59 Geo. 3. c. 50. required that the tenement should be taken for a year; and if it consisted of a house, that it should be held, if of land, that it should be occupied, for that period, by the person hiring the same. The words in the last part of the sentence apply to every separate branch; but the house need not have been occupied under the original hiring; for the occupation of the same tenement under different hirings might be connected: *Rex v. Stow* (7), as *Rex v. Sturton by Stow* (8),—or different tenements might be taken at different times, *Rex v. North Collingham*. Although the 6 Geo. 4. c. 57. requires that the occupation should be under the yearly hiring, it is not of necessity that the occupation should be by the person hiring the same; one restriction was substituted for another: *Rex v. Kibworth Harcourt* (9). When the 6 G. 4. c. 57. passed, the 59 Geo. 3. c. 50. must be taken as if it never existed: *The Bishop's case* (10), *Tattle v. Grimwood* (11). Supposing it never to have existed, the 6 Geo. 4. c. 57. requires merely that the pauper shall rent for a year; and that the premises shall be occupied under the yearly hiring; it is immaterial by whom the occupation is, if the relation of landlord and tenant enure

for the whole year, as originally created. But conceding that the statute requires that the tenement shall be occupied by the person hiring the same, there has been in this case a sufficient occupation, for the occupation of an undertenant must in general be considered, with respect to the lessor, as the possession of his lessee. Gay was but an inmate, and an inmate who goes in by the same door is in the nature of a lodger, and if his room be robbed, it is burglary, yet the indictment must lay it to be the dwelling-house of him who let it, and not of the inmate.

Mr. Justice Bayley.—The statute 59 G. 3. c. 50. is repealed by the statute 6 Geo. 4. c. 57. The question, therefore, in this case is, whether a settlement was or was not obtained under the last-mentioned statute. By the 59 Geo. 3. c. 50, a settlement could not be obtained in the case of a house or building, unless such house or building were held, or, in the case of land, unless it were occupied, and the rent for the same actually paid, for the term of one whole year at the least, by the person hiring the same. The words of the 6 Geo. 4. c. 57. are different. That statute is wholly silent as to the occupation or payment of rent by the person hiring; and it has been decided, in *Rex v. Kibworth Harcourt*, that, according to the true construction of the statute, the payment of rent need not be made by the party hiring. The words "by the person hiring the same," are to be considered therefore as struck out of the statute 6 G. 4. c. 57, and the law altered so far as it required that the rent should be paid by the person hiring the premises. It is now sufficient if it be paid either by the person hiring, or by any other person. The words of the 6 Geo. 4. c. 57. s. 2. are, that the house or building, or land, shall be occupied under such yearly hiring, and the rent for the same to the amount of 10*l.* shall be actually paid for the term of one whole year at the least. Here the phrase is varied: the statute says, not that the house or land shall be occupied by the person hiring the same, but only that it shall be occupied under such yearly hiring; and although it may be difficult to arrive with certainty at the meaning of the legislature, which is not expressed

(7) 4 B. & C. 37; 6 D. & R. 110.

(8) 3 Law Journ. K.B. 154.

(9) 7 B. & C. 790; 1 M. & R. 691; 6 Law J. Mag. Cases, 60.

(10) 13 Coke, 7.

(11) 3 Bing. 496; 4 Law Journ. C.P. 174.

in very intelligible language, I incline to think the true construction of those words is, that it shall be occupied by the person to whom that hiring gives the right of occupation; and that occupation by any other person to whom that right is communicated, either by assigning or underletting, is not an occupation under the yearly hiring within the meaning of the statute. That is my present opinion. If between this time and tomorrow morning, I should change that opinion, I will communicate it to the Court (12). My learned Brothers are of opinion that the words "under such yearly hiring" do not make occupation by the person hiring requisite; but that it is sufficient if either he himself, or any other person under him, should occupy; I think, that a party who occupies as an undertenant, though he may be said in some sense to occupy under the yearly hiring, cannot be said to occupy under the yearly hiring within the meaning of this clause of the act of parliament, because he has no connexion with the person who is the landlord in respect of that yearly hiring. As to the other question, viz. whether the holding before the 22nd of June, when the 6 Geo. 4. c. 57. was passed, and the holding subsequent to that period, can be connected: I am of opinion they may; provided the occupation before the 22nd of June be such as will satisfy the requisites of the 6 Geo. 4. c. 57; and therefore, if a party, before the 6 Geo. 4. c. 57. began to operate, was in possession of a yearly tenement, and held it under such circumstances as that statute says shall be requisite, in order to gain a settlement, a settlement will be conferred. The case of *The King v. Tonbridge* prevents a connecting of a renting before the 59 Geo. 3. with a renting afterwards; but I think you may connect the two, if the first were sufficient to satisfy the 6 Geo. 4. There are no words in the 6 Geo. 4. c. 57. which import that the *taking* shall be subsequent to the time when that statute came into operation. With respect to the residence for forty days, I think the case ought to go down to the Sessions again, in order that it may be stated more distinctly what the nature of the residence was, or whether the whole forty days' residence required was

actually by the husband himself. The cause of the husband's absence, whether it arose from his own free will, or from compulsion, or from other circumstances, may perhaps become material.

Mr. Justice Littledale.—This case depends upon the construction to be given to the word "occupied" in the statute 6 Geo. 4. c. 57. There is a material difference between a holding and an occupation; a person may hold, though he does not occupy. A tenant of a freehold is a person who holds of another, though he does not necessarily occupy. In order to occupy, a party must be personally resident by himself or his family. In this case, I think, the pauper has been the occupier of the house during the whole period. We have no distinct account how the apartment was let or occupied. In an indictment for housebreaking, it might be laid to be the house of the pauper's husband; so, in an action for use and occupation, he might properly be described, not merely as holding, but as occupying the house. In the statute 11 Geo. 2. c. 19. s. 14, which gives the action for use and occupation, where the agreement is not by deed, a distinction is made between the words *held* and *occupied*. That section enacts, "that it shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, &c. *held* or *occupied* by the defendant, in an action on the case for use and occupation of what was *so held* or *enjoyed*." By the statute of the 43rd of Elizabeth, the rate for the relief of the poor is to be on the *occupier*. The rate in this case must clearly have been made on the pauper's husband for the whole house, though he underlet part: *Rex v. Aberystwith* (13). In 1st *Nolan's Poor Laws*, 176, 4th edition, it is laid down, that no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is in the eye of the law the tenant for the whole, and is rated as the occupier. Then, as in an indictment for housebreaking (committed in the apartment let to Gay), the house might be described as the dwelling-house of the pauper's husband; and as he might be described as the

(12) No communication was ever made.

(13) 10 East, 354.

occupier of the house, in an action for use and occupation, and would be rateable to the poor as occupier in respect of the whole house, I think he must be considered, in point of law, as having occupied and resided in this house. It is not necessary, in order to make a man an occupier, that he should actually sleep or take his meals in a house, or that his family should actually dwell in the whole house; but the law considers him, for this purpose, an occupier, if he hold the whole, and by himself or family occupy part; I think, therefore, the pauper's husband may be considered to have occupied the house within the meaning of the 6 Geo. 4. c. 57. It might have been otherwise if he had underlet the whole house and occupied no part. The word occupation, as applied to a house, undoubtedly implies personal residence; but if a lessee of a house dwell in any part of it, though he let the other part, he, in point of law, is to be considered as the occupier of the whole. If that be the true construction of the word "occupied," the pauper's husband occupied the house; and then the only question is, whether there has been forty days' residence by the pauper's husband; and upon that point, as there is some doubt, I agree with my Brother Bayley, that the case ought to be sent back to the Sessions, in order to have the fact cleared up.

Mr. Justice Parke.—I have entertained considerable doubt in this case, but I am inclined to think that this was a good occupation, and that a settlement was gained in the parish of Lyncombe and Widcombe. The question turns entirely on the 6 Geo. 4. c. 57. My judgment may have the effect of defeating the intention of the framer of that act. But it is a very safe rule of construction, not to speculate upon the probable intention, but to adhere to the words of an act of parliament in their natural sense, unless it appears clearly from the context that they were intended to be used in some other sense. There is a material difference between the statute 6 Geo. 4. c. 57, and the statute 59 Geo. 3. c. 50. The last-mentioned statute expressly requires the building to be *held*, and the land to be *occupied*, and the rent to be paid by the person hiring the same. The statute 6 Geo. 4. c. 57, omits the words "by the person hiring the same." It does not require the payment of

rent or occupation by the person hiring the same, but occupation under the yearly hiring. These words may be satisfied by the continuance of the term; and occupation by a sub-tenant or assignee during the continuance of that term. It is not necessary to decide in this case, whether occupation by an assignee would be sufficient or not. Here there was an occupation by a person whose character is left doubtful: it does not appear by the case, whether it was that of a sub-tenant having an entire occupation of one part of the building, or that of a lodger. It seems to me there was an occupation by the husband of the pauper under the yearly hiring, provided the premises continued in the occupation of any person entitled under the tenancy created by the yearly hiring. I find nothing in the context of this act to shew that the words which it uses, taken in their ordinary meaning, do not express the intention of those who used them; I must suppose that the legislature, when they repealed the 59 Geo. 3. c. 50, which expressly required an occupation by the person hiring, had some reason for omitting those words in the 6 Geo. 4. c. 57. Possibly that omission may have arisen from inattention on the part of the framer of the act, and it may have been intended to retain the former provision, that the occupation should be by the person who took the premises. But it seems to me, that the words used do not expressly require such occupation, and we must not presume the intention of the legislature, but collect it from the words of the act of parliament. Then, if the meaning of the legislature be that which the words used naturally import, a settlement has been gained, provided there has been a residence of forty days. As to that, the case is ambiguous; and for the purpose of clearing up that fact, I think the case should go back to the Sessions.

1829. } CHANTER, CLERK, v. GLUBE
May 22. } AND ANOTHER.

Highway Rates—Tithes.

The lessee for years, or other person receiving the benefit of tithes, is liable in respect of them to the highway rates; although he

compound with the tithe payers for the amount, and the tithe is not, in fact, severed.

Trespass, for seizing and impounding two of the plaintiff's cows.

Plea—The general issue.

The cause was tried, at the Summer Assizes 1827, before the Lord Chief Justice Best, when a verdict was found for the plaintiff, with one shilling damages, subject to the opinion of this Court, on the following

CASE.

Before, and at the time of making the assessment hereinafter mentioned, and also before, and at the time of issuing the warrant hereinafter mentioned, the plaintiff was the lessee for years of the tithes of the parish of Hartland, in the county of Devon, under a grant of them by deed from the impropriators thereof: under this lease the plaintiff did not take the tithes in kind, nor did he demise or grant them to the respective occupiers of the lands from which they accrued, or to any other person or persons, by any deed or deeds; but he compounded for them with the respective occupiers, by several parol agreements, under which they retained the tithes accruing on their respective lands to their own use, with the remaining nine parts, from which no severance in fact took place. These parol agreements enured from year to year; and were considered, and treated by the parties, as determinable only by six months' notice. Under these agreements, the tithes were not bargained and sold when at maturity, but the agreements were prospective and had no reference, either to any specific mode of cultivating the lands, or to the amount of produce in any particular year. The composition monies of the tithes so retained were by the agreements payable half-yearly.

The assessment above alluded to was a composition of money in lieu of the statute duty in kind, duly assessed upon the occupiers of lands, tenements, woods, tithes, and hereditaments within the said parish, for the amendment and preservation of the public highways in the same parish; and the plaintiff was therein charged in the sum of 11*l.* 17*s.* as his share and proportion of the said composition, in respect of his occupation of the tithes above mentioned. The payment of the assessment, the

amount of which was not in dispute, was duly demanded and refused.

The defendants were, at the time of the conviction, and issuing of the warrant hereinafter mentioned, Justices of the Peace in and for the county of Devon.

Upon the complaint of the surveyor of the highways of the said parish, the plaintiff was, after due summons, hearing, and proof, convicted of the non-payment; and after demand and refusal to pay the same, the warrant, under which the seizure was made, issued, and the seizure took place. The action was brought after a month's notice, and within the prescribed time from that period.

The question for the opinion of the Court was, whether, under the circumstances, the plaintiff was liable to the payment of the composition in lieu of statute duty, as an occupier of tithes within the said parish. If the Court should be of opinion in the affirmative, then a verdict was to be entered for the defendant; if in the negative, then the verdict was to stand.

Mr. Coleridge, for the plaintiff.—It may be conceded, that the only mode in which tithes can pass is by deed, though according to *Bacon's Abridgment*, a doubt seems to have been at one time entertained whether a lease of tithes for one year only, might not be by parol. The real question, however, is, who is the visible occupier? And how are the surveyors of the highways to ascertain who it is they are to assess?

[*Mr. Justice Bayley*.—Must not they know whether the occupier is entitled to nine-tenths of the produce or to the whole?]

Considerable difficulties might be imposed upon surveyors if they were bound to ascertain the legal title. Suppose a feme covert impropriator to have executed a lease of tithes; notwithstanding the apparent title, the lease would be void. It is therefore safer to leave it to the surveyors, merely to see, who, in point of fact, is actually receiving the tithes. The case of *The King v. Lambeth* (1), may appear unfavourable to the plaintiff, but it is inapplicable (2).

[*Lord Tenterden*.—If it is correctly reported in *Strange*, it decides this question.]

(1) 1 *Str.* 525.

(2) See *Underhill v. Ellicombe*, 1 *M'Clelland and Younge*, 452.

From the report of that case in 8 *Mod. Rep.* 61. it appears that the lessee held under a parol demise; therefore, there could be no ground for charging him.

[*Mr. Justice Bayley*.—There the farmer was considered as every harvest buying his tithes. You must contend, that the bargain passes an interest.]

The case finds that the occupiers retained the tithes, which shews that they were possessed of an interest in the tithes. In *Rex v. the Justices of Buckinghamshire* (3), the liability was doubted.

[*Mr. Justice Parke*.—Suppose there had been a modus in this parish, would not the rector have been occupier of the tithes, in respect of which the modus was paid?—and is this anything more than a temporary modus?]

The principle is in favour of the plaintiff; though, undoubtedly, the case of *The King v. Lacy* (4) appears to be against him.

Lord Tenterden.—The expression in the Highway Act, is "occupier of tithes." In strictness, there can scarcely be said to be an occupier of tithes, and certainly not when the tithes are compounded for; the word "occupiers," therefore, in the statute must have been used to describe the person who receives the benefit of the tithes: and that is the situation of the present plaintiff.

Mr. Justice Bayley.—It is quite clear, that, in the case of poor rates, and, in *The King v. Lacy*, it has been held, that in the case of a money payment substituted for tithes by an inclosure act, the subject-matter, whether tithes, or their substitute, is rateable to repairs of the highways. Here the owner of the tithes does not grant them away, but excuses the setting them out: it is in reality selling the tithes; and I think the decisions on these subjects should not run into the very nice distinctions which are pressed upon us.

Mr. Justice Littledale concurred.

Mr. Justice Parke.—Any doubt thrown out in *Rex v. the Justices of Buckinghamshire* was removed by the decision in *Rex v. Lacy*.

Postea to the defendants.

(3) 1 B. & C. 485; 2 D. & R. 689.

(4) 5 B. & C. 702; 8 D. & R. 457; 5 *LAW J. Mag. Cases*, 6.

1829. }
June 22. } LANCASTER v. GREAVES, ESQ.

Magistrate—Jurisdiction—Master and Servant—Conviction.

1. *A Magistrate has no jurisdiction under the 4 Geo. 4. c. 34, or any of the acts, the powers of which are thereby enlarged, unless the relation of master and servant subsist between the parties to the subject-matter of his proceeding.*

Accordingly, where a person contracted with another to do some work, on a road for a specific sum;—Held, that this was not a case in which the Magistrate had jurisdiction.

2. *The merely describing the person, who is proceeded against under the above act as a "labourer," will not give jurisdiction to the Magistrate.*

3. *A conviction under sec. 3. of the above-mentioned act, ought not to adjudge that the servant be dismissed from his service, and be also imprisoned,—the act authorizing a punishment of this nature in the alternative only.*

Action of trespass and false imprisonment, against a Magistrate of the county of Westmoreland.

Plea—The general issue.

The cause was tried, at the Spring Assizes for the county of Westmoreland, before Mr. Baron Hullock. The following were the principal facts:—

The plaintiff, who was what is called a waller, had entered into a written agreement with one Ullock to do, for a specific sum, some work upon a road, which was in a course of making; and in the making of which, Ullock and others took an interest. The work was of that extent, that it would be necessary for the plaintiff to employ twenty labourers. Disputes arose between the plaintiff and Ullock, and ultimately Ullock caused the plaintiff to be summoned before Mr. Greaves, the defendant, under the 4th Geo. 4. c. 34. s. 3. (1) The clause runs in the following terms:—

(1) See the statutes, and the present case referred to in 2nd Chitty's Statutes, p. 874, title, "Servants and Labourers." The mention of the present case refers to what passed on the granting of the rule nisi.

"If any servant in husbandry, artificer, &c. labourer, or other person, shall contract with any person to serve him for any time, or in any other manner, and, having entered into such service, shall absent himself from his service before the term of his contract be complete, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, any Justice may, on complaint on oath, by the person with whom such servant, &c. shall have contracted, examine into the same; and if he shall not have fulfilled his contract, such Justice may commit to the house of correction, for a period not exceeding three months, and hard labour, and abate a proportionable part of his wages for such period as he shall be confined; or, in lieu thereof, abate the whole or any part of his wages, or discharge such servant, &c. from his service or employment."

In the information, upon which the defendant, the Magistrate, acted, the contract was set out. The plaintiff was described as a labourer.

When the parties were before the defendant, he, with reference to the disputes between the plaintiff and Ullock, produced a paper, which he had prepared, and which he desired the plaintiff to sign, in which the plaintiff begged pardon for his conduct, touching the matter in dispute;—but into which it is not necessary for the present purpose to enter. The plaintiff refused to sign the paper. The defendant then convicted him under this act; and as a punishment discharged the plaintiff from the service, and also committed him to gaol for a month.

The learned Judge was of opinion, that the defendant had jurisdiction over the subject-matter; and consequently, that the conviction which was put in was an answer to the action. But he left it to the jury to say, what damages they thought the plaintiff was entitled to, supposing that, in point of law, the action was maintainable. The jury found that the plaintiff was entitled to 10*l.* damages. It was then settled that the plaintiff should be nonsuited, with liberty for him to move to enter a verdict for the above sum, if the Court should be of opinion that the action was maintainable.

SUPPL. 1829.

On the motion for the rule *nisi*, several objections were taken to the conviction; but it is only advisable to notice those in respect of which any opinion fell from the Court. One of them was, that the conviction was bad, inasmuch as it imposed a double punishment on the plaintiff, while the act only gave the Magistrate the alternative. The plaintiff was dismissed the service and imprisoned; while the act only authorized a dismissal from the service, or imprisonment. The Court intimated an opinion that the conviction was bad in this respect; but it became unnecessary to give any express decision on this point, as the case turned upon the question, whether the defendant had any jurisdiction over the subject-matter.

A rule having been granted, calling on the defendant to shew cause, why the verdict should not be entered for the plaintiff,—

Mr. Courtenay now shewed cause.

The question in this case is, whether the plaintiff was a labourer, according to the meaning intended by that expression in the 4 Geo. 4. c. 34. s. 3. The title and preamble of the act shews that it was intended to enlarge the powers of the previous acts. The act, when taken altogether, appears to have used the term "service," as synonymous with "employment." If the plaintiff meant to deny that he was a labourer within the meaning of the act, he should have taken that objection at the time; and should not afterwards turn round and say, that the Magistrate had no jurisdiction. This was discouraged in the case of *Mann v. Davers* (2). The case of *Bramwell v. Penneck* (3), may be cited by the other side; but it is very distinguishable from the present; as the person summoned before the Magistrate in that case was an attorney who had merely employed a person to take care of goods in execution. In *Lowther v. the Earl of Radnor* (4), it was held, that the Magistrates were not liable to an action like the present; although the real facts of the case did not warrant the complaint.

(2) 3 Barn. & Ald. 103.

(3) 7 B. & C. 536; 1 M. & R. 409; 6 Law J. Mag. Cases, 47.

(4) 8 East, 115.

[*Lord Tenterden*.—The information in that case was very different from the present.]

Mr. Blackburn and Mr. Aglionby, contra, were stopped by the Court.

Lord Tenterden.—I am of opinion, that, in order to a Magistrate having jurisdiction under these acts, the relation of master and servant must subsist between the parties. But the information in the present case shews no such relation. It shews only two contracting parties; and by the terms of the contract, the plaintiff was to do the work for a specific sum. In the case of *Lomther v. the Earl of Radnor*, the real facts were very much like the present case; but they were not brought under the notice of the Magistrates. Here, the very information itself shews that the Magistrate had no jurisdiction. In *Lomther v. the Earl of Radnor*, the information shewed a relation of master and servant between the parties; and with reference to the facts, the Court held that they could only look to such facts as appeared before the Magistrates when they made their order. The calling the plaintiff a labourer in the information, could not give to the Magistrate a jurisdiction which he had not by the subject-matter. It was merely matter of addition.

Mr. Justice Bayley.—I take it to be clear that the relation of master and servant must subsist, in order to give the Magistrate jurisdiction under these acts. The information in this case alleged merely a breach of contract.

Mr. Justice Littledale.—The relation of master and servant must subsist, in order to the Magistrate having jurisdiction. The 6 Geo. 3. c. 25, which was one of the acts, the provisions of which the 4 Geo. 4. c. 34. intended to enlarge, evidently applies only to servants. Indeed, service is mentioned throughout all of them.

Mr. Justice Parke.—No one of the acts applies to such a case as the present. The Magistrate had no jurisdiction whatever.

Rule absolute.

[To shew that a Magistrate cannot give himself jurisdiction, by setting out a fact which is not correct—see the opinion of Lord Ellenborough, in *Welch v. Nash* (5).]

(5) 8 East, 394.

1829. }
April 30. } *HARDY v. RYLE, ESQ.*
July 2. }

Justice of Peace—Jurisdiction—Conviction—Computation of Time—Silk-weaver.

In computing the six months limited by 24 Geo. 2. c. 44. s. 8, for bringing an action against a Magistrate for false imprisonment, the day of discharge from imprisonment is to be reckoned exclusively.

Therefore, where a party, discharged on the 14th of December, sued out a writ on the 14th of June following,—it was held, that the action was commenced in time.

Quære—Whether a silk-weaver is within the statute 4 Geo. 4. c. 34.

To bring a person within the jurisdiction of a Magistrate, under the 4th section of that statute, he must have contracted to serve under a written contract, or must actually have entered the complainant's service before the time of the complaint made, and in such a manner as will create the relationship of master and servant.

Therefore, a silk-weaver, who had agreed to work up, at his own house, certain materials for a master manufacturer,—held to have been improperly convicted under the above act.

Trespass and false imprisonment.

Plea—The general issue.

The cause was tried at the Cheshire Summer Great Sessions for 1828, when the following appeared to be the principal facts:

The action was brought against the defendant, a Magistrate of the county of Chester, in respect of a warrant of commitment issued by the defendant, under a conviction against the plaintiff, professed to be drawn up according to the 4th Geo. 4. c. 34. s. 3, which conviction was in the following terms:

"Be it remembered, that on the 14th day of November, in the year of our Lord 1827, at Macclesfield, in the county of Chester, Thomas Hall, of Macclesfield aforesaid, silk-manufacturer, appeared personally before me, one of His Majesty's Justices of the Peace for the said county: and, by his certain complaint made upon oath to me, the said Justice, by the said Thomas Hall, informed me, that Henry Hardy, of Macclesfield, in the county of Chester, handicraftsman and silk-weaver, on the 10th day

of October, in the year of our Lord 1827, at Huddersfield, in the county aforesaid, did contract and agree with him, the said Thomas Hall, to serve him, the said Thomas Hall, as such handicraftsman and silk-weaver as aforesaid, at and for certain prices and wages then and there fixed and agreed upon by and between them, the said Thomas Hall and Henry Hardy, until the whole of certain materials then and there furnished unto him, the said Henry Hardy, by him, the said Thomas Hall, for the purpose aforesaid, should be woven by him, the said Henry Hardy, into silk crape; and that the said Thomas Hardy did then and there enter into the said service, and did then commence the weaving of the said materials into crape as aforesaid; but that the said Henry Hardy aforesaid, to wit, on the 20th day of the month of October, did neglect the said service before the whole of the said materials were so woven as aforesaid, and did leave the same in an unfinished state, and the same from thence have hitherto remained, and still do remain, in an unfinished state; and the said Henry Hardy hath hitherto neglected to fulfil the said contract, contrary to the form of the statute in such case made and provided: whereupon the said Henry Hardy, being by virtue of my warrant brought before me, the Justice aforesaid, on the 20th day of November, in the year aforesaid, at Macclesfield aforesaid, in the county aforesaid, and having heard the charge contained in the said information, declared he was not guilty of this offence. Whereupon, I, the said Justice, did proceed to examine into the truth of the charge contained within the said information; and, on the 17th day of November aforesaid, at Macclesfield aforesaid, in the county aforesaid, one credible witness, to wit, Francis Middlehurst, of Macclesfield aforesaid, book-keeper to the said Thomas Hall, upon his oath, deposeth and saith, in the presence and hearing of the said Henry Hardy, that, on the 17th day of October last, he gave out to the said Henry Hardy, who was then a weaver in the employ of the said Thomas Hall, materials for weaving a certain piece of sarsnet; and that the usual practice of the weavers employed by the said Thomas Hall, is to bring in their work weekly; that, since the 17th day of October last, the said Henry

Hardy hath neglected altogether regularly to attend to his work, and hath not brought in any of his said work since that time; and that the materials are not yet worked up which he had given to the said Henry Hardy as aforesaid. Therefore, it manifestly appearing to me, that the said Henry Hardy is guilty of the offence charged upon him as aforesaid in the said information, I do hereby convict him of the offence aforesaid, and do declare and adjudge, that he, the said Henry Hardy, shall for such offence be committed to the house of correction, at Knutsford, in the said county, there to remain, and be held to hard labour for the space of one month.

"Given under my hand and seal, the 17th day of November 1827.

"J. Ryle."

The plaintiff was accordingly imprisoned in the house of correction at Knutsford, under the commitment on the above conviction, whence he was discharged on the 14th of December 1827; on the 13th of May following, notice of action was served upon the defendant; and upon the 14th day of June, a writ was sued out.

The plaintiff having been nonsuited, *Mr. J. Williams*, in Michaelmas term last, obtained a rule *nisi* to set the nonsuit aside, or to enter a verdict for the plaintiff, with one farthing damages; with leave to the parties to state a case for the opinion of the Court, on two points:—first, on the statute 24 Geo. 2. c. 44. s. 8, relative to the time of commencing the action; and secondly, on 4 Geo. 4. c. 34. s. 3, in relation to the jurisdiction of the defendant. The former of these points was argued during the Sittings under the royal warrant after Hilary term last, by *Mr. Serjeant Cross*, *Mr. J. Jervis*, and *Mr. J. Williams*, when the following authorities were cited:—*Massey v. Johnson* (1), *Pickersgill v. Palmer* (2), *Thomas v. Popham* (3), *Watson v. Pears* (4), *Ex parte Fallar* (5), *Lester v. Garland* (6), *Pellem v. the Hundred of Wonford* (7),

(1) 12 East, 67.

(2) Bull. N.P. 24.

(3) Dy. 218, b; s. c. Moor, 40.

(4) 2 Campb. 194.

(5) 3 Term Rep. 283.

(6) 15 Ves. 254.

(7) 7 Law Journ. Mag. Cases, 84.

Clarke v. Davey (8), *Bellasis v. Hester* (9), *Norris v. the Hundred of Gawtry* (10), *Rex v. Adderley* (11), *Glassington v. Rawlins* (12), *Castle v. Burdett* (13), *Wallace v. King* (14).

The Court took time to consider; and, on a subsequent day, judgment thereon was delivered by

Mr. Justice Bayley.—The question that, in this case, we have been first required to determine, is a question upon the computation of time. The action was against a Magistrate, for false imprisonment; and it appeared, that the imprisonment, which was the cause of action, ended on the 14th of December 1827; but that the action was not, in fact, commenced, by suing out the writ, until the 14th of June. The point, therefore, came to this:—if the 14th of December was to be *excluded*, the writ was in time; but, if that day was to be reckoned *inclusively*, the plaintiff commenced the action too late, and the nonsuit was right. Now, the clause upon which this question principally turns, is the 8th section of the statute 24 Geo. 2. c. 44, which enacts, that “no action shall be brought against any Justice of the Peace for anything done in the execution of his office, unless commenced within six calendar months after the act was committed.” The act of parliament is entitled “An Act for the rendering Justices of the Peace more safe in the execution of their office; and for indemnifying constables and others acting in obedience to their warrants;” and it therefore applies, not only to actions against Magistrates and constables, but also to actions against individuals: and the same rule must govern the construction, whether the party proceeded against be a Magistrate, a constable, or a private person entitled to the protection of the statute. Upon this question, whether a day is to be reckoned inclusive or exclusive, the cases of *Lester v. Garland*, and *Pellw v. the Hundred of Wonford*, were cited in the argument, and are those

alone which it will be necessary to notice. In the former case, this distinction was taken by the Master of the Rolls, which gets rid of the difficulties in many of the cases:—if the act done be an act to which the party against whom the time is to run, is privy, then the day on which it is done is to be included; otherwise, it is excluded. The Master of the Rolls points out this distinction as reconciling many of the cases; but he does not treat it as a binding rule in all instances: it prevails, however, in general. It applies, for example, under the statute of Hue and Cry,—where a man has been robbed, the day of the robbery is included in the year which is allowed to the party to bring his action against the hundred. So, where a month's notice of action is required to be given, the month is to run from the time of giving notice; because, in both those instances, the party knows of the act at that time. Here, also, it may be said, that he may know when his imprisonment ends. That is true; but we must lay down one general rule, which will be equally applicable to both branches of this clause of the act of parliament. Now, the clause in question extends as well to cases of taking the goods of the party charged, to which he is not privy, as to those of personal imprisonment, to which he, of necessity, is privy. According to the distinction I have mentioned, the day must be reckoned exclusively, where the goods are taken; and therefore, in this case, so must the day of discharge from imprisonment. In *Pellw v. the Hundred of Wonford*, the notice was required, by the 9 Geo. 1. c. 22, to be given within a very short time after the offence committed; and the day of the commitment of the offence was held to be exclusive. In *Lester v. Garland*, the day of the death of the testator, by whose will security was directed to be given, by a Mrs. Pointer, within six calendar months after the decease of the testator, her brother, in order to enable her children to take the benefit of his residuary estate, was also held to be exclusive; because the mother was not privy to the act done, that is to say, to the death of the testator, or to the contents of the will. In *Pellw v. the Hundred of Wonford*, the distinction I have adverted to, as having been taken by the Master of the Rolls, was entertained and approved of.

(8) 4 B. Moore, 465; Com. Dig. tit. Temps, A.

(9) 1 Lord Raym. 280.

(10) Hob. 139; s. c. 2 Rol. Abr. 320, A, pl. 8; Moor, 878; 1 Brownl. 156; 2 Wms. Saunders, 375, b.

(11) Dougl. 465.

(12) 3 East, 407.

(13) 3 Term Rep. 623.

(14) 1 H.-Bl. 13.

In this case, also, it is so far applicable as to lead us to think, that the day ought to be reckoned exclusively; and, consequently, to decide, that the action was brought in time.

The second point came on for argument, on the 2d of July, when

Mr. J. Jervis shewed cause.—This question is reducible to two points:—first, whether the defendant had any jurisdiction upon the subject-matter; secondly, if he had, whether the party charged was brought within it. The act 4 Geo. 4. c. 34. s. 3. is an act enlarging the powers of Justices generally, and gives them authority not only over “*handicraftsmen*” neglecting their service, but contains the words, “or other persons,” which are sufficiently extensive to embrace the party here convicted. The second part of the section will apply to this case, if there was no contract in writing. The only other point, then, relates to the punishment, which is warranted by the act, as the convicting Justice is empowered to hold to hard labour, and to abate a part of the wages of the offender. It may, however, be contended, that, as there is another act applicable to silk-weavers, which is not noticed in this statute, this statute does not extend to persons of that description. Where, however, an act of parliament enlarges powers generally, it need not enumerate all the previous acts in respect of which those powers are extended; but if the words are large enough, a party within the provisions of former acts, not recited in the preamble, may be brought under the extended jurisdiction. The conviction itself is sufficient, as the information preserves the words of the statute, and is supported by the evidence, so far as is necessary to shew that a jury might infer that the offence was committed. With regard to the statement of the evidence in a conviction, it has been laid down, that Justices are placed in the situation of a jury: *Rex v. Reason* (15); and that it is sufficient in convictions, if there were such evidence before the Magistrate as would be sufficient to be left to the jury (16). An objection that the evidence does

not warrant the conviction, cannot prevail, unless the evidence, stated on the face of the conviction, be such, that no reasonable person could draw the conclusion, that the offence was committed: *per* Abbott, C. J., *Rex v. Glossop* (17). No objection can be taken to the commitment, since that is sufficient, if it so far agree with the conviction as to shew it proceeds upon the same offence; nor is it to be construed with the same strictness as the conviction: *Massey v. Johnson* (18), *The King v. Rogers* (19), *The King v.* — (20).

Mr. J. Williams, and *Mr. Wightman*, contra.—First, this conviction is void, under the act of parliament, inasmuch as there is an express provision as to silk-weavers who neglect the performance of their work for eight days successively, in 17 Geo. 3. c. 56. s. 8. The general words in the 4 Geo. 4. do not repeal that statute; and therefore the two may stand together; but, as the provisions in the 17 Geo. 3. with regard to the particular trade, (it requiring that the work must be neglected for eight days successively,) are inconsistent with the enactments of the 4 Geo. 4. in cases of that particular class, the former statute must be resorted to. Secondly, the conviction is bad, in omitting to state that there was a contract in writing, in not pursuing the words of the contract, or in not stating that the party convicted entered into the service of the complainant. According to the facts upon the face of the commitment, indeed, this last allegation could not have been made, as, if the being intrusted with materials to take home and work up as a silk-weaver, were to constitute an entering into the service, the weaver might be convicted of larceny—whereas materials so intrusted are not the subject of larceny. If a silk weaver were within the provisions of this statute by virtue of the words “other persons,” coachmakers, jewellers, and every description of artificers, would likewise be liable to its penal enactments. The conviction is also bad, on the

(15) 6 Term Rep. 375.

(16) 1 Paley on Convictions, 2d edit. 195.

(17) 4 Barn. & Ald. 616.

(18) 12 East, 67.

(19) 1 Dow. & Ryl. 156.

(20) 3 M. & S. 351.

ground, that it does not appear that the party agreed to return the goods within a given time; it is only stated, that it was usual for the workmen to return their work weekly. Had it been stated that this was the usual practice of the trade, and that the plaintiff agreed to work according to the usual terms, then the bargain would have appeared:—at present the time for performance is indefinite and uncertain.

Mr. Justice Bayley.—It is not necessary to decide whether the act 4 Geo. 4. c. 34. does apply to persons employed in the silk trade, although it may be material to observe, that, before that act passed, there were certain acts in force applicable to persons engaged in that trade, and providing for the determination of disputes between masters and workmen (21). Now the act 4 G. 4. c. 34. is entitled "An act to enlarge the powers of justices in determining complaints between masters and servants, and between masters, apprentices, artificers, and others," and it recites two former acts, 20 Geo. 2. c. 19, and 6 Geo. 3. c. 25, and another act, 4 Geo. 4. c. 29, applicable only to cases of apprenticeship, and declares that it is expedient to extend the powers of "the said acts." The 20 Geo. 2. c. 19. contains the same general description of individuals as is contained in this act, except that the words "labourer or other person," are substituted for "other labourers." The words "labourers and others," however, had been introduced in the act, 6 Geo. 3. c. 25. s. 4, and are obviously equivalent to those employed in the present statute, and therefore it should seem that those expressions do not give the power contended for, if the construction of the words "the said act," is to confine the enlarged authority to cases only within those acts. Without now giving any opinion on that question, let us see whether this conviction or commitment comes within the act of parliament. The third section enacts, "that if any servant in husbandry, or any artificer, calico-printer, handicraftsman, miner, collier, keelman,

pitman, glassman, potter, labourer, or other person, shall contract with any person or persons whomsoever to serve him, her or them, for any time or times whatsoever, or in any other manner, and shall not enter into his or her service according to his or her contract (such contract being in writing and signed by the contracting parties), or, having entered into such service, shall absent himself or herself from his or her service, before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof," then it shall be lawful for the Justice to commit the offender to the house of correction, &c. Looking, then, at the title of the act, and at this clause, it is clear to me that the party, to come within its enactments, must not only be a person within the descriptions enumerated, but must also have contracted to serve, or have entered the complainant's service. But there is a plain distinction between a contract to receive and to act as a servant, and a contract between individuals that, for a sum certain, specified work shall be done. A man might contract with many different persons to do work for all, and by so doing would not properly be brought within the meaning of this act, and could not be said to have contracted to serve each; for where a party is a servant, he is so exclusively to one master. On looking further at the conviction and commitment, we find it does not appear that the party, within the words of the act, contracted to serve for any time, nor does the evidence state what the contract was, but merely says what was the usual practice of the weavers employed by the complainant. That, however, would not be conclusive on all the weavers, as the obligations of each would depend on his engagement.

Mr. Justice Littledale.—I am also of opinion, that this case is not within the 6 G. 4. c. 34. In order to become liable to the jurisdiction of the Magistrate under this act, the party must be in the service of the master at the time of the complaint, or he must have made a contract in writing to enter that service. On the face of this

(21) By 10 Geo. 4. c. 52, the provisions of 4 Geo. 4. c. 34. are extended to all persons engaged, whether as masters, servants, apprentices, or otherwise, in the several manufactures, trades, and occupations mentioned in 17 Geo. 3. c. 56.

commitment, there is nothing like a service or a contract to serve. I also think, that the case is not within 17 Geo. 3. As to the contemplation of the relation of master and servant, there is nothing to contradict the supposition that the party convicted was a person only casually employed as a weaver. The commitment therefore is bad in every point of view.

Mr. Justice Parke.—The service contemplated by the act, is a service for a definite time, or till some particular thing is done.

From this conviction, it might even be inferred that the party had not wove the silk at the prices agreed upon, and that this was the subject of complaint. The commitment therefore is not supported by the conviction. It does not appear that the party was in Hall's service for this particular purpose, and he may have been in his employ for a service of a totally dissimilar description.

Rule absolute to enter a verdict for the plaintiff.

INDEX

TO

THE SUBJECTS OF THE CASES REPORTED

IN VOL. VII.

[*.* Subscribers are requested to bear in mind that this Index is intended only for temporary use, and given merely to facilitate reference to the Reports until the regular Analytical Digested Indexes are from time to time completed and delivered.]

CHANCERY.

Abatement—Rules for, between Annuitants and Legatees, where they are to abate proportionally, 105

Account—Some individuals of a class may file a bill on behalf of themselves and the others of that class praying an account, though the plaintiffs have executed separate releases, barring their right; the bill charging the releases as obtained fraudulently, 129

— A large demand established after more than twenty years, against the estate of an accounting party, though no evidence of the particulars of the demand, 141

Accruer and Survivorship—Construction of bequest as to how and amongst whom a fund divisible, 93

Advancement—What is, to a child, with reference to the particular language of an instrument, 98

— See *Covenant*.

Adoption. See *Charitable Use*.

Appointment. See *Power of Appointment*.

Army Agents—Money imprested by the crown into the hands of, for payment of officers, and not demanded by them, to whom it belongs, 1

Award—A decree having ascertained the plaintiff's right to relief, the amount due to him was ascertained by reference and award—such award not binding, the decree on appeal having been reversed, 150

Bankers—entitled to compound interest and to half-yearly or quarterly rests, where, 108

Bankrupt—not bound to answer questions criminating himself, 148

— Such questions being put generally with others, may decline answering any part, where, 148

Bankruptcy—Proof of debt on estate of bankrupt—trustee forging power for and selling stock, 10

— B having two bills of exchange accepted by A, both of which are dishonoured, and A is declared a bankrupt, B may prove for the amount of one
VOL. VII.

bill, and proceed at law against A for the other, where, 27

Bankruptcy—Order to enrol proceedings under 6 Geo. 4. c. 16. s. 96, how to be obtained, 77

— Who servants within that act, s. 48,—78

— Debt claimed—dividend declared—and assignee reserves dividend in his own hands and becomes bankrupt—claiming creditor must bear the loss, 76

— Machinery of iron works mortgaged—how far not within the order and disposition of the bankrupt, though in his possession, 108

— Assignees, and not petitioning creditors, liable to costs, on supersedeas, where, 139

— Supersedeas as to one, the commission being against four—effect of, as to the validity of the commission as against the three, 183

— See *Bankrupt. Contingent Debt. Declaration of Trust. Division of Surplus. Forgery. Impertinence. Life Interest. Notice of Bankruptcy. Prosecution of suit without consent of creditors.*

Baron and Feme—By a settlement before marriage, part of the wife's fortune was settled; and "all other the personal estate to which she was, or might be or become entitled, was to vest absolutely in the husband by right of marriage:" she survived her husband: a contingent reversionary interest held to belong to the wife, where, 95

— See *Renewed Leases*.

Bill of Discovery—exposing to penalties. See *Pleading*.

— See *Discovery*.

Bill of Review—General rules as to, when and for what, and how and upon what terms a supplemental bill in the nature of a bill of review may be filed, 49

Cestui que trust—As to dealings with, by his trustee, 6

- Chancellor's Jurisdiction*—to declare the forfeiture, &c. in sec. 8, 6 Geo. 4. cap. 16,—173
- Charity*—A petition for the regulation of abuses in—how to be preferred under 52 Geo. 3. c. 101, 169
- See *Visitatorial Power of the Crown*.
- Charitable Use*—Construction of a will: that the whole profits of the property devised were devoted to charity; and that a lease of the premises for 500 years was void, as being an improvident act in the management of a charity estate, 115
- An advowson may be given to, ib.
- Next presentation of such advowson. See *Presentation to a Living*.
- Compensation*—None as between devisees of a lunatic, where estates sold to pay debts exclusively out of lands given to one set of devisees, 128
- Compound Interest*. See *Bankers*.
- Compromise*—Deed of, as to doubtful rights, will not be set aside, where, 6
- Party, unsuccessfully attempting to set it aside, ordered to pay costs, ib.
- Construction of Statute*—6 Geo. 4. c. 16. ss. 8, 18, 48, 96, 132, 227,—60, 75, 77, 78,—173
- Construction of Will*—Estate tail not implied, where, 20
- Construction*. See *Covenant*.
- Contempt*. See *Notice*.
- Contingent Debt*—at the date of a commission issued before 1st September 1825, but which, before that time, had ceased to be contingent, not provable under such commission: [since overruled on appeal] 58
- Coroner*—What a sufficient residence within the county, to justify election of, 61
- Corpus of a Fund*—Effect of limitation for wife's separate use for life—as to the corpus of a fund to which she afterwards became entitled as next of kin, 41
- Costs*. See *Compromise*. *Demurrer*.
- Covenant*—Construction of, in a marriage settlement, as extending to give parties claiming to be interested, the same shares which younger children received either during the covenantor's life, after the date of the settlement, by way of advancement, or took on his death, 3
- Construction of, that one child should be entitled to a share of the father's property, equal to the fortunes or advancements of the most favoured child, 98
- Covenant to surrender Copyholds*—Effect of, as revoking a prior will, 38
- Custom*—that a rector shall occupy, in severalty, part of a fen in lieu of tithes of the whole, 158
- Declarations*—made by a testatrix to her solicitor at the time of her making her will—admissible in evidence, where, 136
- Declaration of Trust*—of leaseholds—bankrupt trustee of, though not under written declaration, may make after his bankruptcy, 2
- Demurrer for want of Parties*—A suit cannot be instituted for an account of assets of a testator possessed by an executor in Honduras, unless the will is (or a sufficient reason assigned why it is not) proved here, 43
- Demurrer*—to an amended bill—original bill answered, 161
- allowed to amended bill—suit out of court—and defendant entitled to costs of the whole suit, ib.
- Demurrer*. See *Prosecution of Suit by Assignees of Bankrupt*. *Retivor*.
- } See *Foreign Governments*.
- Discovery* } See *Foreign Governments*.
- Devise*—construction of. See *First Son*.
- Discovery exposing to Penalties*. See *Plea*.
- Division of Surplus of Bankrupt's Estate*—132nd sec. of 6 Geo. 4. c. 16. not retrospective, so as to give interest to simple contract creditors, 60
- Election*—Construction of a will, as to, 98
- between will and deed of appointment—case of, 136
- Equitable Waste*—where estate, settled in a course of limitations—to whom the produce of equitable waste belongs, 150
- Estate Tail*—by implication. See *Construction of Wills*.
- Evidence*. See *Declarations*.
- Examination*—of a party may be read on further directions, for the purpose of having inquiries directed, though no foundation for those inquiries appears on the report itself, 120
- Executory Devise over*—when to take effect, 182
- Farm Modus*—Mode of Pleading, 106
- First Son*—Held, (though not enumerated among the sons named in the devise) to be included as devisee in tail male, from the spirit and general context of the will, 185
- Foreign Governments not recognized by the King of England*—Illegality of purchasing obligations or securities granted by, 65
- Bill of Discovery, in aid of an action to recover money arising out of a contract for the purchase such securities and fraud alleged, &c., not entertained, ib.
- Upon demurrer, the Court's competency of its own knowledge to recognize the fact of such non-recognition—though the contrary averred in the pleadings, ib.
- Forfeiture*. See *Life Estate*.
- Forgery*—Non-prosecution for—proof of amount of stock sold under a forged power against the estate of the party forging and his partners, bankers and bankrupts, who under such power, became possessed of the proceeds, 10
- Fraud*. See *Bill of Discovery*. *Releases fraudulently obtained*.
- Furniture*—what included under the description of, in a bequest, 87
- Grandchildren*. Term grandchildren in a will extended, so as to include great-grandchildren, 176
- Impertinence*—A petition may be referred for, although the respondent on a former occasion succeeded in a formal objection to it, 139
- Infant*. See *Jointure in bar of Dower*.
- Injunction*—Motion for, in an interpleading suit—what affidavit required, 175
- Inquiry on Further Directions*. See *Examination*.
- Jewels*—Construction of a complicated bequest of, 31
- Joint Stock Company*—empowered to sue and be sued in the name of their chairman—cannot sue a shareholder in that manner, 125

- Jointure in bar of Dower*—What charge good as, though the wife an infant at the marriage, and the husband then without power of actually making the charge, 9
- Leaseholds*. See *Limitation for Wife's separate Use for life*.
- Length of Time*. See *Account*.
- Liability for the Costs of Another*. See *Costs*.
- Life Estate*—passes under a general devise of lands, 16
- Life Interest*—of a bankrupt, though subject to a proviso against alienation, passes to his assignees, where, 127
- Limitation for Wife's separate Use for Life*—Effect of, as restraining the alienation of a fund by her, though entitled to the corpus thereof as testator's next of kin;—and leaseholds given upon trusts for sale and the produce constituting part of the same fund, ordered to be converted into money, though the wife and her husband not consenting to such conversion, 41
- Lunacy*—Effect of sales of estate of, for payment of the lunatic's debts, as between devisees under his will. See *Compensation*.
- Marriage*. See *Settlement in Contemplation of Marriage*.
- Motion*—cannot be made by a defendant in contempt, 161
- Marshalling of Assets*—Doctrine of, not applicable to the proceeds of estates situate, and belonging to a testator dying domiciled, in England, 135
- Notice of Act of Bankruptcy*—Security vacated by, though commission not issued for upwards of five years, 156
- Parties*. See *Demurrer for want of Parties*. *Superstitious Uses*.
- Patent*—An invention well described, and what sufficient agreement between the specification and the title of the patent—but
- The substance or article by which the effect was produced not being properly described, the specification held defective, and patent void, 47
- Petitioning Creditor*—Substitution of a debt for that of the petitioning creditor, under 6 Geo. 4. c. 16. s. 18,—75
- What sufficient application to the commissioners for the expungement of petitioning creditor's debt previous to petition for such substitution, ib.
- Bankrupt under second commission cannot be, ib.
- Pleading*—Plea to bill of discovery, that it exposes to penalties, overruled, in the interval between the filing and arguing of the plea, the period having elapsed within which the penalties could be sued for, 44
- See *Farm Modus*. *Tithes*.
- Power of Appointment*—Case of, where well executed, 98
- where not well executed, 107
- Practice*. See *Bill of Review*. *Impertinence*. *Motion*. *Pleading*. *Revivor*.
- Presentation to a Living*—the advowson of which is given to charity—*quare*, if it can be made without a profit being made of such presentation by the trustees, 114
- Presumption*—Doctrine of, as to the attestation of wills in the presence of the testator, 84
- Principal and Agent*.
- Purchase by agent of principal's stock not permitted to stand, where, 163
- Reality of sales and purchases of foreign bonds and stock included in accounts between principal and agent, and alleged to have been made by such agent for his principal—necessity of verification of, by specific appropriations and actual purchases and sales, ib.
- Acts of Agent with general authority—how far binding on the principal, 189
- See *Account*.
- Priority*—of legatees over annuitants. See *Wills Construction of*.
- Prosecution of Suit*—without the consent of bankrupt's creditors, bad, 122—and
- not cured by the commissioners after the suit instituted—assenting to its prosecution, ib.
- Publication*—Enlargement of, on affidavit of witnesses to be examined, 161
- Releases*—fraudulently obtained—set aside, though no express prayer that they might be, 129
- Renewed Leases for Lives*—Leaseholds for lives devised to a feme covert, a lunatic, for an estate, quasi an estate tail, with remainder over in default of issue; husband renews in his own name, and assigns to a trustee for his own benefit, the wife having died—who entitled, 16
- Residue*—Construction of a will, as to vesting of shares of, 105
- Revivor, Order of*—If a defendant does not plead or demur to a bill of revivor, but answers, an order of revivor is of course, though the right to revive contested by the answer, 124
- Revocation of Will*—Covenant to surrender copyholds to uses of a subsequent marriage-settlement, will not amount to, 38
- Nor will a mere partition where the nature of the interest is not changed, 189
- Roman Catholic Religion*. See *Superstitious Uses*.
- Servants*—Who, within 6 Geo. 4. c. 16. s. 48,—78
- Settlement in Contemplation of Marriage*—Parties married, previously making a settlement of real estate; the marriage turned out void; they executed a revocation of that settlement; after a time again remarried, previously making a second settlement to different uses from the first—the second settlement held to prevail, 70
- Specific Performance*—Effect of parties to contract not being aware of their relative situations—and one party contracting under inaccurate representations made by the other party, though sources of information equally open to both, 79
- See *Principal and Agent*.
- Substitution of a Petitioning Creditor's Debt*. See *Bankruptcy*.
- Superstitious Uses*—Certain trusts, after a trust for the settlor for life, held to be superstitious uses, and void, 35—but
- The fund not in the disposition of the Crown, ib.
- The settlor's executors entitled to the fund, ib.
- The Attorney General a necessary party, ib.
- Supersedes*. See *Bankruptcy*.

Survivorship. See *Accruer and Survivorship*.

Tithes—In a suit for tithes, an admission of a specified modus, which cannot be sustained, being defectively pleaded, is an admission of title to tithes, 106

— See *Custom*.

Trustee—What contracts he may make with his Cestui que trust, 6

— See *Forgery*.

Vendor and Purchaser—As to proceedings where the falsity of a vendor's representations as to the quantity of timber forming the principal value of the estate, is discovered after a decree for specific performance, on the ground of a good title only, —and, as to payment of the purchase-money under such circumstances, and state of proceedings pending a supplemental bill in the nature of a bill of review. See *Bill of Review*.

Vested Interests—Construction of a will as to, 105

Vesting—of legacies and shares of residues, 120, 178, 179, 182

Visitation Power of the Crown—Petition for the exercise of—where not sustainable, 169

Void Bequest—Case of, as too remote, 41

Will. See *Election. Power of Appointment. Revocation of Will*.

Wills, Attestation of—Doctrine of Presumption, as to the attestation of in the presence of the testator, 84

— Construction of—as to a claim of priority by legatees over annuitants, 105

— Construction of—as to the vesting of shares of a residue, *ib.*

— Rule to be followed, where annuitants and legatees are to abate proportionally, in making the abatement, *ib.*

— Construction of. See *Grandchildren. Executory Devise over. First Son. Vested Interests*.

Witness—Incompetency of—where a bill is filed on behalf of a class; one of that class, who would have the benefit of the decree, is not a competent witness, 129

— See *Enlargement of Publication*.

KING'S BENCH.

Abandonment—made upon a supposition of certain facts; but, before an action brought, known that those facts did not exist, offer of abandonment not sustainable, 309

— See *Total Loss*.

Abatement. See *Costs*.

Acceptance of Goods—Criteria to try whether there has been, to satisfy the Statute of Frauds, 296

Accommodation Bill—must be presented, and notice given to the drawer of its non-payment, though acceptor never had effects of the drawer, 85

— See *Partnership*.

Ac Etiam. See *Practice*.

Act of Bankruptcy—What, a fraudulent delivery to amount to, under 6 Geo. 4. c. 16.

— by lying in prison, when complete, and how to be reckoned, 97

— before 1st September 1825,—291

Affidavits—for money paid—without adding "at the defendant's instance and request," 120

— Entitling of. See *Practice*.

Amendment. See *Practices*.

— at Nisi Prius, what not permitted. See *Variance*.

Annuity—Memorial of—presumed, where, 201

Arbitration—Protection of witnesses from arrest attending upon, where cause referred at Nisi Prius, 227

— How far conclusive, as to matters within the scope of, but not brought forward on, the reference, 320

— In action by party barred in such a case, the general issue may be pleaded, and proceedings given in evidence in defence, *ib.*

— See *Attachment pending Action on Award. Award. Submission to Arbitration. Umpire*.

Army Agent. See *Assumpsit*.

Arrest—On two arrests for same cause of action, plaintiff must show that second arrest is not vexatious, 99

Arrest—Whether the third arrest can be for the same cause of action—*quære*, *ib.*

— Defendant, arrested on a Sunday on an assault warrant, that he might be arrested under a writ the following day, discharged by the Court, *ib.*

— without probable cause. See *Costs*.

— See *Defendant's Initials*.

Assigning without Consent. See *Landlord and Tenant*.

Assistant Overseer. See *Magistrates' Cases*.

Assumpsit—not sustainable in respect of a subject-matter originating in covenant, unless there has been an express promise to pay a specific balance, although the remedy on the covenant prevented by defendant's own wrong—the remedy must be in equity, 78

— The Colonel of a regiment, by power of attorney, authorized his agent to receive the allowances, issued by the Paymaster-General of the Forces, for the supply of clothing to the regiment; the agent assigned the certificates, which authorized the issue, to his bankers as a security for his private account; the banker received the money, and the agent did not pay the tradesmen who supplied the clothing, &c.—situation of the Colonel as to such bankers, 253

— See *Attorney*.

Attachment—pending an action on award, will not be granted—where, 90

Attorney—liable to costs of sham plea—where, 38

— in custody for contempt. See *Contempt*.

— His general liens—and liens for costs. See *Costs. Set-off*.

— Taxation of bill of—Rule as to payment of costs of—where action brought before, and where after, order for taxation, and a sixth is taken off, 32, 42, 336

Award. See *Umpire*.

Bail—Liability of—after *s. fa.* against principal, 304

— See *Ca. sa.*

- Bank Note**—Whether transferrable abroad, so as to give the receiver of it abroad, a right of action in England—*quære*, 179
- What, in action on such note, the plaintiff must prove, *ib.*
- Bankers' Books**—Entries made by a clerk in, evidence against his sureties in bond for faithful account, 57
- Banker's Cheque**—Rights and liabilities of persons taking, after the day of the date thereof, 270
- Bankrupt**—Payments without notice of acts of bankruptcy—what protected by 6 Geo. 4. c. 16. s. 12, 139
- Repudiation of contract by the assignees in such case, and recovery back of goods on tender of amount paid, *ib.*
- Composition agreed to, under the 133rd section of 6 Geo. 4. c. 16, who will, and who will not be bound by, 282
- Where creditors agree to a composition and release, and, subsequently, the debtor gives to one of them a security for the balance of his debt, what facts must concur and be shewn, to render the security void on the ground of its being a fraud upon the other creditors, 282
- Commission of, issued after, cannot be supported by evidence of a trading, or act of Bankruptcy committed before, 1st Sept. 1825,—291, 335
- See *Set-off*.
- 108th sec. 6 Geo. 4. c. 16. See *Fieri Facias*.
- See *Act of Bankruptcy by lying in Prison*.
- Brickmaker. Deed of Composition. Estoppel. Fraudulent Creditor. Landlord and Tenant. Limitation of Action. Partners in a Joint Adventure. Partnership. Submission to Arbitrator.**
- Bankrupt's Certificate**—no bar to action, where, 150
- See *Contempt*.
- Baron and Feme**—How they must join in actions, upon a cause of action accruing to the wife during coverture, 206
- See *Covenant. Husband's Liabilities for Necessaries*.
- Bill of Exchange**—Restricted indorsement, effect of, 73
- Accepted, payable at, &c.—presentment there a good presentment against the drawer, 83
- Necessity of presentment and notice of dishonour, though accommodation bill, 85
- Indorsee of, has no legal remedy over against the acceptor, for costs at law incurred by him, 301
- See *Notice of Dishonour. Rule to compute*.
- Blockade**—How far insurances on ships' voyages to a port in a state of blockade are legal, 309
- Notice of a port being in a state of blockade—how far a fact for the consideration of a jury, *ib.*
- Bond Fide Holder.** See *Banker's Cheque*.
- Bond**—The word pounds, omitted in the bond, may be supplied by intendment from the condition, where, 29
- Countermand of. See *Surety*.
- Brickmaker**—His non-liability to the bankrupt laws as a trader, 285
- Broker's Note**—not an agreement, under 55 Geo. 3. c. 184, nor liable to a stamp as such between him and his principal, 334
- Buyer and Seller**—Offers made, allowing a given time for acceptance or refusal, how far binding on the person offering, 36
- Time appointed for the performance of a contract, notice of holding thereto necessary to enforce forfeiture, where, 59
- Situation of parties where goods are obtained on false pretences, under a contract to be paid for at a future day, and false pretences are discovered before the period of credit has expired, 139
- See *Contract. Lien. Principal and Agent. Vendor and Purchaser*.
- By-Laws**—by the Lord Mayor's Court of London, in restraint of trade among the citizens,—what must be shewn to support, 186
- Semble, that an action in an inferior court for a penalty of 5*l.* under a by-law, is not an action within 21 Jac. 1. c. 23. so as to prevent its removal to a superior court, *ib.*
- Cancellation**—The mere cancelling of a lease not a surrender within the Statute of Frauds—nor will the mere fact of the lease being produced by the lessor cancelled (the lessee having been in possession), warrant a presumption of a valid surrender, 214
- Ca. sa.**—What days are part of the four days it must lie in the sheriff's office previous to the return *non est inventus*, 337
- Omission of indorsement of defendant's residence and situation in life upon—effect of, 165
- Cessio bonorum.** See *Foreign Judgment*.
- Charters**—Constructions of. See *Corporation*.
- Church Leases**—Whether the provisions of 13 Eliz. c. 20. prohibit the granting of any lease of the glebe, &c. of a benefice with cure, *quære*—201
- but, whether they do or not, all such leases made between 1803 and 1816—good, and why, *ib.*
- Such a lease had been granted within the above period for securing annuities—and held, that the legal estate in the term thereby granted—and after 57 Geo. 3. c. 99. assigned, for securing further sums advanced, was well assigned, *ib.*
- Whether equity would support such further charges—*quære*, *ib.*
- Churchwarden**—As to the validity of his election not being triable by the commissary—and the commissary's return to a mandamus to admit and swear in, 48
- Circuity of Action**—Defendant *prima facie* liable, but holding an indemnity from the plaintiff—*actio non*, on the ground of circuity of action, 536
- Coal Trade**—Vender's Ticket. See *Contract*.
- Cognovit**—Judgment upon, irregular, where cognovit not filed after taxation of costs, pursuant to Reg. Gen. Hilary Term 1822,—332
- Composition.** See *Bankrupt. Fraud. Pleading*.
- Compromise**—Sufficiency of evidence to establish, 242
- Conflicting Creditors.** See *Pleading*.
- Construction of Settlement.** See *Contingent Remainder*.
- Contempt**—An attorney in custody for, for non-payment of money, discharged by bankruptcy and certificate, where, 341
- Contingent Remainder**—Construction of settlement as to, 60
- Contract**—In action upon a contract, rescinded by a new contract not stamped, defendant cannot offer such new contract in evidence, unstamped, to shew such rescindment, 156
- Compliance with the regulations of act of parliament to prevent frauds in a particular trade,

- will preclude plaintiff from recovering, though no fraud committed, where, 158
- Contract**—Assignee of machinery in progress of manufacture for a third person under a contract, may maintain action against such person in his own name, where, 142
- An entire contract being in general not divisible—effect of part-performance only as regards an action thereon, 178
- Buyer's rights where he purchases goods with a warranty, and they prove inferior to the warranty, 225
- for the sale and delivery of a certain quantity of goods, and a smaller quantity be sent to the buyer and received and retained by him—situation of the parties, 264
- See *Bankrupt's Certificate. Buyer and Seller. False Pretences. Game. Illegal Contract. Implied Contract. Time of the Essence of the Contract.*
- Contumace capiendo**—Writ of—A defendant in the custody of the Marshal, may be brought up by habeas corpus and re-committed, charged with a writ De contumace capiendo, directed to the Sheriff of Surrey, 164
- Such writ does not deprive the defendant of the rules, *ib.*
- Copyhold**—Admittance of reversioner not necessary to support ejectment, where, 85
- Corporation**—Construction of charter, as to an election of burgess, who had not previously held the office of jurat [Queenborough charter], 92
- Custom that "every freeman's son" born in the town after his father was a freeman, should be admitted a freeman on attaining twenty-one—construction of the expression "every freeman's son" [Rye charter], 107
- The offices of town clerk and alderman incompatible, and untenable by the same person, where [Weymouth charter], 275
- Whether in every case untenable by the same person—*quære*, *ib.*
- A charter directed the election of common councilmen to be made out of the burgesses and inhabitants—a burgess not also an inhabitant not well elected—and evidence of usage to give a contrary interpretation, inadmissible [Ludlow charter], 277
- To deprive a corporator of one office on the ground that he has vacated it by accepting an incompatible office—what must be shewn, 308
- Costs**—on removal of cause from the Palace Court, defendant not entitled to remedy given by 43 Geo. 3. c. 46. s. 3.—90
- Defendant not entitled to, upon a judgment of Non Pros. for not entering the issue where the issue grows out of a plea in abatement, 121
- Where plaintiff obtains a verdict upon the general issue, defendant upon pleas of justification, or other pleas, which answer the whole action—and,
- Why plaintiff in such case at Nisi Prius should have damages assessed on the general issue, 155
- Where, in trespass, issue is joined on the general issue and other issues, but judgment goes by default upon a new assignment, and a general verdict is found for the plaintiff, but a new trial is granted on the whole record, by reason of some one or more of the issues being improperly found for the plaintiff, 145
- Costs**—Where, before judgment, the plaintiff authorizes the defendant to pay over the money in dispute to a third person, to whom he is indebted—situation of the plaintiff's attorney as to his costs, 174
- The Court *in banco* cannot assist a defendant under 6 Geo. 4. c. 106. s. 21, unless the Judge who tried the cause has certified. That Judge is himself either to grant or refuse the certificate, 229
- What allowed, where the jury return a verdict for the plaintiff upon a particular part of his count, though the verdict be taken and the judgment entered generally, 241
- Where a plaintiff would be entitled to costs, had he succeeded, he is liable to costs where he fails, 249
- The withholding of a penalty gives or does not give a right to costs, where, 249
- of interlocutory proceedings—where they may and where they may not be set off against each other—and that, without regard to the attorney's lien on the general costs of the cause, 330
- Security for—ordered from a person residing abroad seeking to defend as landlord in ejectment, 359
- Verdict at Nisi Prius for the defendant—new trial ordered and plaintiff then discontinued—what costs defendant entitled to, 340
- See *Attorney. Bill of Exchange, Indorser of. Executors. Joint Defence. Sham Plea.*
- Covenant**—that a married woman shall join in levying a fine and execute a deed to declare use to bar dower—in an action for breach—what the covenantee must aver, 17
- against opposition in trade within a certain distance—how distance to be ascertained, 348
- Custom.** See *By-Law. Corporation.*
- Debtor and Creditor.** See *Executor. Principal and Agent.*
- Debts payable at a future day**—Against what, insolvent discharged, as well under 53 Geo. 3. c. 102, as under 7 Geo. 4. c. 57.—337
- Deed of Composition**—a bar to a party thereto suing out a commission of bankrupt, where, 197
- Demand and Refusal.** See *Trover.*
- Devise**—Construction of, as creating estates in remainder only—an intervening prior estate being undisposed of and construed to be in the devisor's heir, 197
- Dies Non.** See *Ca. sa.*
- Discontinuance**—by plaintiff, after rule for new trial obtained by him, 340
- Dissisin**—Acts not amounting to, 60
- Ejectment**—Security for costs ordered in, 339
- See *Copyhold. Mortgage and Mortgagee.*
- Elegit.** See *Pleading.*
- Essoign Day.** See *Judgment by Default.*
- Estoppel**—of the bankrupt from disputing commission, where, 285
- Tenant's right to dispute landlord's title, 18
- See *Fine.*
- Evidence**—Admission of parol evidence, though tenancy under written agreement not produced, 49
- of one partner, in an action against several, 303
- of an interlocutory judgment in an inferior court, where cause removed—non-admissibility on the trial in the superior court, 329

Evidence—of publication of newspaper, what sufficient, 269

— See *Bankers' Books. Compromise. Executor. Extra Work. Foreign Judgment. Joint Stock Company. Justification. Libel. Malicious Arrest. Nominal Plaintiff. Parish Register. Permissive Possession.*

Examination—Commitment of bankrupt for not signing, 128

Excommunication. See *Contumaces capiendi—Writ of. Execution.* See *Fixtures. Mill.*

Executor—The maker of a promissory note appointed as, by the payee—effect of, 148

— His right to have stock transferred into his name, though specifically bequeathed, 183

— Debtor making his creditor executor—no presumption raised by law that he has retained enough to pay his debt: it must be shewn by evidence, 223

— Rule as to costs—where an executor joins count, laying the cause of action to himself as executor, with counts laying the cause of action to his testator, and is nonsuited, 318

— The like—where he pleads non assumpsit by the testator and *plene administravit*, and issues are taken on both, and one plea found for the executor, 325

— The like—where the plaintiff admits the truth of *plene administravit*, and the issue is for him on non assumpsit, *ib.*

Extinguishment. See *Prescription.*

Extra Work—where work is done under a written contract, and extra work is claimed, the written contract must be produced in evidence, properly stamped, 130

False Pretences. See *Buyer and Seller.*

Fieri Facias—The debtor discharged; and the remedy of the creditor against the sheriff only—where, 54

— Judgment creditor not, at the time of the bankruptcy of his debtor, a creditor having a security according to 6 Geo. 4. c. 16. s. 108, and, consequently, not liable to refund—where, *ib.*

Fine—Effect of, levied by a contingent remainderman, 60

— Works by estoppel only—where, *ib.*

— Stranger in estate cannot take advantage of such estoppel, *ib.*

— Fine levied by a party not in actual possession, and his right disputed—non-relation back of subsequent acknowledgment of his right, 119

— See *Baron and Feme. Covenant.*

Fixtures—What sheriff may seize, under a *fi. fa.* 195

Forfeiture—A forfeiture of a lease, by the using of the premises in a manner prohibited, not waived by a subsequent receipt of rent, where, 263

Foreign Judgment—How far evidence between two parties to a contract made in this country, 2

— Discharge in Scotland, under *Cessio bonorum*, where—and where not—pleadable in bar to an action for a debt arising in this country, 3

Fraud. See *Composition.*

Fraudulent Delivery—What is, under Bankrupt Act, 6 Geo. 4. c. 16. s. 3,—125

Freeman's Son. See *Corporation.*

Game—Contract for the sale of live pheasants, though for breeding—void, and why, 117

General Acceptance. See *Bill of Exchange.*

Growing Timber—Contract for sale of, though not felled—not a contract for the sale of an interest in land within sect. 4 of the Statute of Frauds, 296

Habeas Corpus—Action in inferior court for a penalty of 5*l.* under a by-law, is not an action within the 21 Jac. 1. c. 23. s. 2,—186.

Horse-dealing. See *Variance. Warranty.*

Husband and Wife—Husband's liability for necessities supplied to his wife living separate from him, 59

— Where a party has so dealt with a tradesman in respect of goods supplied to his wife or a woman who passes for his wife, as to be liable for goods supplied to her during his absence—tradesmen's situation after the death of the party during such absence, 211

— Liability of goods of a woman living with a man as his wife to seizure, under an execution against the goods of the man, 305

— Difference as to the woman's goods where she supposed herself duly married, but the man had, at the same time, a real wife living, *ib.*

Illegal Contract—effected by an agent—such agent cannot recover from his principal the sum he has paid in effecting it, 208

Illegal Wager—Money deposited with a stakeholder—recovery back of, 26

Implied Contract. See *Husband and Wife.*

Incompatible Offices. See *Corporation.*

Inconsistent Counts—abandonment of. See *Pleading.*

Indemnity—A promise by one co-surety to another to indemnify him in consideration of his joining him as a surety, not within the Statute of Frauds requiring a written undertaking, 49

— Nor *semble*, is any promise to indemnify a person in consideration of his becoming surety, *ib.*

Indorser of Bill of Exchange—his liability to costs, 301

Indorsement of Ca. Sa. See *Ca. Sa.*

Inferior Court—Removal of case from. See *By-Law.*

— See *Evidence.*

Intendment. See *Bond.*

Intention—Where the effect of a publication complained of as a libel, is to injure the plaintiff, action is maintainable, though no injury intended, 302

Interest—General rules regulating the allowance or non-allowance of, as damages, 267

Interest in Land. See *Growing Timber.*

Insolvent Debtors Act. See *Debts payable at a future day.*

Insurance—what facts the assured must communicate, 42

— Effect of non-communication, *ib.*

— See *Abandonment. Blockade. Misrepresentation. Suppression of Fact. Total Loss. Valued Policy.*

Irregularity. See *Cognovit.*

Joint Contractors—Acknowledgment by one, how far binding on the other, previous to 9 Geo. 4. c. 14,—251

Joint Defence—Practice as to allowance of costs in trespass, the defence being joint, and one defendant obtaining a verdict, and the plaintiff obtaining a verdict as to the other, 37

Joint and Several Liability. See *Stamps*.

Joint Stock Company—Construction of 39 & 40 Geo. 3. c. 28, as to persons exceeding six in number, paying their own debts by their own bills, 167

— Letters of a member of, how far evidence of his partnership in, *ib.*

— Liability of members of a building society for work done in pursuance of a resolution, in which they concurred, 274

— See *Partnership*.

Judgment Creditor—*Semble*, that on sale of goods under an execution, the property is divested out of the debtor, and the creditor is no longer a creditor having security under 6 Geo. 4. c. 16. s. 108,—96

— But at all events, he is not such a creditor after the money has been paid to the sheriff, and will not be affected by act of bankruptcy afterwards committed, *ib.*

— Nor will the rights of the judgment creditor be affected by the act of bankruptcy being committed before the writ is returnable, *ib.*

Judgment Recovered. See *Arbitration*.

Judgment by Default—signed between the essoign-day, and full term, regular—and of what term a judgment, 333

Judgment—Record of. See *Inferior Court*.

— Irregularity in the signing of. See *Cognovit*.

— For replacing stock at a future day. See *Insolvent Debtors Act*.

Justification—Warning by a wrong-doer, effect of, 41

— In libel, what evidence may be given under the general issue to shew *bona fides* of intention, though no justification pleaded, 26

— See *Costs*. *Pleadings*. *Privileged communication*.

Landlord and Tenant—A covenant that the lessee, his executors or administrators will not assign, without consent of the lessor, effect of, as regards the lessor and assignee of the lessee without such consent, 12

— Lessee's power, when sued by the assignee of the lessor, to dispute the lessor's title, 18

— Money may be paid into court in replevin on special application, 89

— Assignees of bankrupt may pay a year's rent into court, under 6 Geo. 4. c. 16. s. 14, where distress for more than a year's rent made after bankruptcy, *ib.*

— But landlord, if he accepts such sum, entitled to double costs under 11 Geo. 2. c. 19. s. 22, *ib.*

— Presumption of tenancy may be raised without production of a written contract, but if sought to carry terms of tenancy further, contract must be produced, 84

— See *Evidence*. *Inconsistent Counts*. *Pleading*. *Lease*. See *Cancellation*.

Legal Estate—What devise not sufficient to pass. See *Mortgage*.

Libel—Action for, maintainable, where special damage averred, though no proof of special damage given, 189

— Rule, as to what words are actionable, *ib.*

Libel—against person, who has made the affidavit at the Stamp Office, according to 38 Geo. 3. c. 78, what will be sufficient *prima facie* evidence of publication, 289

— See *Intention*. *Justification*. *Privileged Communication*.

Lien—Vendor's Lien, as against a purchaser, on goods in the hands of an agent, revived, even after sale by that agent—where, 19

— A right of lien upon an instrument, in the possession of a witness, (except in the case of an attorney or solicitor,) is not a good objection to the production of the instrument in evidence, under a *subpoena duces tecum*, 221

— Case of vendor's right of, as against assignees of the bankrupt purchaser, in respect of wines in a bonded warehouse, 265

— General—how it may be waived, 104

Limitation of Actions—6 Geo. 4. c. 16. s. 44, does not protect assignees in seizing goods supposed to be those of the bankrupt, 101

Majority. See *Public Commissioners*.

Malicious Arrest—The plaintiff suffering a non prosequitur of itself, *prima facie* evidence of the want of probable cause—after, if he discontinue by rule of Court, 244

— See *Costs*. *Removal of cause from the Palace Court*.

Master and Servant. See *Libel*. *Privileged Communication*.

Memorial of Annuity—will be presumed, where, 201

Mill—The mill-stones pass with a grant of a mill, 195

Misrepresentation—What will not avoid a policy of insurance, 307

Money—paid in ignorance of facts. See *Sheriff*, 86

Mortgagor and Mortgagee—Right of mortgagee, as to affirming or disaffirming tenancies created subsequent to the mortgage between the mortgagor and his tenants; and relative situation of mortgagors and such tenants, 246

— Mortgagor not entitled to notice to quit, to support ejectment by mortgagee, 84

Mortgage—What devise of real estate will not pass the legal estate in, 109

— The like point as to general words, "securities for monies, &c. *ib.*"

Naval Articles of War. See *Purser*.

Nominal Plaintiff—Where set-off pleaded and parties at issue thereon, evidence that the plaintiff on the record is only a nominal plaintiff, inadmissible, 91

— If admissible in evidence, must be specially pleaded, 91

Non Pros. See *Costs*.

Nonsuit—Where the Judge on a trial is of opinion that the plaintiff ought to be nonsuited, but his counsel refuse, and the Jury find for the plaintiff—*Semble*, that the Court cannot order a nonsuit, but will direct a new trial, 206

— Where neither plaintiff nor defendant prays a tale at Nisi Prius, the defendant cannot afterwards either obtain judgment as in the case of a nonsuit, or try by proviso, 338

Notice of Dishonour—How soon it may be given, 147

— will be dispensed with (on the ground of indirect notice to the drawer), where, 138

— Waiver of—Express notice of dishonour to the drawer of a bill not being proved, facts in the defendant's conduct subsequently, as shewing that he had notice, must go to the jury to pronounce whether sufficient, 108

Off-Reckoning. See *Assumpsit*.

Parish Register—What entries in, will not be admissible in evidence, 161

— Nor will memoranda made by the parish clerk in such case, assist to warrant the admissibility, ib.

Partners—in a joint adventure—Liabilities of the assignees of one of, a bankrupt, where his share not actually delivered, 80,—and,

— What appropriation will not amount to a delivery, ib.

— See *Evidence*.

Partnership—Accommodation bill of one partner indorsed to his partnership firm, the firm will be precluded from suing upon, where, 173

— Money, or other property belonging to two partners, misapplied by one of them, cannot be recovered back in an action in the names of the two. Nor, by their assignees, if bankrupt, by reason of the mere misappropriation before bankruptcy, 247

— What acts in progress towards the formation of a joint stock company—will not amount to, 292

Part-performance. See *Contract*.

Party Walls—General rules as to the power and conduct of a party in pulling down party walls, 322

Patent—Stating in specification, improvements between date of patent and enrolment of specification—effect of, 127

Payment of money into court—upon an account stated, what the plaintiff must shew upon the other counts to entitle him to recover, 78

Penal Action. See *Costs*.

Permissive Possession—What, though no rent ever paid, will amount to evidence of, 122

Pew—Faculty not presumed even after fifty years' possession, where, 95

Pheasants—Illegality of sale of, 95

Plea—Rule for, and demand of, after amendment. See *Practice*.

— See *Arbitration*.

Pleading—Where a creditor sets up a title under an elegit, 13

— Where both parties to an action claimed under the same person, ib.

— Inconsistent counts, and their abandonment at the trial, 16

— A traverse which is too large, bad on general demurrer, 18

— Where new assignment immaterial—plea passing it by, held good, 33

— Plea justifying a trespass—avermont of the identity of the trespass justified with that declared for, 33

— What must be shewn in pleading a composition, to avoid the same on the ground of fraud, 282

— See *Baron and Feme. Covenant. Justification. Landlord and Tenant. Sham Plea. Special Damage. Surplusage. Variance*.

Practice—Affidavit of debt—on foreign contract, what it must state, 89

— Arrest by initials of defendant's Christian names—irregularity of, in the King's Bench, 166

— *Ac Etiam*—in bill of Middlesex not stating the nature of the action, irregular, 87

Practice—Joinder of defendants, writ may be against two, and declaration against one, where, 241

Practice—Mistake—common bail filed, treated as a nullity and judgment signed without demand of a plea, judgment irregular, where, 164

— In trespass, process was issued against twenty defendants, eighteen were served in time, and the declaration was against seventeen only—the proceedings held irregular, 193

— Entitling affidavit—the affidavit to raise the above question, how properly entitled, 193

— Declaration, entitling of, where the writ was returnable and the defendants duly appeared, and the declaration was afterwards delivered, entitled of a subsequent term, held not irregular, 193

— Notice of, must express the nature of the action, 171

— Amendment of new counts not allowed, where, 258

— — in a term subsequent to that in which delivered, practice as to new rule for, and demand of plea, 333

— Rule for and demand of plea, after amended declaration, 333

— Plea in abatement, filed before common bail filed, is warranted by common bail filed on the same day, 258

— Judgment after, cannot be signed by the plaintiff, because the affidavit to verify was sworn before the defendant's attorney, 258

— Judgment, after defendant's death, where regular, 161

— *Dies non*, for what offices can be opened with effect on, 171

— Term's notice, to enter the issue, necessary, where, 307

— See *Affidavit of Debt. Ca. sa. Contumace capiendo, Writ of. Costs. Discontinuance. Rule to compute. Rules of the King's Bench Prison. Sham Plea*.

Prescription—A prescriptive right to the use of water flowing through certain closes for supplying a water-mill, not extinguished by unity of possession of the mill and such closes, 145

Presumption of payment. See *Executor*.

Primage—To whom of right it belongs, 50

— Not taken away except by express agreement, ib.

Principal and Agent—Right of vendor of goods, sold to an agent, to payment from the principal, when discovered, 134

— A creditor taking a bill from the agent of the debtor for the amount of the debt, and renewing it from time to time at the request of such agent—effect of such dealing, as regards the discharge of the principal, the debtor, 237

— See *Illegal Contract*.

Privileged communication—What voluntary statements by a master as to a dismissed servant, may be treated as, 26

— As respects communication with regard to servants whose character is inquired after, what shall be, 272

— See *Justification*.

Promissory Note—payable to order on demand, what stamp sufficient for, 228

Purser—A purser in the navy charged with false entries in a ship's books, for the purposes of fraud, is liable to be tried by a naval court martial, 255

Public Commissioners—General rule as to majority,

- necessary to exercise the powers entrusted to them with effect, 332
- Quantum Meruit**—Whether the plaintiff in an action for goods sold under a warranty, if he fail on the question of warranty, can recover on the *quantum meruit*—*quære*, 225
- Relation back**—as to payment of rent, to a party not in possession, by whom a fine was levied, while property in dispute. See *Fine*.
- Replevin**. See *Landlord and Tenant*.
- Residence**. See *Corporation*.
- Restraint of Trade**. See *By-Law*.
- Restricted Indorsement**. See *Bill of Exchange*.
- Reversioner**. See *Action against Hundred*.
- Rule to compute**—Inquiry in the usual way after judgment by default, will be directed, where, 31
- Rules of the King's Bench Prison**. See *Contumace capiendo*, *Writ of*.
- Scotch Sequestration**—An English debt, proveable under, is barred by 54 Geo. 3. c. 137,—3
- Seisin**. See *Fine*. *Relation back*.
- Separate Actions**—A written contract, giving separate rights of action to different persons—no legal objection to, 50
- Set-off**—Judgment and simple contract debts may be set off, subject to attorney's lien for costs—where, 88
- Not allowed where debtor sends bills to creditor to be discounted and applied to a particular purpose, 314
- See *Costs*. *Specific Appropriation*.
- Sewer Rate**—Liability of parties to, 131
- Sham plea**—Will be set aside, and leave given to the plaintiff to sign judgment, and the defendant's attorney be ordered to pay costs of the application, where, 38
- Cases collected on the subject of, 38, 40
- Sheriff**—Actionable for arresting a person wrongly named in the process, though the person in fact against whom it issued, 33
- But bound to arrest if the party known as well by one name as the other, ib.
- Although liable for his own officers' misconduct, yet where that misconduct caused by another party, Sheriff's remedy over against that party, 86
- And, in such case, recovery back of money paid to that party, though facts known to the officer, ib.
- His right to seize goods of a woman under an execution against a man, where she and the man live together as man and wife, 305
- See *Indorsement of Ca. sa*. *Fieri Facias*. *Fixtures*. *Pleading*.
- Shipping**. See *Prima*.
- Special damage**—Averment of, 151
- See *Libel*.
- Specific appropriation**—by debtor, as between himself and creditor, what will amount to, 314
- Stakeholder**. See *Illegal Wager*.
- Stamps**—Where an instrument is executed by several for one common purpose, though interests of the parties different one stamp sufficient, 106
- *Ad valorem* stamp—Assignment of policy of insurance of goods does not require, 223
- Stamps—Ad val.**—What covenant to pay an annual sum in a deed between tenant for life and reversioner of stock, on the former consenting to a sale of part of the stock—held not to require an *ad valorem* stamp, ib.
- Promissory note payable to order on demand, 228
- See *Broker's Note*. *Contract*.
- Statutes**—Marginal note of 6 Geo. 4. c. 16. s. 153, not correct, 282
- Statute of Frauds**—Letters on treaty for goods, will satisfy the Statute of Frauds, where, 296
- See *Cancellation*. *Indemnity*. *Interest in Land*. *Growing Timber*.
- Statute of Limitations**—Process to save—A latitat duly issued, returned, and continued, is well connected with a bill of Middlesex, by which the defendant is ultimately brought into court—and why, 1
- See *Joint Contract*.
- Stock**—Executor's right to have stock transferred into his own name, though specifically bequeathed, 183
- In a contract for the purchase of stock, time is of the essence of the contract, 230
- A party binds himself to deliver stock upon condition of the payment of certain sums at certain times, it not being obligatory upon the other party to accept the stock, he having an option to take or reject it,—a deposit made by the party having such option will be forfeited, ib.
- to be replaced at a future day. See *Insolvent Debtors Act*.
- Stoppage in Transitu**—By what delay, in vendor's right to, not affected, 104
- See *Lien*.
- Submission to Arbitration**—Whether bankruptcy is of itself a revocation of—*quære*, 327
- But, if the bankrupt's interest in the subject-matter passes to his assignees, may be revoked by the other party, ib.
- Subpoena duces Tecum**. See *Lien*.
- Suppression of Fact**. See *Insurance*.
- Surety**—in a bond for faithful account by a clerk—*quære* as to his power to determine his liability, 77
- See *Banker's Books*.
- Surplusage**—What reference to record set out in pleadings cannot be rejected as, 244
- Taxation of Attorney's Bill**, 32, 42, 336
- Term's Notice**. See *Practices*.
- Time**—of the Essence of the Contract. See *Buyer and Seller*. *Stock*.
- Title**. See *Pleading*.
- Tort**—Warning no excuse—where. See *Justification*.
- Total Loss**—What may be treated as, though vessel afterwards saved by the crew of another vessel, 260
- Perishable goods saved in *specie*, will not prevent recovery for a total loss, ib.
- Town-clerk and Alderman**. See *Corporation*.
- Transfer**—of Chose in Action. See *Contract*.
- Treble Costs**. See *Joint Defence*.
- Trial by proviso**—cannot be had by the defendant—where, 338

Trover—Reference to an attorney (made *bond fide* for communication) not sufficient evidence of a conversion, 217

— Refusal by a constable on demand to redeliver goods taken under a magistrate's warrant, not evidence of conversion, 222

— *Quare*—If trover be within 24 Geo. 2. c. 44. s. 6, *ib.*

Trust—Effect of conveyance of property made to several trustees, where one or more of them do not accept the trust, 198

Umpire—Choice of, by arbitrators by lot, bad, and why, 329

Unity of Possession. See *Extinguishment.*

Usage—Inadmissibility of evidence of—to contradict charter. See *Corporation.*

Valued Policy—To what extent the assured shall recover where there is a total loss, and the ship is not in fact worth so much as the full amount mentioned in the policy, 53

Variance—Declaration, that the buyer of a horse would give 105*l.*—Evidence, that he was to give

105*l.*, and 10*l.* more if the horse suited him—no variance, 25

Variance—What, between pleadings and record therein referred to and produced in evidence, is fatal, 244

— what such, between pleadings and proof, as not to admit of amendment at *Nisi Prius* under 9 Geo. 4. c. 15, *ib.*

— See *Bond.*

Vendors and Purchasers. See *Buyers and Sellers.*

Waiver. See *Forfeiture. Wharfinger.*

Warranty. See *Contract. Quantum Meruit. Non-suit.*

Warranty of a Horse—what description of a horse by a vendor before sale, amounts to, 25

Welsh Judicature. See *Costs.*

Wharfinger—Waiver of his general lien, 104

Witness—protected in attending arbitrator where cause referred at *Nisi Prius*, 227

— but not in such case compellable to attend, *ib.*

— See *Lien. Subpoena duces Tecum.*

Written Contract. See *Evidence. Extra Work. Landlord and Tenant.*

COMMON PLEAS.

Account Current—Admissibility of, to prove payments according to priority of date, 66

Account stated—What acknowledgment of debt will support a count for the plaintiff holding a joint and several note from the defendant, as surety merely, for goods supplied to another, and such note being written on a receipt stamp, 221

Adultery. See *Dower.*

Adverse Possession. See *Notice to Quit.*

Affidavit to hold to Bail—on an engagement conditionally entered into, what it should aver, 30

— Sufficiency of, for goods sold and delivered, 234

Amendment. See *Postea. Writ of Right.*

Arbitration—Revocation of submission to. See *Award.*

Articles of Clerkship. See *Attorney.*

Attachment—Affidavit for, how to be entitled, 71

Attorney—Articles of clerkship to, assigned after the expiration of the term, service a nullity, 57

— Admission of, allowed, though one of his notices left at wrong Judge's chambers, 235

— Power of party acting as, (under general power of, and general letter of credit,) to bind his principals, 172

Avowry—What holding improperly described, and on the evidence held a variance, 248

Award—purporting to be made on reference at *Nisi Prius*, but cause referred under Judge's order, by consent, not enforceable by attachment, 77

— Rule *nisi* for setting it aside, not stating it to have been drawn up on reading the order of reference, held irregular, *ib.*

— sufficiently certain, where—and as to stating objections to, in rule *nisi* to set it aside, 80

Award—Reference by an executor amounts to an admission of assets, where, 60

— Authority for submission may be revoked, where, 156

Bail Bond—In declarations upon, what allegations held to be unnecessary, 54

Bail—Time for render enlarged on bankruptcy of the principal, 233

— In action against a corporation, a burgess of the corporation may be, 261

Bail in error—At what time names of parties are reversed, 233

Bankrupt—Payment of money by, after an act of bankruptcy, not a fraudulent preference, where, 63

— Act—6 Geo. 4. c. 16. s. 14. not applicable to assignees, 84

— 6 Geo. 4. c. 16. s. 72. See *Trover.*

— 6 Geo. 4. c. 16. s. 82. applies to payments before, as well as since the passing of that act, 208

— Sec. 92 of 6 Geo. 4. c. 16. not retrospective, 153

— Affidavit of petitioning creditor's debt must shew the debt due before the act of bankruptcy committed, *ib.*

Baron and Feme—Authority of wife to contract for her husband, 47

— Husband's liability for goods supplied to his wife, 56

— Liability of husband to wife's debts for necessities after divorce *a mensâ et thoro*, and decree for alimony, 198

Baron and Feme—Furniture within the description of necessaries, where, 198.
Bill of Exchange—Effect of alteration in, after acceptance, 68

— Discount of. See *Usury*.
Broker—Duties and liabilities of, 66
 — See *Account Current*.

Carriers—Liability of partners where, and where not, restricted by notices, as to carrier's responsibility—(but see since this case, 1 Wm. 1. c. 68, regulating the future liabilities of carriers) 82

Composition Deed—Concealment of part of his debt by a creditor professing to accept equally with other creditors, effect of, 188

Confirmation of Lease—What acts of tenant in tail amount to. See *Lease*.

Costs—Action for wrongful apprehension, under the Malicious Trespass Act, 7 & 8 Geo. 4. c. 30, and plaintiff nonsuited, defendant entitled to costs, as between attorney and client, 171

— Defendant not entitled to, under statute 43 Geo. 3. c. 46. s. 3, where, 75

— Plaintiff not deprived of, under the Boston Court of Conscience Act, 47 Geo. 3. sess. 2. c. 1. s. 15, where, 96

— on several issues in trespass—plaintiff where entitled to, though the defendant succeeds on one, 82

— on rule for judgment, as in case of a nonsuit for not proceeding to trial, 247

— See *Court of Conscience Act*.

Court of Conscience Act—Who within London Court of Requests Act, 39 & 40 Geo. 3. c. 104. s. 5,—115

Covenant—to indemnify against making parishioners. See *Lessor and Lessee*.

Cross Remainders—implied, where, 182

Custom—Whether a custom set up, is an ecclesiastical or common law custom, should be found by jury, where, 120

— See *Interested Witness*.

Declarations—of a deceased testator. See *Evidence*.
Deed—Consideration for, though apparently inadequate, held, in the absence of all proof of fraud and covin, sufficient, 50

— Blanks in, may be filled up after execution, where, 145

— of composition. See *Fraud*. *Stamps*.

Demurrage. See *Ship-owner*.

Devise—Construction of. See *Estate tail*. *First Son*.

Distress—Remedy for rent by, lost, where, 143

— Damage feasant, what is an abandonment of right of following, 228

Dower—barred by adultery after separation by consent, 253

Ejectment—of mortgagor by mortgagee without notice to quit, or previous demand, 134

— See *Adverse Possession*.

Elegit—Where two elegits are issued on two several judgments of the same term, though by different plaintiffs, and inquisitions are taken thereon at the same time, what the sheriff must deliver, 138

Estate tail—Particular form of devise held to amount to, 9

Evidence—Inadmissibility of—of the party interested in the destruction of a particular custom, or having acted in breach of it, 40

— Post-mark on letter, how proved, 96

— An entry in a book deposited in the registry of a bishop, is evidence of the admission of a curate at the bishop's visitation; and the admission having been stated to have taken place in 1591, *juxta consuetudinem*: Held, that it should have been left to the jury to say, whether it was an ecclesiastical or common law custom; and a new trial directed, 120

— Depositions taken before commissioners of bankrupt, how far conclusive. See *Bankrupt*.

— An attorney a competent witness to prove the circumstances under which a trust-deed had been executed, notwithstanding his claim for costs of preparing, and being a party to, and appointed receiver under the same, in which character he had defended an action, 145

— Parol—in support of the character of a deceased attesting witness—admissibility of, 163

— of declarations of a deceased testator to defeat will—non-admissibility of, 163

— Sealed and certified orders, &c. under sec. 76 of 7 Geo. 4. c. 57, what sufficient verification of, 167

— See *Account stated*. *Malicious Prosecution*. *Prescription*.

Executors—liable in debt, where, 60

First Son—Held to take an estate tail expectant on the decease of his father, tenant for life, though omitted in the particular enumeration of sons to take as tenants in tail, and why—1

Fraud—What amounts to, where composition accepted—and more than appears in the composition deed bargained for, 165

Fraudulent Conveyance—Distinction between voluntary and fraudulent conveyances, 171

— *Preference*. See *Bankrupt*.

Friendly Society—Construction of rules of, as to powers to committee in cases of grievances, 194

Grant of the King—void, where, 126

Guarantee—What dealings between the party guaranteed and the party to whom guarantee given—not within the scope and effect of, 205

Inclosure Act—Allotments set out under: Held (before award made) to pass with the lands in respect of which they were set out, 170

Insolvent Debtors. See *Evidence*. *Malicious Arrest*.

Insurance—on life—Misrepresentation by the life insured—the policy being made by and for the benefit of an innocent third party—effect of, 223

— wrongly described, as to bottomry—where, 239

Interested Witness—Witness claiming a right of presentation to vacant rectory, held to be—though his right (if any) was forfeited by lapse, the bishop not having acted on his right to present, 59

— Party jointly liable with the defendant, held to be, 242

— See *Evidence*.

Joint Stock Company—Plea in debt on bond, that the bond was bad, being conditioned for the forming of an illegal joint stock company—held good, 15

— Liability of shareholders, 231

Jury—The Court would not disturb their finding—where, 81

King's Prerogative—as Duke of Lancaster, 126

Landlord and Tenant—Tenancy from year to year, what assent to charges in an account stated, though no payment made, shall establish, 68

— Relation of, destroyed by devise of landlord, where, 143

— On a contract of present demise, landlord bound to give possession, 162

— Covenant by lessee, to indemnify in respect of settlement. See *Covenant*.

— See *Voluntary Payments*.

Lease—By tenant in tail male—what acts of his successor, tenant in tail male, will confirm, 182

Lessor and Lessee—Validity of covenant by lessee with his lessor, to indemnify the parish in which the demised premises lay, for all costs by reason of his taking an apprentice or servant who should thereby gain a settlement, 261

Libel—It is no justification for the re-publication of, that, at the time of publishing it, the name of the person who communicated it to the defendant was also published, 100

— See *Venus*.

Limitation of Action—Under local Paving Acts, 161

Liquidated Damages—Rules as to what shall be, and what shall not be considered as, 258

Lunacy—Effect of, where one of several vouches in a recovery becomes insane, after the caption of the warrant of attorney, 15

Malicious Arrest—In action for—no defence, that the defendant was ignorant of the proceedings, 167

Malicious Prosecution—Evidence to support action on the case for, 250

Malicious Trespass Act. See *Costs*.

Money had and Received. See *Attorney*—party acting as, under general power of attorney, &c.

Mortgagor and Mortgagee—Ejectment of the former by the mortgagee. See *Ejectment*.

— See *Presumption of Surrender or Cesser*.

Notice to quit—Unnecessary, where possession adverse, 138

Overseer—The Clerk of the Treasury of the Common Pleas not liable to serve the office of, 263

Partnership—*Quere*, whether constituted, by an agreement to give an agent a yearly salary, and also a certain share of the profits of a particular adventure, 172

Petitioning Creditor—Affidavit of debt of, to support commission, 153

Pleading—Sufficiency of allegation of seisin in *quare impedit*, 53

— specially, with the general issue, what may be given in evidence, under the general issue, allowability of, 263

— illegality of intended Company. See *Joint Stock Company*.

— Unnecessary Counts. See *Practice*. *Covenant*.

— See *Attachment*. *Award*. *Bail Bond*. *Costs*.

Scire facias. *Practice*. *Venus*.

Practice—A party irregularly taken in execution and afterwards discharged, may be taken again notwithstanding such discharge, where, 59

— Proceedings for costs of suit will be stayed, and without costs, where, 69

— How re-payment of money paid into court in lieu of bail, is to be procured—defendant obtaining verdict, 70

— On payment of money into court, in lieu of bail, defendant entitled to bail-bond given on arrest, 71

— Amendment in Declaration—Where plaintiffs sued as administratrixes, they being also surviving partners; amendment in writ and declaration allowed, describing them as such surviving partners only, 118

— Unnecessary counts—striking out of—and what not considered as, 115

— Defendant under terms to rejoin issuably, may plead *Puis darrein continuance*, 152

— Plaintiff's power to sign judgment, as in case of nonsuit—where sham plea pleaded, ib.

— On Execution by *Elegit*. See *Elegit*.

Poor Laws. See *Covenant*.

Postea—Amendment of, by judgment being entered on one, instead of two counts, 243

Power of Attorney General—Effect of. See *Attorney*.

Prescription—Parol evidence of—not admissible, where, 126

Prescription for Toll—Case of, held good, where, 40

Presumption of Surrender or Cesser—of a mortgage term, will not be made, where, 255

Production of Papers—in the hands of parties to an action, where ordered, 158

Promissory Notes. See *Stamps*.

Quare Impedit. See *Deed*. *Evidence*. *Interested Witness*. *Pleading*.

Recovery—Passing of—where part of the proceedings are in France, 169

— How passed—where the notarial seal affixed to the acknowledgment of a warrant of attorney taken abroad, was broken to pieces, 114

— Vouchee's name written on an erasure in affidavit of acknowledgment of warrant of attorney, 194

— See *Lunacy*.

Rescindment of Contract—What dealing by vendor, with a horse returned to him, will amount to, 14

Reversionary Interest—Ground of action for damage to, not complete—where, 91

Scire Facias—Sheriff's fees on returning *Nihil*; and *quare* if two *Nihils* will hereafter operate as a *Scire feci*, 79

Sheriff—taking goods of a woman cohabiting with a man as his wife, under an execution against the man—how far justified, 72

— See *Elegit*.

Ship-owner—entitled to demurrage, though certificate under 7 & 8 Geo. 4. c. 56. s. 15, not produced—where, 73

Special Contract—By what pleading and opening of his case, the plaintiff will be deprived of availing himself of proof of, 94

Stamps—Deeds for benefit of creditors—*ad valorem* duty on, not necessary, where, 145

— for promissory notes payable to order on demand—what sufficient, 229

Statute of Limitations—Acknowledgment to take a case out of, before the late statute, 117
Stock-Jobbing—Bill for differences in the hands of a *bonâ fide* holder, validity of, 249
Surety—Liability of—where time given to the principal, 235

Tender—Effect of, 56

Trover—In action of, the allegation, that the plaintiff, being the obligee in a bottomry-bond, and who had commenced proceedings in the Admiralty Court, was lawfully possessed of anchors and cables removed from the vessel to which they belonged, although, to avoid such proceedings, not supported—where, 91

— Where maintainable under 6 Geo. 4. c. 16. s. 72,—84

Toll. See *Prescription for Toll*.

Usury—What giving of part cash and part goods, in discount of bills, will not amount to, 205

Variance—What held as, between declaration on bond and proof, 251. See *Avowry*.

Venue—changing, in action for libel, 14

— Changing of, 78

Voluntary Payments—What, as between a tenant and his landlord, not considered as, 141

Warrant of Attorney—Affidavit of execution of, what it must state for its enrolment under 3 Geo. 4. c. 39. sec. 1,—110

Warranty—What the law implies on the sale of all goods, 213

Witness—Subscribing witness subsequently acquiring an interest in the subject-matter—evidence of, where and where not admissible as an interested witness, 209

Writ of Right—Amendment in—what allowed, 71

POINTS RELATING TO MAGISTRATES.

Action against Magistrates. See *Computation of Time*.
Conviction. *Notice*.

Affidavit in Mitigation—Defendant, on being brought up for judgment for a libel, may shew by affidavit that he published the libel, believing the statement to be true, and shew the reasons which induced him to believe it, 75

Alms Houses—Objects of a charitable foundation in, rateable to the poor, 94

Appeal—Magistrates' duty as to waiting together to afford time for a person convicted, to appeal—where appeal given by the statute creating the offence, 7

— need not be entered till the Sessions following the next after the order of removal executed—where, 77, 78

— See *Former Adjudication*. *Notice of Appeal*.

Apprentice—A chimney-sweeper's apprentice, how he must be bound, 4

Assistant Overseer—under 59 Geo. 3. c. 12, an office conferring a settlement, 18

— Appointment to be, requires a stamp, 96

— Liable to an action under 17 Geo. 2. c. 2, for refusing inspection of a poor-rate—where, 49

— Declaration against, for refusing such inspection, what it should allege, ib.

Canal Companies—Mode of rating, to the poor, 67

— The like, 81

Chimney-sweeper's Apprentice—must be bound in conformity with 28 Geo. 3. c. 48, or indenture altogether void, 4

Churchwarden—Validity of his election not triable by the commissary, so as to bind the contending parties, 46

— Return by such officer to a mandamus, ib.

Churchwardens and Overseers—Majority of—the same person cannot be churchwarden and overseer, 4

Coal Mines—How lessee and occupier of, rateable to the poor, 89

Coal Mines, Houses and Lands—What scale of rating to the poor held sufficient, 64

Committal of Prisoner for Felony—charged on oath—Magistrate justified in, though the prosecution may not be followed up by the prosecutor, 97

Committal of Prisoners for re-examination—Magistrate not justified in—where, 90

— Whether fifteen days a reasonable time for committal for such re-examination—*quære*, ib.

Computation of Time—The six months limited by 24 Geo. 2. c. 44. s. 8, for bringing an action against a Magistrate for false imprisonment, how to be computed, 118

Constable—Authority of, to act on a charge of felony without warrant, 52

Conviction—under 4 Geo. 4. c. 3, what it should adjudge, 114

— To bring a person within the jurisdiction of a Magistrate under 4 Geo. 4. c. 34. s. 4, what facts must concur so that the relationship of master and servant may have been established, 118

Dairy Tenement—As to the time after which this description of settlement ceased, see 59 Geo. 3. c. 50—What construed of the value of 10*l.* a year, 25.

Depositions before Magistrates—Caution as to framing, 97

Evidence—What facts will raise a presumption of tenancy so as to confer a settlement by renting a tenement, and how they may be ascertained by parol though the tenancy was under a written agreement not produced, 35,—but,

— Written agreement must be produced—where, ib.

— See *Forcible Entry*. *Witness*.

Extra-parochial Place. See *Removal*.

Fire. See *Hundred*.

Forcible Entry—In an indictment for, the defendant cannot be allowed to adduce any evidence against the title of the prosecutor, or in support of his own, 92

Former Adjudication—not conclusive even between the same parishes, where, 72

Game Laws. See *Servant of Qualified Person*.

— Sale of live pheasants, though for breeding, illegal. See *K.B. Rep. ante*, 117

Highways, stopping up and diverting—Whether a public carriage highway can be only partially stopped up, leaving it still open to the public as a footway—*quere*, 15

— Order for diverting, what it must shew, *ib*.

Highway Rates—Party compounding for tithes liable to, 112

Hundred—Action against, under 9 Geo. 1. c. 22.

[*Notes*.—This act is repealed by 7 & 8 Geo. 4. c. 27, and the case laying down the above points was given only as important for ascertaining the rules by which such acts are construed.]

Inequality in Poor Rate. See *Poor Rate*.

Justices of the Peace. See *Magistrates*.

Larceny—What taking of property will not constitute, 79

Libel. See *Affidavit in Mitigation*.

Magistrates—acting for two counties. See *Parish Apprentice*.

— Jurisdiction under 4 Geo. 4. c. 34. See *Master and Servant. Silk-weaver*.

— Jurisdiction of. See *Smuggling*.

— their duty as to waiting together for convicted persons to give notice of appeal. See *Appeal*.

— See *Actions against. Alms Houses. Committal to Prison for Felony*—and also for *Re-examination. Computation of Time. Notice of Action*.

Malicious Trespass Act—Injury to property under 7 & 8 Geo. 4. c. 30. s. 20, what constitutes, 79

— See *Notice of Action*.

Mandamus. See *Churchwardens*.

Master and Servant—A Magistrate has no jurisdiction under 4 Geo. 4. c. 34, unless the relation of master and servant subsists between the parties to the subject-matter of his proceeding, 114

— and, the merely describing the person proceeded against as “a labourer” will not give jurisdiction, *ib*.

Notice of Appeal—where Sessions are adjourned, 9

— signed by the attorney for the appellant parish, sufficient, 95

Notices of Action—under 7 & 8 Geo. 4. c. 30. s. 41. where necessary, 60

— against Magistrates—what not sufficient address of attorney for party aggrieved, 100

Occupation. See *Canal Companies. Settlement*.

Parish Accounts—Accounts rendered by parish officers, under 17 Geo. 2. c. 38, how items of expenditure should be stated, to be sufficient, 73

Parish Accounts—If items not properly stated, not sufficient, though allowed by Magistrates and approved by a select vestry, *ib*.

Parish Apprentice—What Justices must allow indenture, where apprentice bound from one county into another, 21

— What giving of money for clothes to an apprentice by the parish officers on his binding out, though bound out of his own accord, held, within 59 Geo. 3. c. 139. s. 11,—26

Pleading—Declaration against assistant overseer for refusing inspection of poor's rate, what it should allege, 49

Poor Rate—Inequality in, must manifestly appear on the face of the rate, to afford ground for the Court disturbing such rate, 64

— See *Churchwardens and Overseers, Majority of. Canal Companies. Coal Mines. Houses and Lands. Occupation*.

Removal—of pauper maintainable under the provisions of a certain Drainage Act, solely by the trustees of such act, to his last (and but for such act) legal place of settlement, being a parish within the tract subject to such provision—held bad, and why, 43

Select Vestry. See *Parish Accounts*.

Servant of Qualified Person—not justified in firing gun to kill game, though in the presence, and by authority, of his master, who is not using the gun at the time, 63

Sessions Practice. See *Appeal*.

Settlement—by apprenticeship—to a certificated man, no settlement gained by, 36

— — Parish apprentice bound under 56 Geo. 3. c. 139. s. 2, into a parish in a county different from that, from which he is bound, by what Justices, indenture must be allowed, 21

— — What giving of money for clothes to an apprentice by the parish officers on his binding out, though bound of his own accord, will be within 59 Geo. 3. c. 139. s. 11;—if indenture not in conformity therewith, no settlement gained, 26

— — Chimney-sweeper's apprentice must be bound in conformity with 28 Geo. 3. c. 48, or indenture altogether void, 4

— by estate—in remainder, no settlement conferred by, 103

— by purchase—Person residing under certificate cannot obtain a settlement by purchase of property in the certificated parish, whatever be the amount, —and

— By what modes only such person can obtain a settlement in the certificated parish, 36

— by hiring and service—Hirings held to be general, 23

— — Hiring held not to be general, 33

— — Sessions having drawn their conclusion of, the Court will not disturb that conclusion where facts are not repugnant, though they would have drawn a different conclusion, 28

— — The like point, 3

— by serving an office—Office of assistant overseer confers a settlement, 18

— by renting a tenement—What facts will raise

- a presumption of tenancy so as to confer a settlement by renting a tenement, and how they may be ascertained by parol, though the tenancy was under a written agreement not produced, 35
- — — To gain a settlement by 6 Geo. 4. c. 57, the house need not be exclusively occupied by the tenant, 110
- — — A renting of a tenement for a year, and an occupation for a year, which year began before the 22d of June 1825, (6 Geo. 4. c. 57.) but ended after that day, will confer a settlement provided the other requisites of the 6 Geo 4. be satisfied, *ib.*
- — — See *Duty Tenement*.
- — — by payment of rates—the payment of ward rates for London no settlement conferred by, 24
- — — by relief—Relief not always *prima facie* evidence of settlement—but,
- — — The Sessions having found a pauper settled by receiving relief, the Court would not disturb their finding, though of a different opinion, 30
- Silk-weaver*—Whether within 4 Geo. 4. c. 34—*quere*, 118
- Smuggling*—What Magistrates have jurisdiction where a person is charged under 6 Geo. 4. c. 108. s. 74,—10
- Stamps*. See *Assistant Overseer*.
- Tithes*. See *Highway Rates*.
- Trustees for Drainage*. See *Removal*.
- Truth*. See *Libel*.
- Ward Rates*—for the city of London—payment of, confers no settlement, 24
- Witness*—Competency of—In an indictment for a forcible entry and detainer, the party turned out of possession, not a competent witness for the prosecution, 98
- — — Subscribing Witness—What search for, must be proved, to let in evidence of the parties themselves, to prove execution of an indenture of apprenticeship, 96

ERRATA.

Chancery, p. 108, in the second paragraph of the placitum to Rufford v. Bishop, for "receipts" read *rents*.
Common Pleas, p. 114, line 5 from bottom, for "was not unavailable," read *was unavailable*.

TABLE OF THE CASES

REPORTED IN

THE LAW JOURNAL,

VOL. VII.

CASES IN CHANCERY.

Attorney General v. Ellison, 162
 ——— v. Harley, 31
 ——— v. Ward and
 Others, 114

Bailey v. Lloyd, 98
 Barton v. Croxall, 188
 Bass v. Russell and Others, 177
 Bishop v. Rufford, 108
 Brookman v. Rothschild, 163
 Brummell v. Macpherson, 1
 Bull v. Pritchard, 41
 Burlton v. Wall, 183
 Butler v. Kynnersley, 160
 Butler v. Burt, 107

Corbett v. Corbett, 9
 Corporation of the Trinity House,
 Stroud v. Burge, 44
 Cremorne v. Antrobus and Others,
 88
 Crowder v. Stone, 93

De Themines v. De Bonneval, 35
 Dymock v. Ashton, 120

Ex parte Bolland, in re Marsh
 and Co., 10
 ——— Chappell, 76
 ——— Cunningham, in re Ca-
 venagh, 139
 ——— Gorton, in re Locker,
 173
 ——— Grundy, in re Russell,
 58
 ——— Kirby, in re Kirby and
 Thomas, 148
 ——— Paul, in re Rich, 139

VOL. VII.

Ex parte Robinson, in re Freer,
 76
 ——— Schlesinger, 27
 ——— Edwards, in re Schle-
 singer, 27
 ——— Pedder, Clerk, in re
 Garstang School, 169
 ——— Stone, in re Marsh and
 Co., 10

Farrer v. Grant, 95
 Fitzroy v. Howard, 16
 Fry v. Watson, 175

Gardner v. Rowe, 2
 Gray v. Folds, 182
 Guillebaud v. Meares, 186

Hanson v. Walker, 135
 Hardinge v. Pratt, 179
 Harris v. Kemble, 79
 Harrison v. Corbould, 162
 Holmes v. Goodworth and Others,
 128
 Houston v. Platt, 29
 Howell v. Edmunds, 147

In the matter of the Election of
 a Coroner for the county of
 Nottingham, 61
 ——— Garstang Town School,
 169
 ——— Grant, 76
 ——— M'Niel, 78
 ——— Sheppard, 60
 ——— Stephens, 77

Jones v. Reid, 161

King v. Tullock, 122

Langston v. Pole, 185
 Lear v. Leggett, 126
 Lewis and Another v. Gentle, 48
 Long v. Hughes, 105
 Lewis v. Mallett, 124
 Livesey v. Livesey, 120

M'Mahon v. Upton, 125
 Mountford v. Ponton, 166

Naylor v. Winch, 6

Ormond v. Kynnersley, 150

Partridge v. Usborne, 49
 Purrier v. Ranken, 141

Reynolds v. Johnston, 45
 Robinson v. Dickenson, 70
 Rufford v. Bishop, 108

St. John v. Stirling, 189
 Sparke v. Ivatt, 158
 Strutt v. Finch, 176
 Sturz v. De la Rue, 47

Taylor v. Barclay, 65

Wharton v. Child, 106
 Williams and Others v. Smith,
 129
 Willis v. Black, 3
 Winchilsea, Earl of, v. Wauchope,
 14

Vawser v. Jeffery, 38

C

IN THE KING'S BENCH.

- Alderson v. Gadsden, 89
 Alexander v. Lawson and Another, 155
 Allan and Another v. Sugrue, 53
 Allan v. Harrison, 106
 Bailey v. Culverwell and Others, 19
 Bailey v. Rawlins, 208
 Baillie's case, 164
 Barber v. Stokes, 206
 Beeston v. Beckett and Others, 193, 333
 Best v. Saunders, 50
 Blades v. Free, 211
 Blandy and Another v. Herbert, 223
 Boorman v. Nash, 150
 Bottings v. Firby and Another, 329
 Bourne v. Freeth, 292
 Braithwaite and Others v. Schofield and Others, 274
 Buchanan and Others v. Findley and Others, 314
 Bull v. Gardner, 166
 Burge v. Jones, 69
 Calvert v. Gordon, 77
 Carpenter v. Blandford, 58
 Carr v. Stephens, 336
 Carridge v. Lantour and Another, 33
 Cartwright v. Cooke, 319
 Cave v. Coleman, 25
 Chanter v. Glubb and Another, 249
 Chatfield v. Parker and Another, 13
 Child v. Affleck and Another, 272
 Churchill and Another v. Day, 78
 Clark, esq. v. Le Cren, 186
 Clark v. Palmer, 165
 Clement v. Chivis, 189
 Clowes v. Chaldecott, 147
 Cocks v. Peachy, 241
 Coles v. Hulme, 29
 College of Physicians v. Harrison, 249
 Cotton v. James, 125
 Crossley v. Beverley, 127
 Crowder and Another v. Long, 66
 Dalhousie, Earl of, v. Chapman, 233
 Davenport and Others v. Thomson, 134
 Dawson v. Morgan, 301
 De la Chaumette v. the Bank of England, 179
 Doe dem. Ambler v. Woodbridge, 263
 ——— Bealey v. Maisey, 85
 ——— Broughton and Another v. Gulley, 201
 Doe dem. Brune and Another v. Martyn, 60
 ——— Courtail v. Thomas, 214
 ——— Dangerfield and Ux. v. Allsop and Another, 331
 ——— Griffith v. Mayo, 84
 ——— Hudson v. Jameson, 339
 ——— Lidgbird v. Wilding and Another, 129
 ——— Thompson v. Clark, 122
 ——— Warren v. Bray, 161
 Dowbiggin v. Harrison, 318
 Dunn v. Murray, 320
 Edge v. Parker, 101
 Edgington v. ———, 164
 Edwards v. Minchin, 268
 Evans v. Whitehead and Another, 241
 Ewington v. Allen, 87
 Ex parte Leek, a bankrupt, 128
 Ferguson and Another v. Carrington, 139
 Flinn v. Headlam, 307
 Fox v. Burbidge, 98
 Franklin v. the Bank of England, 183
 Freakly v. Fox, 148
 Galliers v. Moss, 109
 Gibbs v. Stead and Another, 37
 Glasspoole v. Young and Others, 305
 Hall v. Curzon and Others, 303
 Handley v. Levy, 90
 Harbyn, gent. v. Miles, 336
 Hardy v. Ryle, esq., 249
 Harratt and Another v. Wise, 309
 Harris v. Wilson, 302
 Harrison v. Smith, 171
 Hartley and Others v. Spittall and Another, 83
 Harvey and Others v. Kay, bart., 167
 Head v. Diggon, 36
 Heane v. Rogers and Another, 285
 Helps v. Glenister, 117
 Hewson v. Heard, 336
 Higgins and Others v. M'Adam, (*Exchequer*), 97
 Hill and Another v. Farnell, 139
 Holderness and Another v. Shackels, 80
 Holland v. Deakin, 145
 Howson v. Houseman, 26
 Hunter v. Leake, 221
 In the matter of arbitration between Cassal and Another, 329
 ——— Higgins and Willis, 90
 Jardine and Others v. Lewis, 229
 Jardine and Others v. Williams and Others, 31
 Jay v. Coaks, 32
 Jones and Others v. Yates and Another, (*Treuer*), 217
 ——— (*Assumpsit*), 219
 ——— v. Fort, 220
 Leigh v. Hind, 318
 Little v. Poole, 158
 Loftus v. Hudson, 242
 Long v. Sperrin, 332
 Lord v. Hillier, 307
 Man v. Owen, kn. and Others, 255
 Manderston v. Robertson and Another, 251
 Marsh and Others v. Wood and Another, 327
 Marshall and Another v. Wilder, 325
 Mayne v. Fletcher, 269
 Michlam v. Bate, 121
 Miers v. Golding, 222
 Morgan v. Curtis, bart., 95
 Morland and Another v. Pellat, 54
 Morley and Others v. Hay, 104
 Moyser and Another v. Whittaker, (*supporting Keates v. Wheldon, as reported 6 Law Journal, K.B. 226*), 228
 Naylor and Others v. Taylor, 311
 Norton v. Pickering, 84
 Oldfield v. Lowe, 142
 Oxendale v. Wetherell, 264
 Page v. Newman, 1
 Same v. Same, 267
 Palmer and others v. Moore, 291
 Parry v. Aberdeen, 260
 Patterson v. Jones, esq., 26
 Paul and Others v. Nuge and Another, 12
 Pellew v. Hundred of Wosford, 148
 Peyton v. the Governors of St. Thomas's Hospital, 322
 Phillips v. Allan, 2
 Phillips v. Dance, 338
 Pitt v. New, 120
 Place v. Fagg, bart., 195
 Pope v. Biggs, 248
 Poulton v. Lattimore, 225
 Quarman v. Veale, 42
 Rex v. Burke, 330
 — v. the Commissioners of Sewers for the Tower Hamlet, 131
 — v. Day, 308
 — v. Edwards, 341
 — v. Greet, 93

Rex v. the Inhabitants of Muck-
stone, 165

— v. Rawden, 84

— v. Ringstead, 197

— v. Mayor and Jurats of Rye,

107

— v. Salway, 277

— v. Tizzard, 275

— v. Whittaker and others, 332

— v. Williams, esq. 48

Ricketts and others v. Toulmin,

108

Robinson v. Read, 236

Rothschild v. Hennings, 230

Rothschild v. Corney and Others,

270

Russell v. May, 88

Sammon v. Miller, 337

Sama v. Culham and Another, 171

Seymour v. Franco, 18

Sigourney v. Loyd and Others, 73

Sinclair and Another v. Bowles,

178

Slark v. Bailey, 138

Small and Another v. Marwood,

197

Smith v. Surman, 296

Spargo v. Brown, 16

Sparrow and Others v. Chisman,

173

Starling v. Pain, (*Sham pleading,*
and Cases collected) 38

Stevenson v. Roche and Another,

304

Stewart v. Beattie and Another,

337

Surtees v. Ellison, 335

Sweeting v. Halse, 156, 258, 389

Taylor v. Watson and Another,

174

Tenon v. Mars, 89

Thomas v. Cooke, 49

Tomkins v. Savory, 334

Tooley v. Nicholls, 17

Tuck v. Tooke, 282

Vincent v. Cole, 180

Von Lindenau v. Desborough,

42

Wansell v. Southwood, 227

Webb v. Hill and Another, 244

White v. Fitch, 223

Whitmarsh and Others v. Genge
and Another, 57

Whittaker v. Whittaker and An-
other, 161

Wills v. Gurney, 99

Wilton v. Buxton, 91

Winks and Another v. Hassell
and Another, 265

Woolley v. Scovell and Another,
41

IN THE COMMON PLEAS.

Abbey v. Lill, 96

Adams and Others v. Bateson, 259

Alcock v. Cooke and Another, 126

Amner and Another v. Cattell, 78

Anonymous (*Practice*), 115

Armitage v. Berry, 229

Arnold and Others v. the Bishop of
Bath and Wells and Others, 120

Ashby and Another v. Ashby and
Another, 221

Beddington v. Beddington, 79

Bousfield and Another v. Godfrey,

158

Bridges v. Smyth, 143

Britten and Others v. Hughes, 188

Bryant v. Perring, 152

Burns v. Carter, 161

Bushnell v. Levi, 115

Carew, dem. Basten, tenant, 114

Carruthers and Others v. Payne,

84

Carter v. Carter and Another, 141

Christie v. Hamlet and others, 77

Churchill and Another v. Crease,

63

Coe and Another v. Clay, 162

Cox v. Bent and Others, 68

Day v. Stuart, 249

Davies v. Russell and Others, 52

De Crespigny v. Wellesley, 100

Dicas v. Jay, gent. one &c., 80

Dillon and Others v. Edwards and
Another, 110

Doe dem. Cheese and Another v.
Creed, 138

— Davies and Others v.
Creed, 138

— Dixon and Another v.
Willis and Another, 170

Doe dem. Fisher v. Giles and
Others, 134

— Hammond v. Cooke,

255

— Southouse and Another
v. Tomlins and Another, 182

Duvergier v. Fellowes, 15

Edwards v. Farebrother and
Others, 72

Ellis v. Schmæck and Another, 231

Elworthy and Others v. Maunder

80

Evans v. White, 205

Everett v. Desborough, 223

Ex parte Jefferies, 263

— Lambert, 235

— Unthank, 57

Falmouth, Earl of, v. George, 40

Ferguson v. Cristall and Another

91

Garner v. Shelley and Others, 194

Gould v. Shirley, 117

Gully and Others v. the Bishop
of Exeter and Another, 50, 52

Hall and Another v. Cecil and
Another, 242

Hammond v. Teague, 263

Harrington v. M'Dowell, 47

Henley v. the Mayor and Bur-
gesses of Lyme Regis, 243, 261

Henman v. Dickinson, 68

Hetherington v. Graham, 253

Hovill and Another v. Stephenson
and Another, 209

Hudson v. Revett, 145

Hughes v. Reeves, 81

Hunt v. Blaquiery, 198

In the matter of Houghton and
Fallows, 71

Jones v. Bright and Others, 213

Jones v. Nicholls, 167

Kemble v. Farren, 258

Key and Another v. Cook, 153

Knight v. Hunt, 165

Knowles v. Blake and Another,

228

Langston v. Pole, bart. and
Others, 1

Long v. Preston, 14

Mackie v. Warren, 59

Macklin v. Waterhouse and
Others, 32

Mills v. Collett, clerk, 230

Murray v. Nicholls, 14

Nicholas and Others, vouches,
169

Palmer v. Thomas, 73

Partington v. Wyatt, 247

Philpott v. Dobbinson, 248

Proctor v. Brain, 66

Provis and Another, demandants;
Reed, tenant, 163

Raggett and Another v. Beaty, 9

Recovery—Ex parte Crooke, 15

— Murray, 194

Riddell v. Sutton, 60

Riley and Another v. Horne and
Another, 32

Rooke v. Wasp, 69

Seaton v. Espinasse, 56

Sharp v. Abbey and Others, 54

